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**SUPREME COURT OF THE STATE OF WASHINGTON**

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James Kumar, Ranveer Singh, Asegedew Gefe, and Abbas Kosymov,

Petitioners,

v.

Gate Gourmet, Inc.,

Respondent.

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**BRIEF OF RESPONDENT ANSWERING**

**BRIEFS OF *AMICI CURIAE***

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 ORIGINAL

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## I. INTRODUCTION

On October 1, 2013, the Court granted permission for the Washington State Association for Justice Foundation, Legal Voice, the Washington Employment Lawyers Association, the American Civil Liberties Union of Washington, and the Washington Human Rights Commission (“HRC”) to file *amicus curiae* briefs in this matter. Defendant/Respondent Gate Gourmet, Inc. (“Gate Gourmet”) submits this response to the arguments raised by *amici curiae*.

The principal arguments raised by *amici curiae* lack merit because (1) it is well-established that the role of the judiciary is not to legislate; and (2) notwithstanding the liberal construction of the Washington Law Against Discrimination (“WLAD”), RCW 49.60.010, *et seq.*, this Court has declined to impose on employers a general duty to accommodate employees, instead limiting the accommodation duty to disabled employees. *Hegwine v. Longview Fibre Company, Inc.*, 162 Wn.2d 340, 172 P.3d 688 (2007). For these reasons and the other reasons described below, Gate Gourmet respectfully submits that *amici curiae*’s arguments do not support their conclusion that state law requires employers to reasonably accommodate their employees’ religious beliefs.

## II. ARGUMENT

### A. According To Well-Established Principles Regarding The Appropriate Role Of The Judiciary, The Court May Not Assume The Role Of The Legislature.

Gate Gourmet respectfully submits that the determination whether to impose a duty on employers to reasonably accommodate the religious beliefs of their employees is properly reserved for the state legislature or the HRC. As this Court has recognized, "It is not the role of the judiciary to second-guess the wisdom of the legislature." *Rouso v. Washington*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010). "[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Id.*, quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981). Also, "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Rouso*, 170 Wn.2d 70 at 75, quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963).

No better example of the application of these fundamental principles exists than the Court's decision in *Hegwine*, *supra*. The Court in *Hegwine* determined that employers have no obligation to reasonably accommodate an employee's pregnancy. It based this decision

specifically on the absence of any language in WLAD or in the HRC's regulations articulating such a requirement. As the Court held, "It is not for this court to impose such an accommodation analysis where the legislature has not seen fit to do so." *Id.* at 352.

The decision in *Short v. Battle Ground School District*, 169 Wn. App. 188, 279 P.3d 902 (2012), which decision *amici curiae* ask this Court to overturn, is entirely consistent with these principles. The court in *Short* held, "where government branches tasked with establishing public policies relating to WLAD have remained silent, despite sweeping changes at the federal level, we cannot judicially promulgate legislation or administrative regulations to fill this void." *Id.* at 203.<sup>1</sup>

Notwithstanding the holding in *Hegwine*, the HRC claims that the similar holding of the Court of Appeals in *Short* is erroneous. See HRC Brief at 5-6. Gate Gourmet disagrees. The HRC relies on its own informal "guidance" and its processing of administrative complaints on

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<sup>1</sup> See also *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6<sup>th</sup> Cir. 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971). In *Dewey*, the Sixth Circuit Court of Appeals declined to impose a duty to accommodate employees' religious beliefs because in 1966, when the plaintiff in that case was discharged, the language of neither Title VII, nor the EEOC's guidelines contained any such duty. *Id.* at 336. In concluding that no duty to accommodate existed, the court relied on the express statutory and regulatory language in existence at the relevant time.

