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Case No. 97630-9

IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

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W.H., *et al.*,

Plaintiffs,

vs.

OLYMPIA SCHOOL DISTRICT, *et al.*,

Defendants.

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**BRIEF OF *AMICUS CURIAE***  
**NATIONAL CENTER FOR VICTIMS OF CRIME**

---

Rebecca J. Roe, WSBA No. 7560  
Schroeter Goldmark & Bender  
810 Third Avenue, Suite 500  
Seattle, WA 98104  
Phone: (206) 622-8000  
Email: roe@sgb-law.com

Erin K. Olson, WSBA No. 34656  
Law Office of Erin Olson, P.C.  
2014 N.E. Broadway Street  
Portland, OR 97232  
Phone: (503) 546-3150  
Email: eolson@erinolsonlaw.com

*Counsel for Amicus Curiae*

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## **I. INTERESTS OF AMICUS CURIAE**

The National Center for Victims of Crime ("NCVC") is a nonprofit organization based in Washington, DC. NCVC is the nation's leading resource and advocacy organization for all victims of crime. The mission of NCVC is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, NCVC, among other efforts, advocates for laws and public policies that create resources and secure rights and protections for crime victims. NCVC is particularly interested in the issues presented in this case because of its commitment to victims of sexual assault and child abuse, and seeks to ensure that the Washington Law Against Discrimination is interpreted to include all forms of gender-based discrimination, including sexual assault, and to apply to all places of public accommodation, including schools and school buses.

## **II. INTRODUCTION**

Defendants have challenged the applicability of the Washington Law Against Discrimination ("WLAD"), RCW chapter 49.60, to the sexual abuse of a child attending a public school by her school bus driver. They argue that the WLAD does not apply to school districts, that a school bus operated by a public school district is not a place of public

accommodation, and that sexual abuse is not sex discrimination within the meaning of the WLAD. For the defendants to be right, this Court must conclude one of the following: (1) that plaintiffs are not members of a protected class; (2) that the Olympia School District's school bus, in which plaintiffs were sexually abused, was not a place of public accommodation; (3) that the defendants did not discriminate against plaintiffs because they treated them in a manner comparable to the treatment they provide to persons outside the protected class; or (4) that plaintiffs' protected status (gender) was not a substantial factor causing the discrimination. *Floeting v. Grp. Health Coop.*, 191 Wn.2d 848, 853, 434 P.3d 39 (2019) (citing *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996)).<sup>1</sup>

Defendants' arguments are not supported by statute, case law, or policy. The WLAD's prohibition against sex discrimination in places of public accommodation applies to the sexual assault of a girl by her school bus driver, and the imposition of strict liability to the school district will further the remedial goals of combating discrimination in public accommodations that the legislature has found to "threaten[] not only the

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<sup>1</sup> Defendants also argue that RCW 4.08.120 limits the liability of school districts to negligence, so the WLAD does not apply to them at all. Amicus does not address this issue as there is no textual or other support for it.

rights and proper privileges of [Washington's] inhabitants but menace[]  
the institutions and foundation of a free democratic state.” RCW  
49.60.010.

### **III. ISSUES ADDRESSED BY AMICUS**

1. Whether subjecting employers to strict liability for sex  
discrimination in public accommodations is consistent with, and furthers  
the remedial goals of, the WLAD.

2. Whether intentional sexual misconduct, including sexual  
assault, constitutes sex discrimination under the WLAD.

### **IV. STATEMENT OF THE CASE**

*Amicus Curiae* adopts the Statement of the Case as set forth in  
Plaintiffs’ Opening Brief.

### **V. ARGUMENT**

**A. THE HISTORY, PURPOSES, AND THIS COURT’S  
PRIOR INTERPRETATIONS OF THE  
WASHINGTON LAW AGAINST DISCRIMINATION  
REQUIRE THE IMPOSITION OF STRICT  
LIABILITY AGAINST EMPLOYERS FOR SEX  
DISCRIMINATION PERPETRATED BY ITS  
EMPLOYEES IN PUBLIC ACCOMMODATIONS.**

## 1. Introduction.

The purpose of statutory torts such as the WLAD is to displace or supplement common law when a legislature determines the common law is inadequate to address a problem. Along with at least forty-four other states,<sup>2</sup> the Washington Legislature has determined that specific protections and remedies are needed to address discrimination in public accommodations. Washington has taken the added step of imposing strict liability on employers who operate public accommodations for the discriminatory acts of their agents or employees. RCW 49.60.215; *Floeting v. Group Health Coop.*, 192 Wn.2d 848, 859, 434 P.3d 39 (2019).

