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No. 96335-5
[Ninth Circuit No. 16-35205]

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

CERTIFICATION FROM UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT
IN

CASEY TAYLOR and ANGELINA TAYLOR, husband and wife
and the marital community composed thereof,

Appellants,

v.

BURLINGTON NORTHERN RAILROAD HOLDINGS, INC., a
Delaware Corporation licensed to do business in the State of Wash-
ington, and BNSF RAILWAY COMPANY, a Delaware Corporation
licensed to do business in the State of Washington,

Respondents.

**ANSWERING BRIEF OF RESPONDENTS TO AMICUS
CURIAE BRIEFS OF WASHINGTON STATE ASSOCIA-
TION FOR JUSTICE FOUNDATION, OBESITY AC-
TION COALITION, DISABILITY RIGHTS WASHING-
TON, THE WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION, AARP, AND AARP FOUNDATION.**

Britenae Pierce, WSBA #34032
Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
pierce@ryanlaw.com

Telephone: (206) 464-4224

Facsimile: (206) 583-0359

Bryan P. Neal
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201

bryan.neal@tklaw.com

Telephone: (214) 969-1700

Facsimile: (214) 969-1751

Attorneys for Respondents

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Burlington Northern Railroad Holdings, Inc. and BNSF Railway Company (collectively, “BNSF”) submit this answering brief to the amicus curiae briefs supporting the Taylors’ position, specifically, those filed by the Washington State Association for Justice Foundation (“WSAFJF”); Obesity Action Committee and Disability Rights Washington (“OAC/DRW”); Washington Employment Lawyers Association (“WELA”); and AARP and AARP Foundation (“AARP”).¹

ARGUMENT

A. No amicus mentions the HRC’s guidance recognizing that physical characteristics are not impairments without an underlying physiological disorder.

Amici uniformly reject or minimize the significance of federal law to interpretation of the WLAD. They specifically discount the EEOC’s guidance on the meaning of its regulation defining “impairment” under the Americans with Disabilities Act (“ADA”). To be

¹ BNSF uses “amicus” and “amici” in this response to refer only to those amici.

sure, BNSF has discussed the ADA—but not because its position depends on it. The Court can answer the certified question as BNSF has requested based on Washington authority alone. The amici do, however, shun reality when they fail to acknowledge that the federal EEOC’s regulation quite plainly served as the model for RCW § 49.60.040(7)(c), as shown by both the near verbatim use of the language and the legislative history expressly referring to the regulation.²

They likewise uniformly fail to mention the Washington State HRC’s guidance (itself plainly modeled on EEOC’s guidance). Nor do they mention the deference the Court gives to the HRC’s informal interpretations. *See* BNSF Brf., 16-17 & n. 12. The HRC’s guidance echoes EEOC’s guidance about physical characteristics but serves as independent authority for the Court directly supporting BNSF’s position. It does not expressly mention weight along with height as the

² As to the state of federal law, AARP insists on contending that federal law is not as BNSF described it. But BNSF addressed every AARP point in BNSF’s brief to this Court. BNSF Brf., 17-19, 31-39. AARP simply says that BNSF—and the numerous judges who decided the many cases BNSF cited—are wrong. If the Court decides to consult federal law, BNSF submits that those judges are more qualified authorities than AARP to opine on the proper interpretation of it.

EEOC's guidance does. But the HRC's guidance is much shorter than EEOC's and plainly is meant as a summary making the same points. Moreover, the HRC's guidance uses the phrase "such as" after "physical traits" and "[s]uch as" introduces an example of a broader genus rather than limiting the genus to the exemplary species." *Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 811 (Fed. Cir. 2002); accord, <https://www.merriam-webster.com/dictionary/such%20as>. Under the HRC's guidance, obesity is not an impairment absent an underlying physiological disorder.