the subject of religious accommodation. The “guidance” to which the HRC refers and its processing of administrative complaints are inadequate to constitute the type of legislative or regulatory activity that effectively would impose on employers a duty to accommodate based on religion. To impose such a substantive legal duty to accommodate, the HRC must promulgate an administrative regulation, pursuant to the notice and comment rulemaking requirements of the Administrative Procedure Act, Chapter 34.05 RCW. *See e.g.* RCW 34.05.310(1)(a) (“To meet the intent of providing greater public access to administrative rule making and to promote consensus among interested parties, agencies must solicit comments from the public on a subject of possible rule making before filing with the code reviser a notice of proposed rulemaking”). An administrative regulation promulgated in this manner, rather than an agency’s mere informal “guidance,” is entitled to great weight by the courts. *See Washington Water Power Co. v. Washington State Human Rights Comm’n*, 91 Wn.2d 62, 68–69, 586 P.2d 1149 (1978) (in construing an ambiguous statute, a court will give great weight to a regulation adopted by the administrative agency charged with the statute’s administration, absent a compelling indication that such interpretation conflicts with the legislative intent). In fact, courts may completely

disregard agency guidelines that are not promulgated pursuant to the Administrative Procedure Act. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 851, n.1, 50 P.3d 256 (2002) (the Court declined to consider a Department of Labor and Industries Interpretive Guideline that was not a “published agency rule under RCW 34.05.210”).

Again, the Court’s decision in *Hegwine, supra*, is determinative. The Court there considered the language of the WLAD and the HRC’s regulations, not any non-regulatory, informal “guidance” by the agency. The Court held, “It is appropriate to look to [the HRC’s] *regulations* in interpreting and applying *RCW 49.60.180* because the WHRC is statutorily charged with interpreting and enforcing the WLAD.” *Hegwine*, 162 Wn.2d at 349 (emphasis added).

The plaintiff in *Hegwine* brought claims against her employer for refusing to hire her based on her pregnancy. The employer in that case, like *amici curiae* here, argued that the reasonable accommodation requirements applicable to disability controlled. The Court disagreed. Specifically, the Court held that the WLAD and its related interpretive regulations regarding sex discrimination “do not call for an accommodation analysis like that applicable to disability related employment discrimination claims; hence, no such analysis is applicable

or appropriate, in evaluating a pregnancy related employment discrimination claim.” *Id.* at 344-45.

The employer in *Hegwine* argued further that under the WLAD an accommodation obligation exists as to **all** forms of discrimination, not just disability. *Id.* at 351. Again, the Court disagreed, recognizing that “the statutory language plainly extends this analysis *only to cases involving disability discrimination.*” *Id.* at 351-52 (emphasis added). Thus, according to *Hegwine*, there is no general, inherent duty to accommodate employees under either WLAD or the HRC.

Notably, in the instant case HRC fails to identify any administrative regulation that imposes a duty on employers to accommodate the religious beliefs of their employees. The agency is unable to do so, of course, because no such administrative regulation exists. Furthermore, the HRC cites no authority holding that its mere “guidance,” that is not in the form of an administrative regulation, is controlling. (As the HRC concedes in its brief, the Court in *Roe v. TeleTech Customer Care Management (Colorado) LLC*, 171 Wn.2d 736, 759, n.10, 257 P.3d 586 (2011), merely observed that based on the HRC’s informal guidance, the agency would not investigate claims of

discrimination based on medical marijuana use; however, the Court made no determination that such informal guidance constituted substantive law.)

In its brief, the HRC further claims that its “responsibility to eliminate and prevent religious discrimination” would be adversely impacted by a finding that no duty to reasonably accommodate employees’ religious beliefs exists under WLAD. HRC Brief at 3. In making this argument, the HRC correctly recognizes a fundamental difference between the WLAD and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Title VII covers employers with 15 or more employees, and WLAD covers employers with eight or more employees. *See* HRC Brief, p. 3, n.1; RCW 49.60.040(11); 42 U.S.C. § 2000e(b).<sup>2</sup> According to the HRC, the absence of an obligation under WLAD to reasonably accommodate employees’ religious beliefs creates “a gap in protection from discrimination for those employees not covered by federal law.” *Id.* at p. 3. The issue that flows from the HRC’s argument is whether it is for this Court, the state legislature, or the HRC

