Supreme Court Case No. 1018321
(COA No. 84242-1-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

FITNESS INTERNATIONAL, LLC,
a California limited liability company,

Appellant,
v.

NATIONAL RETAIL PROPERTIES, LP,
a Delaware limited partnership,

Respondent.

ETHNIC CHAMBER OF COMMERCE COALITION'S MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Secondary Sources

Rules

Oher Authorities

I. INTRODUCTION

This case is an ideal vessel to adopt Restatement (Second) of Contracts §§ 269, 270, and 272 (Am. Law Inst. 1981), *i.e.*, the doctrine of temporary frustration of purpose and its mitigating doctrines. The Covid-19 pandemic has changed life as we know it in several ways. It has revealed new abilities, including unprecedented levels of remote work, and even virtual jury trials. It has also been devastating, causing extreme and sudden economic hardship. As the dust settles, the clear disproportionate impact on minorities and communities of color comes into sharp focus.

"This court has stated, unequivocally, that we owe a duty to increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice." *Henderson v. Thompson*, 200 Wn.2d 417, 421, 518 P.3d 1011, 1016

(2022) (citing Open Letter from Wash. State. Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020)).

This case presents an opportunity to do so. Specifically, to increase access to justice and continue developing our legal system into one that serves the ends of justice by adopting an equitable tool that could provide relief to thousands of Washingtonians and particularly to minority-owned businesses in Washington: the doctrine of temporary frustration of purpose.

The doctrine is an equitable remedy.[1] It allows courts to temporarily relieve an obligor's duty to perform when circumstances constituting temporary impracticability or frustration arise. Being an equitable remedy, it also incorporates balance: once the temporary frustration ceases, the obligor's duty to perform resumes. And the doctrine fits neatly into a gap in Washington law, as it is a

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[1] This Court applied the doctrine, in spirit, when it granted diploma privilege and other temporary modifications to bar examination applicants. *See infra* at Section II, C, *3*.

sub-rule of the doctrine of supervening frustration of purpose (Restatement § 265[2]), which this Court has already adopted.

This Court does not have to wait for a future pandemic to address present inequities. The Ethnic Chamber of Commerce Coalition respectfully submits that review is proper and just under RAP 13.4(b)(4).

II. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review under RAP 13.4(b)(4) because the petition involves an issue of substantial public interest: whether Washington courts should be equipped with an equitable tool which temporarily relieves an obligor's duty to perform when unforeseen circumstances constituting legal impracticability or frustration arise.

[2] All references in this memorandum to "Restatement" are to the Restatement (Second) of Contracts (Am. Law Inst. 1981).

This issue is of substantial public interest because while "affecting parties to this proceeding, [it] also has the potential to affect every" business in Washington, particularly minority-owned businesses, who experience extreme hardship, albeit temporary, due to impracticability or frustration. *See, e.g.*, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (granting review under RAP 13.4(b)(4), despite there being only two parties to the case, because of the potential to affect every person in similar circumstances); *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011) (granting review in a moot case because the issue "affect[ed] many parties and will likely be raised in the future.")

The doctrine of temporary frustration of purpose is consistent with Washington law (and inherent in its equity jurisprudence), but is currently unavailable as it has not yet been expressly adopted. This Court adopted Restatement § 265, the doctrine of supervening frustration of purpose, a

little over thirty years ago in *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn.2d 694, 773 P.2d 70 (1989). Section 265 is a related doctrine, but is a stronger medicine and a higher burden that does not allow relief for temporary frustration.

Expressly filling the gap will provide an avenue to relief where none currently exists—particularly for those who need it most. The disproportionate impact that the Covid-19 pandemic and related closure order and use restrictions had on communities of color and minority businesses is not surprising and well documented. *See, e.g.*, Mynor Lopez, *Washington Investment Trust: A Public Complement to Private Banking*, 20 SEATTLE J. FOR SOC. JUST. 539, 539–40 (2022) ("Small, minority-owned businesses are heavily impacted in today's current economic climate because the SARS-CoV-2[4] (COVID-19) pandemic disproportionately impacts communities of color.") (citing Andre Dua et al., *COVID-19's effect on*

minority-owned small businesses in the United States, McKinsey & Co. (May 27, 2020)).[3]

The Court should grant review under RAP 13.4(b)(4).

A. This Court should consider the disproportionate effects of economic hardship on minorities and minority-owned business.

The racial wealth gap in our society is deeply rooted in generations of decisions by people in power. These decisions have historically come in the form of laws, policies, and judicial opinions. *See, e.g.*, Sherry Cable & Tamara L. Mix, *Economic Imperatives and Race Relations: The Rise and Fall of the American Apartheid System*, 34 J. BLACK STUD. 183 (2003) (analyzing how contemporary U.S. social institutions continue to produce racial differentials despite considerable pressures for

[3] *Accessible at* https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19s-effect-on-minority-owned-small-businesses-in-the-united-states, *last accessed on* May 21, 2023.

institutional changes to reduce or eliminate those differentials).

