No. 101386-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ADELINA GABRIELA SUAREZ,

Respondent/Cross-Petitioner

v.

THE STATE OF WASHINGTON, *et al.*,

Petitioners

WASHINGTON HEALTH CARE ASSOCIATION'S *AMICUS CURIAE* MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

Miscellaneous

I. INTRODUCTION

The Washington Health Care Association (WHCA) respectfully submits this *amicus curiae* memorandum in support of the State's petition for review. This Court should accept review of the Court of Appeals' September 20, 2022 published opinion so that it can reverse the court's erroneous interpretation of "undue hardship" under the Washington Law Against Discrimination (WLAD) and state public policy.

The Court of Appeals' adoption of WAC 82-56-020 as the standard for "undue hardship" is contrary to this Court's opinion in *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014), violates settled principles of stare decisis and statutory interpretation, and will unnecessarily subject public and private employers to significant, unnecessary costs.

For employers of essential health care workers—including WHCA's member nursing homes and assisted living facilities—hiring and retaining qualified staff is critical to providing effective care. These long-term care providers are already

experiencing severe staffing shortfalls, a situation worsened by the COVID-19 pandemic. The Court of Appeals' opinion will impose even more staffing constraints on these providers, thereby threatening quality of and access to care for our state's elderly and vulnerable population.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WHCA is a Washington non-profit organization that represents over 530 assisted living facilities and skilled nursing homes in the State of Washington. WHCA's members employ nearly 20,000 essential health care workers and provide health care, social support and housing to more than 31,000 elderly and disabled Washingtonians daily—many of whom suffer from dementia or require behavioral support. WHCA's mission is to promote quality long-term health care and services by acting as an advocate for its members, as well as their staff and residents.

WHCA serves the interests of its members by, among other things, representing members in proceedings before state agencies; encouraging state and federal legislation that enables

members to provide quality health care; promoting reasonable compensation for members participating in public health care programs; and engaging in litigation or participating as *amicus curiae* to protect member interests and resident rights.

WHCA supports the State's petition for review because, unless reversed, the Court of Appeals' opinion may have significant adverse effects on the ability of Washington's long-term care providers to adequately staff at their facilities—which, in turn, will adversely affect access to care. WHCA believes its perspective will be of assistance to the Court.

III. ISSUE ADDRESSED

The Court of Appeals held that there was a disputed issue of fact on whether the State, in its capacity as employer, failed to reasonably accommodate Ms. Suarez's religious beliefs. In so holding, the court concluded that WAC 82-56-020 applies to determine whether an employee request for accommodation creates an "undue hardship" on the employer. WHCA's memorandum focuses on whether the Court of Appeals erred in

applying WAC 82-56-020 rather than *Kumar*'s *de minimis* standard, as well as on the impact the court's decision may have on long-term care providers and their residents.

IV. ARGUMENT

A. The Court Of Appeals' Decision Conflicts With *Kumar*'s Holding That A *De Minimis* Standard Applies To Determine "Undue Hardship" Under The WLAD.

The State's petition for review should be granted because the Court of Appeals' opinion conflicts with this Court's decision in *Kumar*. RAP 13.4(b)(1). The *Kumar* court held that an employer does not violate the WLAD if an employee request for religious accommodation imposes an "undue hardship" on the employer. 180 Wn.2d at 502. In identifying what constitutes an "undue hardship," the Court recognized the standard used by the United States Supreme Court under analogous federal law—"an 'undue hardship' results whenever an accommodation 'require[s an employer] to bear more than a *de minimis* cost.'" *Id.* (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

Kumar's *de minimis* standard is the law in Washington. The Human Rights Commission (HRC) cites that standard in its published guidelines. HRC, *Guide to Religion and Washington State Non-Discrimination Laws* (July 2015) ("the employer can generally show undue hardship if the cost or impact is more than *de minimis*.") (www.hum.wa.gov/sites/default/files/public/99_Religion%20and%20non-discrimination.pdf.). The *de minimis* standard is likewise embodied in the Pattern Jury Instructions—albeit substituting Latin with plain English: "An accommodation causes an 'undue hardship' when it would have more than an insignificant effect on the business." 6A Wash. Practice: *Wash. Pattern Jury Instr.: Civil* 330.42 (7th ed. Supp. 2022); *id.*, Comment ("The employer must also demonstrate that the accommodation would require more than *de minimis* cost.").

The Court of Appeals wrongly departed from *Kumar*'s *de minimis* standard in favor of WAC 82-56-020's "significant difficulty or expense" standard. The two standards conflict, with the Court of Appeals' test imposing a more stringent burden on

employers—a burden not reflected in the WLAD, its regulations, or the federal law upon which it is based. As explained below, because WAC 82-56-020 does not apply, stare decisis compelled the court to follow *Kumar*. *Presbytery of Seattle v. Schulz*, 10 Wn. App. 2d 696, 708, 449 P.3d 1077 (2019) ("appellate courts in Washington must follow decisions handed down by our Supreme Court"). Review should be granted on this basis alone.

