FILED
SUPREME COURT
STATE OF WASHINGTON
2/28/2020 4:54 PM
BY SUSAN L. CARLSON
CLERK

No. 97630-9
W.D. Wash. No. C16-5237 BHS

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

ON CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

W.H., as guardian for her minor daughter, P.H.; W.H., individually; J.H., individually; B.M., as guardian for her minor daughter, S.A.; and B.M., individually,

Plaintiffs,

v.

OLYMPIA SCHOOL DISTRICT, a public corporation; JENNIFER PRIDDY, individually, FREDERICK DAVID STANLEY, individually, BARBARA GREER, individually, WILLIAM V. LAHMANN, individually, DOMINIC G. CVITANICH, individually,

Defendants.

RESPONSE TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

A. RCW 49.60.215 does not apply because children are not a protected class and school buses are not public accommodations. 2

1. Children are not a protected class under RCW 49.60.215. 2

2. School buses are not public accommodations. 5

B. A school district may not be strictly liable, but may be liable only for negligent acts and omissions. 8

C. ***Floeting*** does not apply. 12

D. The District's liability for criminal sexual abuse of children should continue to be governed by ***McLeod*** and its progeny, not the WLAD. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Soap Lake Sch. Dist.,
191 Wn.2d 343, 423 P.3d 197 (2018).....10

Briscoe v. Sch. Dist. No. 123, Grays Harbor Cnty.,
32 Wn.2d 353, 201 P.2d 697 (1949).....9, 14, 16

C.J.C. v. Corp. of the Catholic Bishop of Yakima,
138 Wn.2d 699, 985 P.2d 262 (1999).....11

Christiansen v. Royal Sch. Dist. No. 160,
156 Wn.2d 62, 124 P.3d 283 (2005).....11

City of Federal Way v. Koenig,
167 Wn.2d 341, 217 P.3d 1172 (2009).....14, 15

Doe v. Wash. Dep't of Transp.,
85 Wn. App. 143, 193 P.2d 196, *rev. denied*, 132
Wn.2d 1012 (1997).....4

Fell v. Spokane Transit Auth.,
128 Wn.2d 618, 911 P.2d 1319 (1996)..... *passim*

Floeting v. Group Health Coop.,
192 Wn.2d 848, 434 P.3d 39 (2019).....3, 12, 14

Glasgow v. Georgia-Pac. Corp.,
103 Wn.2d 401, 693 P.2d 708 (1985).....4, 18

Hendrickson v. Moses Lake Sch. Dist.,
192 Wn.2d 269, 428 P.3d 1197 (2018).....9

J.N. v. Bellingham Sch. Dist. No. 501,
74 Wn. App. 49, 871 P.2d 1106 (1994) 11

Estate of Kerr,
134 Wn.2d 328, 949 P.2d 810 (1989).....13

Lunsford v. Saberhagen Holdings, Inc.,
166 Wn.2d 264, 208 P.3d 1092 (2009).....12

McLeod v. Grant Cnty. Sch. Dist.,
42 Wn.2d 316, 255 P.2d 360 (1953).....10, 11, 14, 16

N.L. v. Bethel Sch. Dist.,
186 Wn.2d 422, 378 P.3d 162 (2016).....11

Niece v. Elmview Group Home,
131 Wn.2d 39, 929 P.2d 420 (1997).....11, 12

O.S.T. v. Regence BlueShield,
181 Wn.2d 691, 335 P.2d 416 (2014).....13

Peck v. Siau,
65 Wn. App. 285, 827 P.2d 1108, *rev. denied*, 120
Wn.2d 1005 (1992).....11

R.L. v. Olympia Sch. Dist.,
Thurston Cnty. No. 15-2-00089-3 (Complaint filed
Jan. 14, 2015) 3

Rhea v. Grandview Sch. Dist.,
39 Wn. App. 557, 694 P.2d 666 (1985) 9

Riehl v. Foodmaker, Inc.,
152 Wn.2d 138, 94 P.3d 930 (2004).....14, 15

In re Rights to Waters of Stranger Creek,
77 Wn.2d 649, 466 P.2d 508 (1970).....15