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<sup>2</sup> There are other differences between Title VII and the WLAD, as well, and as a consequence of these material differences, “[f]ederal cases interpreting Title VII are ... not helpful in determining the scope of RCW 49.60.030(1).” *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996).

itself to determine whether such a “gap in protection” is acceptable. Gate Gourmet submits, based on *Hegwine* and the other authorities referenced above, that discussion of any “gap in protection” is properly reserved for the legislature or the HRC and is not the appropriate role of the judiciary.

There is a debate to be had regarding this “gap in protection.” However, this appeal is not the appropriate vehicle for that debate. The issue of whether smaller employers, *i.e.*, those with between eight and 14 employees, will be subject to an obligation to accommodate the religious beliefs of their employees is significant. Smaller employers necessarily would be impacted more severely than larger employers by any such obligation, inasmuch as their ability to provide an accommodation is significantly more limited -- they would have fewer options to adjust their operations when an employee asserts a need for a religious accommodation. The participants in this debate should include these small employers, not merely Gate Gourmet, an employer that admittedly has a duty to accommodate the religious beliefs of its employees under Title VII.<sup>3</sup> The proper forum for this debate thus is either (a) the state

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<sup>3</sup> Thus, this appeal is *not* about whether Gate Gourmet has an obligation to accommodate its employees based on their religious beliefs. Gate Gourmet does not dispute that it has such an obligation. All of its (Continued...)

legislature, where elected representatives of those small employers may openly discuss the merits of imposing an accommodation obligation on them; or (b) the HRC itself, pursuant to the rulemaking procedures that would allow those small employers to provide their own comments on the subject. *See* RCW 34.05.310(1)(a) (emphasizing the need to promote “greater public access to administrative rule making and to promote consensus among interested parties”).

The HRC also claims that it was “caught off-guard” by the Court of Appeals’ decision in *Short*. Gate Gourmet respectively submits that the HRC should not have been caught off-guard. The HRC and the legislature have known since 1992, when this Court issued its opinion in *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 837 P.2d 618 (1992), that (a) the Court had concluded that no express religious accommodation duty existed, and (b) there was open issue as to whether any such duty could be implied. *Hiatt* should have been a wake-up call for the HRC, as well as the legislature. Yet, the HRC and the legislature declined to respond to

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employees at its Seattle facility, including the plaintiffs here, are and have been protected in that regard -- under federal law. However, the plaintiffs here chose voluntarily not to pursue their rights under federal law. Instead, they opted to pursue a religious accommodation claim under state law only, expressly reserving in their Complaint a claim under Title VII.

the Court's decision in *Hiatt*. For the last 21 years, the HRC and the legislature have taken no regulatory or legislative action to establish that employers have a duty to accommodate their employees' religious beliefs. Even in the more than one year since the Court of Appeal issued its decision in *Short, supra*, the legislature and the HRC have failed to take any such action. These government branches have remained silent.

Nothing has precluded the HRC from proposing a regulation, pursuant to appropriate notice and comment rulemaking that would have imposed such a duty and closed the "gap of protection." Nothing has precluded the state legislature from taking similar action. Gate Gourmet submits that the HRC's and the legislature's silence in this regard constitutes regulatory and legislative determinations, by inaction, that no reasonable accommodation based on religious beliefs exists under state law and that the decision in *Short*, accordingly, is correct.