Finally, even if *Kumar* left the issue of "undue hardship" open, this Court should accept review and endorse the *de minimis* standard. In recognizing a right to religious accommodation, *Kumar* relied on federal law. *Kumar*, 180 Wn.2d at 496-503. The federal standard has endured for over 40 years, and has been adopted in many states. *See Ky. Comm'n on Human Rights v. Lesco Mfg. & Design Co., Inc.* 736 S.W.2d 361, 364 (Ky. App. 1987); *Penn. State Univ. v. Penn. Human Relations Comm'n*, 505 A.2d 1053 (Cmwth. Ct. 1986); *Maine Human Rights Comm'n v. Local 1361*, 383 A.2d 369, 375, 381 (Me. 1978). Continued use

of the *de minimis* standard would therefore promote uniformity and, as explained below, good public policy. RAP 13.4(b)(4).

B. WAC 82-56-20 Relates Only To The Statutory Benefit Set Forth In RCW 1.16.050(3), Not To Requests For Religious Accommodation Under The WLAD.

The Court of Appeals acknowledged *Kumar*, but ignored its *de minimis* standard in favor of WAC 82-56-20's definition of "undue hardship." This was error. The rule has nothing to do with claims for religious accommodation under the WLAD. State employees enjoy a statutory right to two days of leave for reasons of "faith or conscience," which an employer must give "unless the employee's absence would impose an undue hardship on the employer." RCW 1.16.050(3). The legislature directed the Office of Financial Management (OFM) to promulgate rules to define "undue hardship" for purposes of this statute. *Id.*

WAC 82-56-20 is OFM's rule, and it relates only to the benefit set forth in 1.16.050(3). WAC 82-56-10 ("The purpose of this chapter is to establish the definition of 'undue hardship' for purposes of chapter 168, Laws of 2014."). Nothing in the rule

references the WLAD because OFM has no authority over the WLAD. Only HRC has such authority, RCW 49.60.120(3), and it has never defined "undue hardship." That silence suggests that HRC "assumes the WLAD imposes exactly the same duty to accommodate religious practices that [federal] Title VII does and thus needs no regulatory clarification." *Kumar*, 180 Wn.2d at 494. Indeed, as noted above, HRC uses the federal standard.

Engrafting OFM's inapposite definition into the WLAD's implicit right to religious accommodation violates basic rules of statutory construction. *See Capello v. State*, 114 Wn. App. 739, 751, 60 P.3d 620 (2002) (rejecting argument "that language used … in different chapters of the RCW should dictate the proper interpretation of a statute in an unrelated, separate, and distinct chapter"). Only the legislature, HRC or this Court can define "undue hardship" under the WLAD—and, until and unless they do so, *Kumar*'s *de minimis* standard remains the law.

The Court of Appeals' opinion not only marks a radical departure from the prevailing standard, its reach stretches beyond

its likely intended scope. WAC 82-56-10 only applies to state employees—a fact the court emphasized. Op. at 17. But if the court intended to limit its decision to state employees like Ms. Suarez, it failed to do so. Ms. Suarez claimed violation of the WLAD—and, thus, the Court of Appeals' reasoning ostensibly applies to both public *and private* employers with 8 or more employees. Worse yet, because the court applied its reasoning to Ms. Suarez's tort claim, that standard applies to *all* employers of *any* size. For this reason too, the petition involves a matter of substantial public interest. *See* RAP 13.4(b)(4).

C. The Court Of Appeals' Decision Threatens To Worsen An Already-Existing Staffing Crisis For Providers Of Long-Term Health Care In Washington.

The Court of Appeals' adoption of WAC 82-56-10's heightened standard will put significant burdens on Washington employers. The increased risk of liability will make employers reluctant to scrutinize and deny requests for religious accommodation. This, in turn, means that employers with specialized, inflexible or small workforces may face labor

shortfalls. For nursing homes and assisted living facilities, this threatens to worsen an existing staffing crisis that will jeopardize access to long-term care for our state's elderly and vulnerable.

1. Long-Term Care Providers Are Subject To State And Federal Staffing Requirements.

Adequate staffing is closely linked to the quality of care and outcomes residents receive in nursing homes and other long-term care facilities. *See* 87 Fed. Reg. 22720, 22771-72 (Apr. 15, 2022); Ctrs. for Medicare and Medicaid Servs. (CMS), *Nursing Home Staff Turnover and Weekend Staffing Levels* (Jan. 7, 2022), (www.cms.gov/files/document/qso-22-08-nh.pdf). As a result, staffing levels, credentialing and training are regulated at both state and federal levels—particularly for nursing homes.

For example, in Washington, large nursing homes must have an RN on duty supervising residents 24 hours per day, seven days a week. Smaller homes must have an RN on duty 16 hours per day, and an RN or LPN on duty for the remaining 8 hours. RCW 74.42.360(3), (4). Moreover, nursing homes are required to provide a minimum of at least 3.4 hours per resident day of

direct resident care through RNs, LPNs or CNAs. RCW 74.42.360(2); WAC 388-97-1090(1).[1] Failure to meet these minimum staffing levels can result in significant fines. RCW 74.42.360(2)(b); WAC 388-97-1090(8).[2]

Federal law likewise requires Medicare/Medicaid certified nursing homes to have an RN on duty at least 8 hours a day, 7 days a week; and an RN or LPN on duty 24 hours a day. And, while there are not yet federal minimum staffing levels, nursing homes are frequently surveyed to ensure they have "sufficient nursing staff … to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-

[1] In response to the COVID-19 pandemic, the governor issued proclamation 20-18 suspending parts of the staffing statute. Subsequent proclamations extended the suspension. DSHS intends to promulgate a rule to gradually re-implement the staffing requirements, with an effective date of October 27, 2022.