The Court invited the HRC to participate as an amicus. Considering the legal—and practical—significance of the question the Court must answer, the HRC likely would have informed the Court if its views had changed since it issued its guidance in 2007 and updated it in 2012. That it filed no brief suggests three things. First, the HRC, like BNSF, understood the Legislature to have approved the EEOC's guidance when it made the substance of EEOC's regulation part of Washington law. Second, the HRC agreed with the approach ex-

pressed in EEOC's guidance. Third, legal, medical, and societal developments since 2007 have not changed the HRC's views.

Given the HRC's statutory responsibility for interpreting the WLAD, the deference the Court gives to those interpretations, and amici's unanimous insistence on the "clarity" of the statutory text, amici's omission of even a reference to the HRC's guidance is telling.

B. No amicus argues for the "plain meaning" of the words "condition...affecting one or more...body systems."

All amici argue that the "plain meaning" of RCW § 49.60.040(7)(c) makes "obesity" (mostly without definition, as discussed below) *always* an impairment. Yet all pass over in silence BNSF's point that the phrase "condition...affecting one or more...body systems" "plainly" includes conditions that affect the body in a positive way, such as being physically fit, which the Legislature could not have meant when defining an "impairment." BNSF Brf., 28. Another "condition" that "affects" every "body system" is simple chronological age, which nobody, including the Legislature, would characterize as an "impairment." *See also* BNSF Brf., 26-29.

Consequently, as all amici and the HRC agree, “condition” when used in the WLAD must mean a *medical* condition, *i.e.* a malfunctioning or abnormality. WSAFJF Brf., 13; OAC/DRW Brf., 20; WELA Brf., 12-13. Thus, no amicus tries to defend the broadest possible meaning of the statement from *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 793, 358 P.3d 464 (2015), *rev. denied*, 185 Wn.2d 1017 (2016), that “any mental or physical condition may be a disability” —*i.e.* that being fit, healthy, and twenty-two years old can be a disability.

BNSF therefore agrees with amici about the meaning of “condition...affecting one or more...body systems.” It refers to a *medical* condition. But the fact that the phrase’s correct meaning differs from its “plain” meaning and must instead be drawn from the statute’s context, structure, and purpose refutes the idea that the answer to the certified question is ready for extraction from plain statutory text. That conclusion is reinforced by another observation made by BNSF and unmentioned by any amicus (or the Taylors)—the absence of a reported decision of a Washington court over the long history of the

WLAD involving a claim that obesity is an impairment. To that fact can be added yet another equally telling one: as far as BNSF has been able to determine, neither the HRC, the Washington State Department of Health, nor any disability, health-rights, or obesity-focused private organization active in Washington has previously asserted publicly that obesity is (or should be) a disability under the WLAD.

Answering the certified question requires interpretation of the statute, not just reading it.

C. No amicus explains why health consequences “consistent with” a “disease” makes excess weight a physiological disorder or medical condition, *i.e.* a medical abnormality, rather than a physical trait.

Having agreed that a statutory “condition” must be a *medical* condition or medical *abnormality*, amici argue that “obesity” is just that—in their view a “disease,” and as such is *always* an impairment under the WLAD. WSAFJF Brf., 4; OAC/DRW Brf., 21; WELA Brf., 1; AARP Brf., 2. Yet with one exception noted later, *see infra*, fn. 9, no amicus even mentions the points made by BNSF: that “obesity” necessarily refers to weight; that weight is a physical trait shared by all persons and thus is not a *medical* abnormality though at extremes it

can be a *statistical* abnormality; and that the now common use of the word “disease” by doctors and public-health organizations to refer to health *consequences* without regard to *causes* makes the term of no help in deciding what the Legislature meant when adopting RCW § 49.60.040(7)(c). BNSF Brf., 26-30, 40-46.