## 2. The Legislative History of the Washington Law Against Discrimination Supports This Court's Interpretation in *Floeting* that the Legislature Intended to Impose Strict Liability Against Employers to Effectuate its Goals of Eliminating and Preventing Discrimination in Public Accommodations.

The special role of public accommodations in daily life was recognized in Washington and other states<sup>3</sup> soon after statehood. The first

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<sup>2</sup> The forty-five states with laws that prohibit discrimination on the basis of sex in public accommodations are listed at <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> (last accessed January 25, 2020).

<sup>3</sup> See, e.g., 1885 Minn. Laws 224, §§ 1-2, codified as *former* Minn. Stat. Ann. § 327.09 (1947) (subjecting persons engaging in discriminatory practices in public facilities to criminal liability and civil damages not to exceed \$500 to the aggrieved person); 1893 Cal. Stat. 186 (requiring

Washington law to prohibit discrimination in public accommodations was a penal law passed by Washington's First State Legislature on March 27, 1890 -- within six months of Washington's statehood. That law provided as follows:

SECTION 1. That all persons within the jurisdiction of the State of Washington shall be entitled to the full and equal enjoyment of the public accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement and restaurants, subject only to the conditions and limitations established by law and applicable alike to all citizens of whatever race, color or nationality.

SECTION. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of whatever race, color or nationality, the full enjoyment of any of the public accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, or shall be imprisoned not less than thirty days nor more than six months.

Laws of 1889, Ch. 16, p. 524. When the Washington Legislature codified the criminal laws in 1909, the above-quoted law was condensed into one

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“places of amusement” to grant admission to any person over age 21 who presented a purchased ticket, and entitling persons refused admission contrary to the requirement to actual damages plus \$100). *See generally*, Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 Wash. L. Rev. 841 (1965).

paragraph, but retained its overall purpose of prohibiting discrimination in public accommodation on the basis of race or national origin. Rem. Code, § 2686 (1909), now codified as RCW 9.91.010. *See generally Powell v. Utz*, 87 F. Supp. 811, 815-816 (E.D. Wash. 1949).

In 1921, this Court held that violation of the criminal anti-discrimination law created a private right of action. *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 194 P. 813 (1921) (affirming award of noneconomic damages to a man denied admission to a theater because of his race under a Washington criminal law that prohibited the denial of “the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement” because of “race, creed, or color[.]”).

Since *Anderson v. Pantages Theatre Co.* was decided, the Washington Legislature has explicitly created civil causes of action for discrimination. First came the “Law Against Discrimination in Employment” in 1949,<sup>4</sup> which was limited to the employment context. In 1957, the legislature clarified and expanded the employment protections created in 1949, and added provisions prohibiting discrimination in public accommodations. Laws of 1957, ch. 37. The expanded anti-

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<sup>4</sup> Laws of 1949, ch. 183.

discrimination law protected persons based on their “race, color, creed, or national origin,” and was named the “Law Against Discrimination.” *Id.*, §§ 1-2.

Since 1957, the legislature has repeatedly expanded the protections, reach, and remedies of Washington’s Law Against Discrimination (“WLAD”)<sup>5</sup> in accordance with its stated invocation of its police powers to eliminate discrimination:

This chapter shall be known as the “law against discrimination.” It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. \* \* \*

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<sup>5</sup> See generally *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655 (2002), *cert. den.*, 538 U.S. 1057 (2003) (summarizing legislative history of WLAD).

RCW 49.60.010. *See also Tenino Aerie*, 148 Wn.2d 224 at 246 (“the purpose of the WLAD – to deter and eradicate discrimination in Washington – is a policy of the highest order.”).

Gender was added to the WLAD as a protected class in 1973, shortly after the people of Washington approved an Equal Rights Amendment in 1972 that now appears as Const. art. XXXI.<sup>6</sup> Laws of 1973, ch. 141, § 1. In 1985, the legislature explicitly added “sex” to the law prohibiting unfair practices in places of public accommodation, fixing what this Court had said in 1981 was an “inadvertent” omission. Laws of 1985, ch. 90, § 6; *Maclean v. First Northwest Industries*, 96 Wn.2d 338, 343, 635 P.2d 683 (1981).

