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No. 95205-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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**CHRISTOPHER H. FLOETING,**

**Respondent,**

**v.**

**GROUP HEALTH COOPERATIVE,**

**Petitioner.**

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**RESPONDENT'S ANSWER TO BRIEF OF AMICI CURIAE  
UNIVERSITY OF WASHINGTON, ET AL.**

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## **INTRODUCTION**

Respondent Christopher Floeting submits this brief in answer to the Amici Curiae Brief of University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, and The Evergreen State College (collectively “Amici” or “Universities”).

Mr. Floeting acknowledges that public universities must be cautious when attempting to regulate speech on campus. However, that issue is not relevant to the actual dispute between the parties in this case and has not been well-developed in this litigation. The Court need not and should not decide here how the Court of Appeals’ ruling would apply in a hypothetical case involving academic speech. Instead, the Court can address the concern expressed by Amici simply by identifying the issue and explicitly reserving judgment on it.

## **ARGUMENT**

The Universities’ argument is a narrow one. Amici do not contend that the Court of Appeals erred in recognizing the WLAD’s different standards of liability for discrimination in a place of public accommodation versus in an employment setting. They do not dispute the lower court’s conclusion that the WLAD makes business owners directly liable for unlawful public-accommodation discrimination by their

employees and agents. Rather, the purpose of Amici’s brief is to remind the Court of the heightened First Amendment concerns public universities face when attempting to regulate on-campus speech. They urge the Court to address these concerns, either by borrowing the “severe or pervasive” standard established for judging employment sexual harassment claims and applying it to cases involving public accommodations, or, more simply, by noting that the Court of Appeals’ test for evaluating sexual harassment in a public accommodation may need to be further clarified in a case involving a claim of sexual harassment in a public university setting.

Mr. Floeting does not dispute Amici’s premise that public universities must accommodate important First Amendment rights when they aim to regulate on-campus speech. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675 (1967) (academic freedom is “a special concern of the First Amendment”). However, Amici have not demonstrated that adopting the “severe or pervasive” test in public accommodations cases would be an effective way to address this concern without unduly weakening the force of the WLAD. Therefore, while the Court should acknowledge Amici’s concern in this case, it should wait to resolve the concern until such time as it is presented with a relevant case.

This Court has repeatedly stated that it “will not decide a constitutional issue unless it is absolutely necessary for the determination of a case.” *State v. Zakel*, 119 Wn. 2d 563, 567, 834 P.2d 1046 (1992) (citations omitted). The First Amendment was not an issue in this litigation until less than a month ago, when Amici pointed it out as a relevant factor for public universities trying to draft sexual harassment policies. The current dispute, between a private individual and a private healthcare corporation, can be resolved without this Court having to decide how (or even whether) a hypothetical harassment claim would need to be analyzed differently if it were to arise in a public university setting.

Amici are essentially asking this Court to issue an advisory opinion to guide them in drafting harassment policies that comply with both the WLAD and the First Amendment. Their request assumes, without demonstrating, that the Court of Appeals’ ruling cannot be implemented in at public university without violating the First Amendment. It further assumes, also without demonstrating, that the problem can be cured by adopting the “severe or pervasive” language from employment sexual harassment jurisprudence.

This Court will be in a much better position to consider the First Amendment implications of the WLAD in a public university setting if and when it is presented with an actual case in which the parties argue the

issue based on real (versus hypothetical) facts and develop the legal arguments more fully. For now, the Court can address the Universities' concern by including language in its opinion similar to the following:

Amici suggest that the Court's ruling might not fully account for the special First Amendment considerations that public universities must address when aiming to prevent sexual harassment on campus. We reserve for another day the question of whether the rules announced in this opinion would apply in the same manner to a case involving allegations of sexual harassment in a public university setting.

*See Garcetti v. Ceballos*, 547 U.S. 410, 425, 126 S. Ct. 1951 (2006)

(declining to address how current decision regarding public employees' First Amendment rights would apply in case involving speech related to scholarship or teaching).

## **CONCLUSION**

While Amici have raised a legitimate question regarding potential First Amendment limitations in trying to eradicate sexual harassment on public university campuses, that question would be better addressed in a case where the issue is actually in dispute so that the Court may consider it in light of actual, relevant facts and with the benefit of more-fully-developed legal arguments.

Respectfully submitted this 12th day of June, 2018.

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## **CERTIFICATE OF SERVICE**

I certify that on this date I filed the attached brief using the Washington Appellate Courts' Portal, which will send notice of the filing and a link to the brief to the following attorneys:

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