Scott v. Blanchet High Sch.,
50 Wn. App. 37, 747 P.2d 1124 (1987) 11

State v. Farnsworth,
192 Wn.2d 468, 430 P.3d 1127 (2018).....16

State v. Schaaf,
109 Wn.2d 1, 743 P.2d 240 (1987) 3

Swank v. Valley Christian Sch.,
188 Wn.2d 663, 398 P.2d 1108 (2017).....2

Wagenblast v. Odessa Sch. Dist.,
110 Wn.2d 845, 782 P.2d 968 (1988).....8

Wynn v. Earin,
163 Wn.2d 361, 181 P.3d 806 (2008).....10, 11

Constitutions

Washington Constitution, Art. II, §26, Art. IX.....8

Statutes

RCW 4.08.120 ..... *passim*

RCW 28A.160.010.....5, 6

RCW 28A.160.100.....6

RCW 49.60.030(1)(b).....17

RCW 49.60.040 .....5, 6

RCW 49.60.215 ..... *passim*

RCW 49.60.216 5

RCW Ch. 48.44.....13

Other Authorities

WAC 162-28-030 3

INTRODUCTION

Whether Plaintiffs may pursue a WLAD public-accommodation claim depends first and foremost on whether they are members of a protected class and whether the place – a school bus – is a public accommodation. Despite amending RCW 49.60.215 11 times since its adoption, the Legislature never added age or children. Simply stated, children are not a protected class under RCW 49.60.215. Neither are school buses public accommodations. Rather, they convey only a small section of the public, shutting out all others. Plaintiffs cannot satisfy these two factors, so may not pursue a WLAD claim.

Neither can Plaintiffs satisfy the remaining two factors: whether they were treated differently than those outside their protected class based in substantial part on their protected status. Gary Shafer is an admitted child abuser, accused of molesting young boys and girls. That is, he did not discriminate based on gender. He molested children because they are children. The WLAD seeks to eradicate and remediate discrimination. It cannot remediate all injurious conduct, no matter how reprehensible.

This Court should stand by decades of law governing sexual misconduct in schools and reject Plaintiffs' claims.

ARGUMENT

A. RCW 49.60.215 does not apply because children are not a protected class and school buses are not public accommodations.

Whether Plaintiffs have a cause of action under RCW 49.60.215 turns first on: (1) whether they are members of a protected class, and (2) whether the "place" – a school bus – is a public accommodation. ***Fell v. Spokane Transit Auth.***, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996). Like Plaintiffs, amici Legal Voice ("LV"), National Center for Victims of Crime ("NCVC"), and Washington State Association for Justice Foundation ("WSAJF") (collectively "Amici") largely ignore these inquiries.[1]

1. Children are not a protected class under RCW 49.60.215.

As to the first ***Fell*** inquiry, this Court looks at the controlling statute's language to determine whether Plaintiffs are members of a protected class. ***Swank v. Valley Christian Sch.***, 188 Wn.2d 663, 676, 398 P.2d 1108 (2017). RCW 49.60.215 does not include children or age as its protected classes. Defendants' Brief on Certified Questions 5-7. Rather, as WDTL explains in considerable

[1] While this brief does not purport to respond to amici Washington Defense Trial Lawyers ("WDTL") and Washington Schools Risk Management Pool ("WSRMP") the District concurs with their arguments, noting particularly important points herein.

detail, the Legislature has amended RCW 49.60.215 eleven times since its adoption, but has never added age as a protected class, despite adding age to several other WLAD provisions. WDTL 6-8. Neither has the Human Rights Commission, tasked with promulgating rules and regulations to implement the WLAD, classified age or children as protected classes in public accommodations. WDTL 10-11 (citing WAC 162-28-030). This is consistent with the fact that children are not a suspect or quasi-suspect class, and has the added benefit of common sense in that public accommodations regularly discriminate based on age. *See* ***State v. Schaaf***, 109 Wn.2d 1, 18-19, 743 P.2d 240 (1987).