B. The Duty To Accommodate Employees' Disabilities Is Not Analogous To Religious Accommodation.

Both the legislature and the HRC engaged in the debate referenced above and promulgated statutory and regulatory language imposing an obligation on employers to accommodate their employees' disabilities. See RCW 49.60.040(7)(d); WAC 162-22-065. Relying on this Court's

decision in *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 521 (1978), *amici curiae* urge the Court to recognize that even before legislation was enacted recognizing a duty to accommodate in the disability context, the judiciary had concluded that such a duty existed. *Amici curiae's* reliance on *Holland* is misplaced for two reasons. First, although the legislature had not yet enacted a statute imposing such an obligation, the HRC had promulgated a regulation doing so. *Id.* at 389 (“Further, the concept of definitive relief, by means of a reasonable accommodation to the handicapped employee, is found in an administrative regulation issued pursuant to RCW 49.60”) (emphasis deleted), *citing* WAC 162-22-080. That regulation was “entitled to be given great weight.” *Id.* In contrast, as stated above, the HRC to this date has issued no regulation related to reasonable accommodation based on religion.

Second, the Court in *Holland* focused on the significant differences between disabled employees and non-disabled employees.

The physically disabled employee is clearly different from the nonhandicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment fails to take into account ***the unique characteristics of the handicapped person.*** (Emphasis added and deleted.)

*Id.* at 388.

In *Holland*, the Court considered whether the federal *de minimus* effort test applicable to religious accommodation claims under Title VII, as articulated in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 53 L. Ed. 2d 113, 97 S. Ct. 2264 (1977), applied in the disability context. The Court in *Holland* distinguished *Hardison* on the ground that “*Hardison* did not involve a handicapped individual; rather, it involved religious discrimination.” *Holland*, 90 Wn.2d at 390. The Court expressly relied on the individualized hardships associated with disabilities, as distinct from any other type of discrimination. *Id.* (“discrimination on the basis of handicap is different in many respects from other types of employment discrimination”). As a result, the Court declined to adopt the federal *de minimus* effort test for disability accommodation cases.

In light of the Court’s express recognition in *Holland* that disability issues are unique, as well as the Court’s explicit distinction between religious claims and disability claims, *amici curiae* are precluded from relying on the duty under WLAD to accommodate employees’ disabilities. *Holland* confirms that employee disabilities and employee religious preferences are so different that the laws applicable to each necessarily must also be different.

C. The Bar Against “Discrimination” Does Not Imply A Duty To Accommodate Religious Beliefs.

*Amici curiae* also argue that because discrimination claims may be pursued under disparate impact and disparate treatment theories and that the courts also have recognized claims for harassment, claims premised on a reasonable accommodation theory likewise should be recognized. *See e.g.* Washington State Assn. for Justice Foundation Brief, p. 8. This argument fails to recognize the unique nature of the reasonable accommodation obligation.

Discrimination claims may be brought under two separate theories, disparate treatment, pursuant to which an intent to discriminate is an element, and disparate impact, pursuant to which intent is not an element. *See Fahn v. Cowlitz County*, 93 Wn.2d 368, 379, 610 P.2d 857 (1980), quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36, n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). Disparate treatment and disparate impact are merely two different “forms” of discrimination. *Id.* at 378 (“Discrimination cases brought under Title VII may take one of two forms, either ‘disparate impact,’ or ‘disparate treatment’ (also called overt discrimination)”).

In contrast to disparate treatment or disparate impact discrimination, reasonable accommodation, where it has been recognized, is not a “form” of discrimination. Instead, it is a separate and distinct substantive legal right. See *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 27-28, 244 P.3d 438 (2010) (statute prohibiting disability discrimination “gives rise to a cause of action for at least *two different claims*: for failure to accommodate, when the employer fails to take steps “reasonably necessary to accommodate an employee’s condition,” and for disparate treatment, when the employer discriminates against an employee because of the employee’s condition”) (emphasis added), quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (footnotes omitted).