Since the passage of its first anti-discrimination statute in 1949, the legislature has been clear that the provisions of the WLAD are to be liberally construed in order to accomplish its remedial objectives of eliminating and preventing discrimination:

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<sup>6</sup> Washington’s Equal Rights Amendment reads:

§ 1 Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

§ 2 The Legislature shall have the power to enforce, by appropriate legislation, the provisions of this article.

Const. art. XXXI, §§ 1-2.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. \* \* \*

Laws of 1949, ch. 183, § 12; Laws of 1957, ch. 37, § 2; RCW 49.60.020.

*See also Tenino Aerie*, 148 Wn.2d at 247 (“The WLAD requires liberal construction of its provisions in order to accomplish the purposes of the law. . .”).

As relevant to this case, plaintiffs allege that defendants committed acts which resulted in discrimination against them in a place of public accommodation based on their sex, in violation of RCW 49.60.215. That statute provides in relevant part:

It shall be an unfair practice for any person or the person’s agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination \* \* \* in any place of public \* \* \* accommodation [or] assemblage \* \* \* regardless of \* \* \* sex. . .<sup>7</sup>

RCW 49.60.215. This Court recently interpreted the same provision to impose strict liability on an employer for the sexual harassment of a patron by its employee, concluding that “[i]t is the province of the legislature to establish standards of conduct and attendant rules of liability, and the legislature determined direct liability is appropriate here.” *Floeting*, 192

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<sup>7</sup> For purposes of the WLAD, including RCW 49.60.215, “[s]ex’ means gender.” RCW 49.60.040(25).

Wn.2d at 856. In doing so, the Court rejected the employer’s argument that only actions by supervisors are imputed to an employer under the public accommodations protections of the WLAD, and also distinguished federal civil rights laws which do not contain language that imposes both direct and vicarious liability. *Id.* at 856-57 (comparing RCW 49.60.215 with 42 U.S.C.A. § 2000a (1964)).

The legislature has made a policy judgment that the imposition of strict liability on employers for certain of the discriminatory acts of their agents and employees<sup>8</sup> is the best available means to eliminate and prevent discrimination in public accommodations. As this Court has repeatedly noted, such policy judgments are the province of the legislature. *See, e.g., Burkhart v. Harrod*, 110 Wn.2d 381, 385, 755 P.2d 759 (1988) (“The Legislature is uniquely able to hold hearings, gather crucial information, and learn the full extent of the competing societal interests.”); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 57-58, 929 P.2d 420 (1997) (declining to impose a “nondelegable duty theory” of tort liability on group homes without a legislative policy judgment that doing so “would actually improve the lives of persons who are dependent upon private residential care facilities[,]” because “a decision to impose a new tort

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<sup>8</sup> The legislature imposed strict liability under the WLAD for only two of the 14 “unfair practices” it defined. *Floeting*, 192 Wn.2d at 857.

liability requires a consideration of factual matters extrinsic to the case before the court.”).

The legislature’s decision to impose strict liability for discrimination against protected classes on those responsible for public accommodations is a powerful and effective means of preventing and eradicating discrimination, and advances a number of purposes and policy goals of the civil justice system. First, it provides significant incentives for employers to select, train, and supervise their employees and agents to not discriminate, thereby preventing discrimination. There can be no reasonable dispute that those who operate places of public accommodation are in the best position to prevent discrimination. Second, those who operate public accommodations often control the means available to prove discrimination has occurred, including the testimony of witnesses to the discrimination (either employees or other patrons) and technological mechanisms for proof (access controls, surveillance cameras, employee records). Third, those who operate public accommodations are in a better position than patrons or others to insure against or distribute the costs of compensating victims of discrimination. *See generally* Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 Wash. L. Rev. 225, 239-43 (1971).

This case illustrates the fairness of the legislature’s imposition of strict liability for discrimination on those who control public accommodations. Defendants hired, trained, and/or supervised the employee who discriminated against the plaintiffs. Defendants controlled all means of proving the discrimination occurred other than the testimony of the plaintiffs. Defendants were in a better position than plaintiffs or the perpetrator to insure against or distribute the cost of compensating plaintiffs for the discrimination they suffered.

The Court should follow *Floeting* in this case, and hold the school district strictly liable for the school bus driver’s sexual abuse of plaintiffs, because nothing in the WLAD excludes intentional sexual assault from the discriminatory acts it proscribes, and such assaults are indisputably “unfair practices” that directly or indirectly result in discrimination when they are motivated by the victim’s gender. *See* RCW 49.60.215.