What Plaintiffs have in common with other alleged victims is their age. While these Plaintiffs are female, their counsel represents at least one male Plaintiff making the same or similar claims against Shafer. ***R.L. v. Olympia Sch. Dist***., Thurston Cnty. No. 15-2-00089-3 (z). Like Plaintiffs here, he too seeks to amend his Complaint to add a claim for strict liability under RCW 49.60.215, per this Court's decision in ***Floeting v. Group Health Coop.***, 192 Wn.2d 848, 434 P.3d 39 (2019). (Plaintiffs' Motion for Leave to

Amend Complaint filed April 30, 2019).[2] That is, girls, and at least one boy, allege that Shafer "discriminated" against them based on their gender.

The employment context provides a useful corollary. In the workplace, conduct targeting both men and women is not "because of sex," no matter how reprehensible. ***Glasgow v. Georgia-Pac. Corp.***, 103 Wn.2d 401, 405-06, 693 P.2d 708 (1985); ***Doe v. Wash. Dep't of Transp.***, 85 Wn. App. 143, 148-49, 193 P.2d 196, *rev. denied*, 132 Wn.2d 1012 (1997). A plaintiff must show that they would not "have been singled out and caused to suffer the harassment if [they] had been a different sex." ***Glasgow***, 103 Wn.2d at 406; ***Doe***, 85 Wn. App. at 148-49. Put another way, their gender must be "the motivating factor for the unlawful discrimination." ***Glasgow***, 103 Wn.2d at 406.

Shafer is an admitted child molester. ER 2. The "motivating factor" for his sexual abuse of children is not their gender, but their age. That is not a protected class under RCW 49.60.215. Amici do not and cannot argue otherwise.

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[2] See the pleadings and order re supplementing the record.

LV attempts to bypass this issue by arguing that child molestation must be WLAD discrimination because it denies children the full enjoyment of school. LV 2-3. That is a non sequitur. The WLAD does not seek to remediate all conduct that negatively effects the full enjoyment of a public accommodation. It seeks to eradicate and remediate discriminatory conduct – that which fails to treat a plaintiff comparably to members outside their class, due in substantial part to their protected status. ***Fell***, 128 Wn.2d at 637 (factors three and four).

LV next argues that in correctly pointing out that the Legislature did not make children a protected class under RCW 49.60.216, the District "ignores the realities" that those classes already facing barriers to the full enjoyment of public schools are more likely to face sexual assault. LV 3-4, 11-13. The sad fact that populations that "already face barriers" in schools (and elsewhere) are more likely to face sexual harassment does not allow this Court to add a protected class to a statute the Legislature has not seen fit to add for decades, and very much appears to have rejected.

2. School buses are not public accommodations.

As to the second ***Fell*** factor, a school bus is not a public accommodation: "any place" used "for public conveyance or

transportation on land … .” RCW 49.60.040(2). Simply stated, a school bus (unlike a city bus) simply is not a place of transport open to the public. Rather, school buses are principally reserved to public school children traveling within the district. RCW 28A.160.010; Defendants’ Brief on Certified Questions 7-8. The only other permitted uses are transporting private school children with limitations and for a fee, transporting the elderly for educational or recreational purposes when school buses are not otherwise in use, and transporting school employees for supervisory purposes. RCW 28A.160.010, .020, & .040. The general public may access school buses only for interscholastic activity and only for a fee. RCW 28A.160.100. In short, any school district is free to exclude any person, adult or child, who does not attend a public school within the district.

LV, the only Amici engaging this argument, argues that school buses must be public accommodations because they are necessary to ensuring access to, and therefore full enjoyment of, public education. LV 15-20. But the question is not whether buses facilitate access to schools (presumably public accommodations) but whether they convey the public. RCW 49.60.040. They don’t. School buses generally convey only a very small fraction of the

public – children (not a class under RCW 49.60.215) attending a public school in the district.

That busing was a useful tool in desegregating schools also does not make them public accommodations. LV 16-17. Nor does the possibility that abhorrent, racists behavior occurs on a bus make it a public accommodation. LV 18. By that standard, every place would be a public accommodation. And public-school-bus riders are not left remediless. *Id*. As here, they have tort claims.