Again, the Court’s decision in *Hegwine, supra*, controls. There, the Court distinguished between a discrimination claim on the one hand, and a reasonable accommodation claim on the other hand. Specifically, while the Court in *Hegwine* recognized the validity of the plaintiff’s claim for discrimination based on her pregnancy, it rejected the viability of any claim for failure to reasonably accommodate her pregnancy. *Id.* 162 Wn.2d at 352, 361. “[A]n accommodation analysis like that applicable to disability related claims is not applicable to pregnancy related sex

discrimination claims.” *Id.* at 352 (footnote omitted). As stated above, the Court reached this conclusion based on its finding that no pregnancy-related reasonable accommodation obligation existed under the WLAD or the HRC’s regulations.

In contrast to the pregnancy context, the HRC and, more recently, the state legislature have imposed a reasonable accommodation obligation on employers in the context of employee disabilities. The legislature and HRC have declined to impose such an obligation in any other context, particularly in the context of religious accommodation. Thus, pursuant to *Hegwine*, there is no basis to conclude in the instant case that a failure to reasonably accommodate employees’ religious beliefs may be inferred from the broad language of the WLAD or from the existence of varied discrimination-related theories of recovery.

D. Reasonable Accommodation Is Not An “Appropriate Remedy” Under The WLAD.

The Washington Employment Lawyers Association (“WELA”) and the American Civil Liberties Union of Washington (“ACLU”) rely on RCW 49.60.030(2), according to which provision anyone injured as a result of discrimination may obtain an injunction, recover actual damages and/or recover “any other appropriate remedy authorized by this chapter or

the United States Civil Rights Act of 1964 . . . .” They suggest that reasonable accommodation is a “remedy.” Their reliance on this provision is misplaced.

WELA and ACLU fail to provide any authority showing that the failure to reasonably accommodate is a “remedy.” It is not. Reasonable accommodation, if it existed in the context of employees’ religious beliefs, would be a substantive legal right, not a remedy. “Substantive law “creates, defines, and regulates primary rights . . . .”” *Putnam v. Wenatchee Valley Medical Center, PS*, 166 Wn.2d 974, 984, 216 P.3d 374 (2009), quoting *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). “A “right” is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right.” *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997), quoting *Dept. of Retirement Sys. v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994).

As argued by *amici curiae*, themselves, a claim for failure to reasonably accommodate employees’ religious beliefs purportedly arises under the broad substantive provisions of RCW 49.60.180(3) that prohibit employers from discriminating based on the terms and conditions of employment. *See e.g.* HRC Brief at 11-14. The substantive provisions of

RCW 49.60.180(3) describe legal rights of employees to be free from discrimination. The remedies for violation of such legal rights, described in RCW 49.60.030(2), include an injunction and recovery of damages. Reasonable accommodation, itself, is not a “remedy.” It is, in the context of disability only, a substantive legal right. RCW 49.60.030(2) thus does not support the recognition of a claim for failure to accommodate the religious beliefs of employees.

E. The Standard For A Reasonable Accommodation Claim Under the WLAD Need Not Be Addressed.

*Amici curiae* offer conflicting suggestions as to the standard that should be applied to a claim under the WLAD for failure to reasonably accommodate an employee’s religion. See Washington State Assn. for Justice Foundation Brief at 18; Legal Voice Brief at 1. Inasmuch as no such claim exists under the WLAD, this issue is moot. Moreover, this purported issue is not appropriate here, as it has not been identified by the parties as an issue to be resolved on appeal. For these reasons, Gate Gourmet declines to address this issue further.

### III. CONCLUSION

Gate Gourmet respectfully submits that the arguments raised by *amici curiae* do not impact the trial court’s conclusion that no obligation

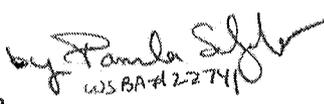
exists under state law to reasonably accommodate employees' religious beliefs. There is no valid basis to disturb that decision.

Respectfully submitted,

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**Subject:** Kumar et al v. Gate Gourmet, Inc. - Brief of Respondent Answering Briefs of Amici Curiae

Please accept the attached Brief of Respondent Answering Briefs of Amici Curiae for filing with the Court. Per agreement with the other counsel, this Brief is being served by email only. Thank you.

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