**B. SEXUAL ABUSE IS “SEX DISCRIMINATION”  
WITHIN THE MEANING OF THE WASHINGTON  
LAW AGAINST DISCRIMINATION.**

The second question certified to this Court by the federal court is whether intentional sexual misconduct may constitute “discrimination” under the WLAD. The clear answer to the question is “yes.”

In *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996), this Court set forth the elements of a *prima facie* case of

discrimination under RCW 49.60.215. The fourth and final element is that “the plaintiff’s protected status was a substantial factor that caused the discrimination.”<sup>9</sup>

Whether bus driver Gary Shafer sexually abused plaintiffs in substantial part because they were female is a question of fact for the jury.<sup>10</sup> *Fell v. Spokane Transit Auth.*, 128 Wn.2d at 637 (whether the plaintiff’s membership in a protected class “was a substantial factor causing the discrimination . . . is strictly a question of fact”). If Shafer did target plaintiffs in substantial part because they were female, then his

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<sup>9</sup> This is so whether the perpetrator is of the same or opposite sex of the victim. *See, e.g., Doe v. Kansas City*, 372 S.W.3d 43 (Mo. Ct. App. 2012) (applying Missouri Human Rights Act to same-sex, peer-on-peer sexual harassment in a school setting and concluding that the school district is a place of public accommodation).

<sup>10</sup> Defendants claim in their brief that “it is undisputed that Shafer sexually molested both boys and girls,” citing ER 13 and ER 263 as the sources of their claim. Def. Brief, p. 7. ER 13 is a page of plaintiff’s complaint that recites a kindergarten boy’s report to his mother that Shafer “was making farting noises, tickling he and another student, and otherwise horsing around with them while on the bus.” ER 13. ER 263 is a page from the district court’s order that says, “The Court agrees with Plaintiffs that whether Plaintiffs can show gender was a substantial factor in the discrimination \* \* \* remains a factual question at this point in the proceedings[.]” ER 263.

The distinction between Shafer’s behavior toward boys and his (truly) undisputed sexual abuse of girls leaves little doubt that the latter was “because of” the girls’ gender, but that is not an issue this Court should address. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9<sup>th</sup> Cir. 1994) (district court erred in “endorsing Showboat’s argument that [its employee’s] conduct was not sexual harassment because he consistently abused men and women alike.”).

sexual abuse of them constituted sex discrimination, just as Christopher Floeting’s sexual harassment by a female Group Health employee constituted sex discrimination because he was targeted in substantial part because he was male.<sup>11</sup> *Floeting*, 192 Wn.2d at 853. While this Court has never explicitly said that sexual assault constitutes sex discrimination, that may well be because it goes without saying. *See, e.g., S.S. v. Alexander*, 143 Wn. App. 75, 108, 177 P.3d 724 (2008) (“There is no question that rape constitutes a severe form of sexual harassment and, accordingly, also constitutes a severe form of sex discrimination.”).<sup>12</sup>

It has long been accepted under federal law that sexual assault can constitute sexual harassment, and that sexual harassment is sex discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (recognizing sexual harassment as a form of sex discrimination under Title VII of the Civil Rights Act of 1964).<sup>13</sup>

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<sup>11</sup> This Court did not identify the gender of Floeting’s harasser, no doubt because it was irrelevant to whether Floeting was targeted substantially because of his gender. The Court of Appeals did identify the gender of Floeting’s harasser in its opinion. *Floeting v. Grp. Health Coop.*, 200 Wn.App. 758, 762, 403 P.3d 559 (2017), *aff’d*, 192 Wn.2d 848, 434 P.3d 39 (2019).

<sup>12</sup> *S.S. v. Alexander* was decided under Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681 *et seq.* (1972).

<sup>13</sup> The sexual harassment alleged in *Vinson* included the harasser fondling plaintiff in front of other employees, following her into the women’s restroom when she went there alone, exposing himself to her,

It is assumed by the Washington Superintendent of Public Instruction that sexual assault is sexual harassment, and thus is sex discrimination:

2. What are some examples of sexual harassment?

Sexual harassment can occur in any school program or activity and can take place in school facilities, on a school bus, or at off-campus locations, such as a school-sponsored field trip or training program at another location. The conduct can be verbal, nonverbal, or physical and can include, but is not limited to:

\* \* \*

- Touching of a sexual nature.
- Physical interference with movements, such as blocking or following someone.
- Acts of physical violence, including rape, sexual assault, sexual battery, and sexual coercion.