LV's parade of horribles does not answer WSRMP's correct argument that making school districts strictly liable for crimes committed by employed bus drivers would disproportionately affect rural and low-income schools. WSRMP 8. While some school districts employ bus drivers, others that can afford it and are located where third-party transportation services are available may contract out transportation. *Id*. Still others, typically in urban, wealthy areas, may provide vouchers for students to take public transportation. *Id*. That is, wealthy schools may be able to avoid the strict liability Plaintiffs seek to impose, leaving out smaller, rural, economically less advantaged schools.

Disparate impacts aside, all public schools would face the potentially catastrophic reality of losing their liability insurance and

their ability to risk pool. WSRMP 15-20. Liability insurance does not typically cover intentional conduct, much less intentional criminal conduct. WSRMP 17. Indeed, WSRMP "is unaware of ***any*** liability insurance on the market that would cover an employee's intentional criminal sexual abuse of a child." *Id*. (emphasis original).

This lack of coverage jeopardizes the ability to risk pool as well. WSRMP 18-20. That leaves districts potentially operating with uninsured high-risk exposure.

In sum, children are not a protected class and public-school buses are not public accommodations under RCW 49.60.215. Plaintiffs should not be permitted to pursue a WLAD claim.

B. A school district may not be strictly liable, but may be liable only for negligent acts and omissions.

As WSRMP correctly notes, Washington's Constitution requires the Legislature "to set up a public school system, to fund it, and to direct when, how and where lawsuits may be brought against such state-created governmental entities." WSRMP 3 (citing Washington Constitution, Art. II, §26, Art. IX). WSAJF similarly concedes that "[w]hether and to what degree schools are subject to suit is generally a legislative question." WSAJF 7 (citing ***Wagenblast v. Odessa Sch. Dist.***, 110 Wn.2d 845, 859, 782 P.2d

968 (1988)). The Legislature made that decision when it adopted RCW 4.08.120, permitting suits against schools and other public corporations "upon a contract" or for injuries resulting from an act or omission. Since then, the Legislature and the courts have consistently imposed liability on schools only for their acts and omissions, and only for foreseeable injuries. This Court should continue to do so. Simply stated, school districts cannot be strictly liable because they are not guarantors of student safety.

While school districts were immune from suit at the common law, they have, like any other public corporation, been subject to suit in tort since at least 1869. ***Briscoe v. Sch. Dist. No. 123, Grays Harbor Cnty.***, 32 Wn.2d 353, 360-61, 201 P.2d 697 (1949) (addressing REM. REV. STAT. §§ 950, 951, currently RCW 4.08.120). But in waiving sovereign immunity, the Legislature did not subject school districts to all suits, but to suits in contract or arising from their acts or omissions. ***Briscoe***, 32 Wn.2d at 361; ***Rhea v. Grandview Sch. Dist.***, 39 Wn. App. 557, 559-60, 694 P.2d 666 (1985). Simply stated, school districts are held to a standard of ordinary care. ***Hendrickson v. Moses Lake Sch. Dist.***, 192 Wn.2d 269, 278-79, 428 P.3d 1197 (2018) ("We have never held that a school district is subject to a heightened duty of care.

Instead, school districts are held to a standard of *ordinary* care to protect their students from foreseeable harm”).

Washington courts have consistently addressed sexual misconduct in schools through the rubric of tort liability before and after the Legislature amended RCW 49.60.215 to add sex in 1985. School district liability generally takes three forms: (1) liability for the negligent failures to protect students from harm inflicted by a third party that is within the general “field of danger” that should have been anticipated; (2) liability for negligent hiring or retention, when the district knew or should have known of the employee’s “unfitness”; and (3) knew or should have known that the employee presented a risk of danger to others. ***Anderson v. Soap Lake Sch. Dist.***, 191 Wn.2d 343, 356-58, 368, 423 P.3d 197 (2018); ***McLeod v. Grant Cnty. Sch. Dist.***, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). While school districts may also be vicariously liable, it is widely recognized that sexual misconduct falls outside the scope of employment. Defendants’ Brief on Certified Questions 11-12.