These deep roots are growing. Minority-owned businesses are currently suffering disproportionately "for two critical reasons: they tend to face underlying issues that make it harder to run and scale successfully, and they are more likely to be concentrated in the industries most immediately affected by the pandemic." Mynor Lopez, *supra*, at 542. Those underlying issues include: starting with far less capital,[4] increased difficulty obtaining credit along with disproportionate loan denial,[5] and heuristics and biases such as pattern matching and implicit bias.[6]

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[4] Robert Fairlie et al., *Black and White: Access to Capital among Minority-Owned Startups*, 30-32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28154, 2016).

[5] Robert W. Fairlie & Alicia M. Robb, U.S. Dep't. of Com., *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, 51 (Jan. 2010).

[6] Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419 (2018).

Because these deep roots persist today, "[m]inority-owned small businesses face structural challenges that underscore the underlying economic fragility of underrepresented groups, including the black and Latinx communities." Andre Dua et al., *supra*, at 6.

In short, through generations of decisions, minority-owned businesses today have less financial wherewithal relative to their non-minority counterparts; and lack of financial wherewithal is often an insuperable deterrent to those who might otherwise bring meritorious claims in court. *See, e.g.*, Carlos Berdejó, *Financing Minority Entrepreneurship*, 2021 WIS. L. REV. 41 (2021) (citing Robert W. Fairlie & Alicia M. Robb, *Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital*, 25 J. LAB. ECON. 289 (2004)).

Adopting the equitable doctrine at issue in this case will not stop these deep roots from growing—but it may stunt their growth through increased access to equity.

B. The doctrine is desirable and inherent in Washington law but not yet expressly adopted.

Equitable remedies are desirable. "Equity, after all, is a great supplement to the common law. It deals with everything all over the whole domain of the common law." Frank Askin, *Two Visions of Justice: Federal Courts at A Crossroads*, 11 ST. JOHN'S J. OF LEGAL COMMENT. 63, 69 (1995) (quotations omitted). "Equity looks at the entire matter and grants or denies relief as good conscience dictates." 27A Am. Jur. 2d, *Equity* § 98 (Feb. 2023 Update) (citation omitted).

The doctrine of temporary frustration of purpose is no exception. As it stands, Washington courts have broad discretionary power to fashion equitable remedies that effect fairness, justice, and equity. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 146 P.3d 1172 (2006). However, the equitable

remedy must first be available as a matter of law. *Borton & Sons, Inc. v. Burbank Properties, LLC*, 196 Wn.2d 199, 207, 471 P.3d 871 (2020). Because the doctrine has not been expressly adopted in Washington, courts are powerless to effect equity in these situations, including for those who need it most.

Courts have traditionally been bastions of power and privilege. Those without power and privilege have not made it through the doors easily; a fact that is particularly true for minorities and communities of color. *See, e.g.*, William Y. Chin, *Multiple Cultures, One Criminal Justice System: The Need for A "Cultural Ombudsman" in the Courtroom*, 53 DRAKE L. REV. 651, 657 (2005).

Adopting this equitable remedy increases access to justice. While "[t]here is no denying the fact that no quick solution exists to solve the deep divide in our society caused by systemic racism and decreased access to justice for minorities in the United States," Sukhsimranjit Singh,

In the Shadow of the Pandemic: Unearthing Unequal Access to Justice Vis-à-Vis Dispute Resolution, 68 WASH. U.J.L. & POL'Y 95, 103 (2022) (discussing *inter alia* increased reliance on force majeure and/or frustration doctrines by minorities), each step taken towards greater access to justice and equity is a step well taken.

While no quick solution exists, opening a door to temporary equitable relief through §§ 269, 270, and 272 is a small price to pay for a step in the right direction. This is particularly true in Washington which has historically favored the Restatement.

C. Adopting the doctrine will positively advance Washington law in harmony with Washington courts' regular adoption of the Restatement.

1. Washington courts often adopt the Restatement and leading Washington treatises have cited Sections 269, 270, and 272 favorably.

Washington courts have a long history of adopting the Restatement. Indeed, "[p]erhaps more than any other source within recent years, Washington courts have looked

to the Restatement of Contracts for guidance in formulating and applying basic law of contracts." David K. DeWolf et al., 25 Wash. Prac., Contract Law And Practice § 1:18 (3d ed.)

Whether to adopt Sections 269, 270, and 272, is an issue of first impression.[7] However, the Washington Practice Series has relied on these Sections with unequivocal approval, evidencing their consistency with Washington law. *Id.* at § 10:16, n.13 (citing § 269 for the availability of temporary frustration of purpose); *id.* at n.14 (citing § 270 for the resumption of duties after frustration ceases).