*Prohibiting Discrimination in Washington Public Schools*, p. 36, Equity and Civil Rights Office, Office of Superintendent of Public Instruction (February 2012).<sup>14</sup>

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and forcibly raping her on several occasions. *Meritor Savings Bank v. Vinson*, 477 U.S. at 60.

<sup>14</sup> Found at <https://www.k12.wa.us/policy-funding/equity-and-civil-rights/civil-rights-guidelines-state-policy> (last accessed January 20, 2020).

Even defendants' own sexual harassment policy, published in its student handbook, includes "sexual violence" within its scope.<sup>15</sup>

As a practical matter, it is well-established that females are typically targeted for sexual abuse because they are females. As Professor Catherine MacKinnon wrote in an oft-quoted law review article nearly 30 years ago:

Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender. Forty-four percent of women in the United States have been or will be victims of rape or attempted rape at least once in their lives. Women of color experience disproportionately high incidence rates. In one random sample study, only 7.5% of American women reported encountering no sexual assault or harassment at any time in their lives. Females -- adults and children -- make up the overwhelming population of victims of sexual assault. The perpetrators are, overwhelmingly, men. Men do this to women and to girls, boys, and other men, in that order. Women hardly ever do this to men.

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<sup>15</sup> Policy 3205, "Sexual Harassment of Students Prohibited," in the Olympia School District's "Student Rights and Responsibilities Handbook," states, "This procedure applies to sexual harassment (including sexual violence) targeted at students carried out by other students, employees or third parties involved in school district activities." Handbook, p. 39 (2019-20), found at [https://osd.wednet.edu/community/student\\_handbook](https://osd.wednet.edu/community/student_handbook) (last accessed January 20, 2020).

Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1301-02 (1991). Subsequent reporting of statistics suggests that the situation for women and girls as described by Professor MacKinnon remains a serious national problem. *See, e.g.*, National Sexual Violence Resource Center Statistics, found at [www.nsvrc.org/node/4737](http://www.nsvrc.org/node/4737) (last accessed January 20, 2020); National Institute of Justice & Centers for Disease Control & Prevention, *Prevalence, Incidence and Consequences of Violence Against Women Survey* (1998) (one out of six American women has been the victim of an attempted or completed rape in her lifetime).

Gary Shafer, an employee of defendant Olympia School District, committed an act of sexual abuse against plaintiffs that interfered with their right to the full enjoyment of their school bus and their school experience. It is a question of fact for the jury whether plaintiffs' gender was a substantial factor that caused the discrimination, so the answer to the certified question is "yes."

## **VI. CONCLUSION**

The purpose of the WLAD is to eradicate and prevent discrimination. Holding employers in the public accommodation setting

strictly liable for the discriminatory acts of their agents and employees

advances this purpose, because, as this Court recently observed:

[I]f employers know that the only way they can prevent lawsuits is by preventing their employees from discriminating at all, they will try even harder to make sure that their employees are well trained, are well supervised, and do not discriminate. In addition, [strict liability] gives employers an incentive to end any alleged discrimination as soon as possible, limiting their exposure to damages. This will encourage employers to focus on preventing discrimination, rather than merely punishing employees when it occurs. Prevention will better further the legislative goal of eradicating discrimination in places of public accommodation.

*Floeting*, 192 Wn.2d at 861.

Dated: January 27, 2020, at Seattle, Washington.

Respectfully submitted,



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Rebecca J. Roe, WSBA No. 7560  
Schroeter Goldmark & Bender  
810 Third Avenue, Suite 500  
Seattle, WA 98104  
Phone: (206) 622-8000  
Email: roe@sgb-law.com



---

Erin K. Olson, WSBA No. 34656  
Law Office of Erin Olson, P.C.  
2014 N.E. Broadway Street  
Portland, OR 97232  
Phone: (503) 546-3150  
Email: eolson@erinolsonlaw.com

*Counsel for Amicus Curiae NCVC*

# SCHROETER GOLDMARK BENDER

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- jmoberg@mrklawgroup.com
- ken@appeal-law.com
- kevin@pcvalaw.com
- mendoza@sgb-law.com
- mmcfarland@ecl-law.com
- paralegal@appeal-law.com
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Address:  
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Suite 500  
Seattle, WA, 98104  
Phone: (206) 622-8000

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