The Legislature was presumptively aware of this considerable progeny when it amended RCW 49.60.215 in 1985 to add sex as a protected class. *See* ***Wynn v. Earin***, 163 Wn.2d 361, 371, 181 P.3d 806 (2008). Since the Legislature expressed no

intent to change the law on the intentional sexual abuse of children in schools, this Court presumes it did not intend to do so. ***Wynn***, 163 Wn.2d at 371.

Washington courts stayed the course following this Court's 1996 ***Fell*** decision establishing the elements for proving discrimination in public accommodations. Defendants' Brief on Certified Questions 16-21. That is, courts continue to apply the ***McLeod*** foreseeable field-of-danger test, or negligent hiring retention and supervision, to sexual misconduct in schools. *See e.g.,* ***N.L. v. Bethel Sch. Dist.***, 186 Wn.2d 422, 430-32, 378 P.3d 162 (2016); ***Christiansen v. Royal Sch. Dist. No. 160***, 156 Wn.2d 62, 64-65, 124 P.3d 283 (2005); ***J.N. v. Bellingham Sch. Dist. No. 501***, 74 Wn. App. 49, 58-59, 871 P.2d 1106 (1994); ***Peck v. Siau***, 65 Wn. App. 285, 292-94, 827 P.2d 1108, *rev. denied*, 120 Wn.2d 1005 (1992); ***Scott v. Blanchet High Sch.***, 50 Wn. App. 37, 42-45, 747 P.2d 1124 (1987). And in a related context, this Court made clear, after extensive consideration, that no Washington case law, nor public policy, favors strict liability for an employee's intentional sexual misconduct. ***C.J.C. v. Corp. of the Catholic Bishop of Yakima***, 138 Wn.2d 699, 718-19, 985 P.2d 262 (1999) (addressing

Niece v. Elmview Group Home, 131 Wn.2d 39, 55, 929 P.2d 420 (1997)).

C. *Floeting* does not apply.

Floeting does not address this considerable body of statutory and common law, dating back to the State's limited waiver of sovereign immunity. Defendants' Brief on Certified Questions 21-26. ***Floeting*** did not sub silentio overrule those many cases. *See* ***Lunsford v. Saberhagen Holdings, Inc.***, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). Rather, as this Court correctly recognized in ***Niece***, "impos[ing] essentially strict liability for an employee's intentional or criminal conduct" is a "major change in Washington employer liability" requiring legislative action. 131 Wn.2d at 42. But the Legislature has not amended RCW 4.08.120, imposing liability on school districts arising from their negligent acts and omissions, and nothing in the legislative history remotely suggests an intent to depart from RCW 4.08.120 and its progeny.

Only WSAJF attempts to grapple with this law, arguing that RCW 4.08.120 and RCW 49.60.215 are related, so must be harmonized despite their apparent conflict. WSAJF 11-15. WSAJF argues that "RCW 4.08.120 abolishes common law immunity for public corporations, including school districts, and permits claims of

negligence; RCW 49.60.215 prohibits discrimination in public accommodations, which include schools." WSAJF 13. That is, the only purported relation between these statutes is that they both apply to public corporations. *Id*. WSAJF does not develop this argument and could not seriously suggest that every statute involving a public corporation is related.

While WSAJF admits, as it must, that RCW 4.08.120 is a limited waiver of sovereign immunity, subjecting school districts to suit only in contract and "negligence," it argues that this statute can "stand side by side" with RCW 49.60.215, each fulfilling its intended purpose. WSAJF at 13-15. This is not a matter of harmonizing a specific and a general fee provision, both in Title 11 governing probates. WSAJF 13 (citing ***Estate of Kerr***, 134 Wn.2d 328, 949 P.2d 810 (1989)). Nor is it a matter of harmonizing two statues in the same Chapter, 48.44 RCW, governing health care services (§ .341 requiring all health plans that cover medical and surgical proceedings to also cover mental health services, and § .450 mandating coverage for children under age seven). WSAJF 14 (citing ***O.S.T. v. Regence BlueShield***, 181 Wn.2d 691, 335 P.2d 416 (2014)). RCW 4.08.120's purpose is not just to "permit causes of action against public corporations," but to permit only two types

of actions – "claims arising out of contract and claims arising out of negligent acts or omissions." WSAJF at 14-15. Imposing strict liability from a different Title and Chapter would impermissibly change this limited waiver into an unintended blanket waiver.