2. The doctrine promotes balance and equity in Washington law.

Because of the drafters' design (and because of its very nature as an equitable remedy), while the doctrine

[7] Section 272 has arguably been adopted *sub silentio* as it has been cited and applied (albeit unsuccessfully) on multiple occasions. *See, e.g.*, *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 934, 691 P.2d 524 (1984) (quoting § 272 for the availability of restitution).

generally relieves obligors, it simultaneously maintains and promotes balance.

First, in the event that a balancing of the equities compels temporary equitable relief, once the frustrating event ceases, the obligor's duty to perform resumes. Restatement § 269. And, where only part of an obligor's performance is frustrated or impracticable, it may still be obligated to perform the remaining part. Restatement § 270 (a), (b). Critically, under any of these rules, ***either*** party may have a claim for relief including restitution. Restatement § 272 (1). Finally, in the event that these rules together "will not avoid injustice, the court may grant relief on such terms as justice requires," thereby allowing the parties and the trial court latitude to properly effect fairness and equity. Restatement § 272 (2) (known as "mitigating doctrines").

The drafters explained that § 272's mitigating doctrines are necessary for balance and fairness.

Specifically, they are necessary to avoid "what might otherwise appear to [be] the harsh effect of denying either party any recovery following the discharge of one party's duty based on impracticability or frustration[.]" Restatement § 272, cmt. a. To avoid that appearance or result, § 272 "makes it clear that several mitigating doctrines may be used to allow at least some recovery in a proper case." *Id.*

In sum, these Sections are firmly grounded in balance and fairness. Before they are applied, the underlying reasons "will be scrutinized, and the rule will not be applied if those reasons do not support its application based on the facts of the particular controversy." 27A Am. Jur. 2d, *Equity*, § 5 (Feb. 2023 Update).

3. This Court's recent Orders regarding the bar examination apply the equitable nature of the doctrine of temporary frustration.

This Court has applied, in spirit, the equitable nature of the temporary frustration of purpose doctrine when it temporarily relieved then-registered applicants' duty to take the bar examination before being licensed.

First, the Court granted diploma privilege to applicants then-currently registered to take the bar (or LLLT) examination in either July or September 2020. Wash. Sup. Court Order No. 25700-B-630 (June 12, 2020). The Court granted diploma privilege to those individuals because it "recognize[d] the extraordinary barriers facing applicants" during the height of the pandemic. *Id.*

Then, as conditions improved, the Court resumed examinations, but it lowered the minimum passing score, and conducted the examinations remotely. Wash. Sup. Court Order No. 25700-B-651 (December 3, 2020).

Analogizing to § 269, the bar applicants would be the obligors, the Washington State Bar Association would be

the obligee. The principal purpose is to license competent attorneys to practice in Washington; this is achieved through the bar examination.

To perform "their end of the bargain," the applicants must take and pass the bar examination. However, the temporary extraordinary circumstances frustrated the principal purpose because "those examinations have traditionally been administered in-person[.]" Wash. Sup. Court Order No. 25700-B-651 (December 3, 2020). This was impracticable at the time due to "the challenges of administering an in-person examination to a large group of examinees while complying with health and safety protocols to alleviate risks to the applicants and WSBA staff associated during a pandemic[.]" *Id.*

As such, *because it had the power to do so and therefore the option to do so*, this Court fashioned a remedy through "temporary modifications[.]" Wash. Sup. Court Order No. 25700-B-630 (June 12, 2020). It

temporarily relieved the obligors' duties, thereby alleviated the hardship of the temporary frustration, and achieved the principal purpose of licensure through fairness and equity. This was a just and equitable decision that was compelled by circumstances that temporarily frustrated the principal purpose of the bar examination.

Washington trial courts should have a similar option, *i.e.*, to grant temporary modifications and relief of obligations when a balancing of the equities compels such a result. Because the proposed Sections would provide that option and equip Washington courts with a valuable tool to effect equity and justice for thousands of minority business owners in Washington, and because this Court often adopts the Restatement as a "convenient and effective means of clarifying and regularizing" Washington contract law, *Eastlake*, 102 Wn.2d at 46, this Court should grant review. *See* RAP 13.4(b)(4).

III. CONCLUSION

The ECCC respectfully submits that Washingtonians, and particularly communities of color and minority-owned businesses, should not have to wait for a future pandemic to address present inequities. In considering whether to accept review, this Court should consider historical structural barriers, and the disproportionate impacts of economic hardship on minorities and communities of color. This case presents an opportunity to better equip Washington courts to effect equity, and to uphold the duty that this Court recently recognized in *Henderson*—the Court should take it.

RAP 18.17(b) Certification: I certify that this motion and memorandum contains 2,448 words, exclusive of words in the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, and signature blocks, in compliance with RAP 18.17(b)(9).

DATED this 30th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, I caused a true and correct copy of the foregoing to be served on the following counsel of record in the manner indicated below:

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