[2] Assisted living facilities (ALFs) are regulated only at the state level. In Washington, ALFs must have "sufficient, trained staff persons to … [f]urnish the services and care needed by each resident consistent with his or her negotiated service agreement." WAC 388-78A-2450(1)(a). Like nursing homes, ALFs are surveyed to ensure compliance with this standard.

being of each resident." 42 U.S.C. §1395i-3(b)(4)(C)(i); 42 C.F.R. §§483.35, 483.70(e).[3] Nursing homes that fail to comply with these requirements are subject to citations and penalties, including loss of Medicare/Medicaid funding.

An increased duty to accommodate employees may cause some long-term care providers to fall below these standards. This case proves the point. When Ms. Suarez asked for time-off, her nursing home employer denied the request because her absence would cause the short-staffed facility to violate its minimum staffing rqeuirements. That decision was justified. Long-term care providers should not have to choose between resident welfare and potential liability for religious discrimination.

2. Washington Long-Term Care Providers Face Staffing Shortages That Risk Access To Care.

Washington nursing homes and assisted living facilities cannot simply hire more staff to avoid this dilemma. The

[3] CMS will soon promulgate federal regulations that will impose minimum staffing requirements similar to those in Washington. 87 Fed. Reg. 22720, 22790-96 (Apr. 15, 2022).

COVID-19 pandemic exacerbated ongoing staffing shortages in the long-term care industry nationwide. 87 Fed. Reg. 22720, 22790-91 (Apr. 15, 2022). Facilities have long suffered from low Medicaid rates that do not cover the cost of care. These low rates, coupled with the pandemic, have left many facilities without the means to hire new workers or keep their current ones. The resulting staffing shortfall has caused many facilities to decrease capacity or turn away new residents. This strains the entire health care system, as residents scramble to find alternative solutions.[4]

This staffing crisis is acute in Washington. Demand for long-term care workers already outpaces supply, and is expected to get worse. Low Medicaid rates, coupled with our state's high minimum wage, make it hard for providers to pay competitive wages necessary to hire qualified staff. As a consequence, our

[4] *See* Press Release, Am. Health Care Ass'n/Nat'l Ctr. for Assisted Living, *Long Term Care Sector Continues To Battle Worsening Workforce Crisis* (Nov. 3, 2021); *Staffing Challenges in Long Term Care Facilities Continue to Threaten Access to Care for Residents* (Oct. 18, 2021) (www.ahcancal.org/News-and-Communications/Press-Releases).

state's nursing homes have the ninth lowest occupancy rate in the country. *See* Presentation, Joint Leg. Exec. Comm. on Planning for Aging and Disability Issues, *Long-Term Care Workforce & Economic Trends & Conditions* (Nov. 29, 2022) (https://app.leg.wa.gov/committeeschedules/Home/Document/246693#toolbar=0&navpanes=0). This crisis will become more dire as our population ages. The demand for long-term care will outgrow our state's capacity within the next several years. *Id.*

Indeed, in a FY 2023-25 budget analysis, DSHS reported its findings that long-term care providers "are experiencing critical workforce shortages that are resulting in longer waits for clients who need long-term care services in all settings"—a problem DSHS predicted will only worsen over the next 20 years. "The result is long waits to begin services, gaps in care, long lengths of stays in institutions, and a lack of choice in how and where individuals receive needed long-term services and supports." (https://abr.ofm.wa.gov/ (DSHS; Long-Term Care; N9-Direct-Care Workforce)). Hospitals have been forced to hold

patients who are ready to be discharged because long-term care facilities have been unable to operate at full capacity.[5]

The Court of Appeals' decision will exacerbate this crisis by making it more difficult for long-term care providers to adequately staff their facilities. To be sure, providers recognize the benefits of religious tolerance and accommodation. But accommodation cannot come at the expense of a facility's duty to comply with staffing requirements, resident care and the state's health care system as a whole. The *de minimis* standard strikes the proper balance between the burden that falls on long-term care providers and their residents when accommodating religious beliefs and the burden that falls on employees when legitimate circumstances prevent accommodation.

V. CONCLUSION

The State's petition for review should be granted.

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[5] *See* Seattle Times, *Staffing Has Long Been A Challenge In Long-Term Care. Washington State's Vaccine Mandate Could Make It Worse* (October 10, 2021) (www.seattletimes.com).

I certify that this memorandum contains 2495 words in compliance with RAP 18.17.

Respectfully submitted on December 19, 2022.

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CERTIFICATE OF SERVICE

I, Ryan McBride hereby certify under penalty of perjury of the laws of the State of Washington that on December 19, 2022, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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