LV and NCVC ignore this considerable body of law entirely, arguing only that strict liability helps reduce discrimination (per ***Floeting***) so furthers the WLAD's goals. LV 13-14; NCVC 12. The desire to further the WLAD's goals does not permit rewriting the statute, overturning decades of correct and helpful law providing the framework for adjudicating sex abuse of children in schools.

In a similar vein, WSAJF asks this Court not to create an "exception" for public schools to RCW 49.60.215's imposition of strict liability. WSAJF 10. This is not a matter of this Court creating an exception. The "exception" predates RCW 49.60.215 by more than 100 years, when the State waived sovereign immunity for public corporations, but only for contracts and negligent acts or omissions.

This Court should not now construe RCW 49.60.215 to work an additional waiver of sovereign immunity at odds with RCW 4.08.120, or abandon ***Briscoe***, ***McLeod***, or their progeny, laying out a correct and helpful legal framework. ***City of Federal Way v.***

Koenig, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009) ("The principle of stare decisis "'requires a clear showing that an established rule is incorrect and harmful before it is abandoned'"") (quoting ***Riehl v. Foodmaker, Inc.***, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting ***In re Rights to Waters of Stranger Creek***, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))). Like Plaintiffs, Amici do not argue otherwise, ignoring the damage to precedent, and to the principal of stare decisis, adopting their position would cause.

Indeed, WSAJF, the only Amici to even address this considerable progeny, argues only that the "overlap" between the common law applying negligence standards to intentional criminal conduct in schools and § .215 does not warrant restricting the WLAD's reach. WSAJF 17-19. This is not merely an "overlap." § .120 imposes liability for negligence, and since its inception has permitted tort liability for intentional sexual misconduct in schools only when that misconduct is within a foreseeable zone of danger. *Supra* Argument § B. This Court has already stated that such liability is not strict. *Id*.

Strict liability does not overlap with or "supplement" tort liability in negligence – it obliterates it. WSAJF 20. If school districts are strictly liable for intentional criminal conduct, then they have lost

their statutory and common law protections. It is no answer that plaintiffs "routinely assert multiple theories of recovery." WSAJF 19. A plaintiff cannot assert strict liability when the State has waived immunity only for injuries caused by negligent acts or omissions.

Further, WSAJF's only support for this assertion is unavailing. WSAJF argues that "the Legislature may 'supersede, abrogate, or modify the common law by statute'" and that common law yields if there is a conflict. WSAJF 18-19 (quoting ***State v. Farnsworth***, 192 Wn.2d 468, 474, 430 P.3d 1127 (2018)). But WSAJF ignores that the Legislature did not modify RCW 4.08.120 when it adopted RCW 49.60.215. Rather, nothing in the WLAD's legislative history suggests that the Legislature intended to make Washington the only state in the country imposing strict liability on schools for an employee's child molestation.

In sum, this Court should reject Plaintiffs' effort to turn its tort claim into a strict-liability WLAD claim, holding that this matter is governed by RCW 4.08.120, ***Briscoe***, ***McLeod***, and their progeny.

D. The District's liability for criminal sexual abuse of children should continue to be governed by *McLeod* and its progeny, not the WLAD.

Even assuming *arguendo* that a school district may be strictly liable in direct conflict with RCW 4.08.120, the WLAD does

not encompass the intentional sexual abuse of children. Defendants' Brief on Certified Questions 27-29; WSRMP 10-11; WDTL 19. Neither Amici nor Plaintiffs point to anything in RCW 49.60.215 or its history showing that the intent to eradicate gender discrimination in public accommodations includes child sex abuse. Rather, as WSRMP succinctly states it:

> There is nothing in the WLAD's prohibition against gender discrimination in public accommodations that should persuade this Court that RCW 49.60.030(1)(b) is a child abuse statute the legislature intended to completely upend more than a century of school law, including decades of case law specifically defining the nature and scope of a public school's duty to protect a child from sexual abuse by a school employee. The judicial creation of a new legal theory for suing public schools for the criminal conduct of an employee—a theory under which plaintiffs need not prove fault and will be awarded reasonable attorneys' fees if they prevail—would eclipse and practically preempt Washington law designed specifically to address school liability for the sexual assault of a minor student.

WSRMP 10. Indeed, no court in the country has imposed strict liability for child abuse on a public school based on public-accommodation law (or any other legal theory). WSRMP 5-6, 19.

Attempting to vilify the District, LV and NCVC[3] ignore its important concession: "assault or abuse could give rise to a claim under RCW 49.60.215 if a plaintiff can satisfy the ***Fell*** factors … ." Defendants' Brief on Certified Questions 28. In other words, the District does not disagree that sexual assault may be a form of discrimination. NCVC 14. This conclusion follows naturally from this Court's decision in ***Glasgow***, in which the WLAD claim for workplace sex discrimination included allegations of unwanted sexual touching. 103 Wn.2d at 402-03.

That *some* sexual misconduct may be discriminatory does not mean that *all* sexual misconduct is discriminatory, or particularly that child sex abuse is discriminatory. LV 5-7; NCVC 14. Amici (like Plaintiffs) draw a false analogy to cases and other sources addressing the harassment of women, a protected class, being harassed because they are women. LV 8-9; NCVC 15-17. That is not the case here. As WSRMP again succinctly states it: "Concepts of welcome/unwelcome sexual advances between adults in a workplace setting [or public accommodation] do not apply to

[3] WSAJF recognizes this concession. WSAJF 2 n.2.

children. The sexual assault of a child is not gender discrimination; it is child abuse." WSRMP 11.

In arguing that sexual assault is always "because of sex" (***Fell*** factor 4), LV and NCVC completely overlook the third ***Fell*** factor, considering only the fourth. LV 5-9; NCVC 14-17. After establishing: (1) class membership; and (2) a public accommodation; Plaintiffs must prove (3) that Shafer discriminated against them by failing to treat them comparably to persons outside their protected class; and (4) that their protected status was a substantial factor causing the discrimination. ***Fell***, 128 Wn.2d at 637. Since Plaintiffs (both females) assert gender discrimination, they must show that Shafer failed to treat them like males and that their gender was a substantial factor causing their disparate treatment. 128 Wn.2d at 637. In other words, the WLAD is not intended to remedy all reprehensible acts; it is intended to remedy discriminatory acts.

Discrimination is more nuanced than causing harm, or even causing harm by touching parts of the body associated with gender. Shafer did not discriminate based on gender – he sexually molested children. And although Shafer has female and at least one male accuser, it would not matter if all of Shafer's alleged

victims were the same gender. The simple fact is that the WLAD is not intended to address the criminal sexual abuse of children. Such conduct is addressed in the criminal code and in tort.

Finally, LV argues that the WLAD is concerned only with the victim's experience of being victimized, such that it is irrelevant that other victims fall outside the Plaintiffs' protected class. LV 5-9. The third ***Fell*** factor says otherwise. 128 Wn.2d at 637. Plaintiffs' WLAD claim (if any) turns on whether Shafer treated them differently than persons outside their protected class – their gender. *Id*.

In sum, even if a school district could be strictly liable under RCW 49.60.215 (in direct conflict with RCW 4.08.120), criminal sexual abuse of children does not fall within the WLAD.

CONCLUSION

This Court should answer: (1) that the WLAD does not impose strict liability for intentional criminal conduct, or alternatively that school districts may not be strictly liable; and (2) that the WLAD does not encompasses the intentional sexual abuse of children.

RESPECTFULLY SUBMITTED this 28th day of February 2020.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **RESPONSE TO AMICUS CURIAE BRIEFS** on the 28th day of February 2020 as follows:

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February 28, 2020 - 4:54 PM

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