BNSF does not agree, as WELA claims, WELA Brf., 16, that obesity is a “disease” as that word has until recently been understood—as referring to both the *cause* of ill health and its consequences. The OAC/DRW, on the other hand, describes obesity as “consistent with” a disease or disorder. OAC/DRW Brf., 2. BNSF agrees with that characterization—if the reference is solely to health *consequences* and not their cause. As BNSF observed in its response brief, BNSF Brf. 41, on the same principle smoking, vaping, alcohol consumption, online gaming, ingestion of certain medications, gun violence, and “vaccine hesitancy”³ are health threats and thus “consistent with” a disease or disorder. So is age, especially on the right tail of the bell

³ See <https://www.who.int/emergencies/ten-threats-to-global-health-in-2019>.

curve, and serious proposals have in fact been made by the medical community to label *advanced* age—just as with obesity—a “disease.”⁴ But as originally used, “disease” meant an unhealthy condition *caused* by a physiological or psychological *malfunction*, *disorder*, or *abnormality*. By that standard, obesity is no more a disease than age is,⁵ unless the excess weight results from an underlying medical disorder or abnormality, as BNSF now explains.

What distinguishes a physical characteristic or trait from a physical impairment is that characteristics are universal, and they differentiate one thing from another.⁶ Nonetheless, too much or too little

⁴ See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4471741/>.

⁵ RCW § 49.60.040(7)(a)(i) defines a “disability” as “the presence of a sensory, mental, or physical *impairment* that: (i) Is medically cognizable or diagnosable.” (emphasis added). The impairment requirement is thus separate. That smoking, vaping, alcohol consumption, online gaming, ingestion of certain medications, gun violence, “vaccine hesitancy,” and age are “medically cognizable or diagnosable” does not make them impairments as defined in RCW § 49.60.040(7)(c). The same is true for “obesity.”

⁶ See <https://www.merriam-webster.com/dictionary/characteristic> (“a distinguishing trait, quality, or property”); <https://www.collinsdictionary.com/us/dictionary/english/characteristic> (“The characteristics of a person or thing are the qualities or features that belong to them and make them recognizable.”).

of a characteristic can pose the same kind of problems for an individual as a physical or mental impairment. For example, although every person has height, being taller than average is a hindrance to working in an underground mine, and being shorter than average is an obstacle to a career in the National Basketball Association. Likewise, although every human body has muscle tissue, having lower muscle tone than average is an impediment to many jobs requiring physical labor and some public-safety jobs with physical-fitness requirements. Similarly, despite every physical body having weight, weighing more than average is a stumbling block to success as a horse-racing jockey or as a dancer, and weighing less than average is an encumbrance for a football lineman or a sumo wrestler. Age similarly can be a barrier to flourishing in many activities. And “hindrance,” “obstacle,” “impediment,” “stumbling block,” “encumbrance,” and “barrier” are each synonyms for “handicap,”⁷ itself the term used originally in the WLAD for which “disability” was later substituted.

⁷ See <https://www.thesaurus.com/browse/handicap>.

Consequently, a statute prohibiting discrimination against persons with a “handicap” or “disability,” *if* those terms are not defined, *could* extend beyond physiological and mental disorders to include physical characteristics (height, weight, muscle tone, age) and even economic, cultural, environmental, personality, or other factors that can be obstacles equivalent in their workplace and social impact to traditionally understood disabilities such as blindness, deafness, paralysis, quadriplegia, cerebral palsy, epilepsy, muscular dystrophy, and multiple sclerosis. But in the WLAD the Legislature deliberately chose to provide protection against *discrimination* only to persons whose disability resulted from a “physical or mental impairment” or was perceived to in the case of a claim invoking the “regarded-as” theory of statutory coverage. RCW § 49.60.040(7)(a)(iii). The Legislature *could* have elected to include persons disadvantaged because of too much or too little of some physical characteristic or, for that matter, because of cultural, economic, personality, or environmental factors. But it was neither absurd nor illogical for the Legislature to have drawn the line where it did by requiring a physiological *disorder*, no

matter how seemingly similar the plights of those disadvantaged because of something else.

Moreover, branding “excess” weight “obesity” does not make body weight a “disorder” or medical “abnormality.” An “excess” of anything—including of a good thing—denotes a negative. But when that good thing is a characteristic, an excess does not transform it from a characteristic to a disorder or medical “abnormality” even if there are some negative consequences. Thus, using the medicalized term “obesity” to describe excess weight does not mean that weight is no longer the issue. Styling “excess” height as “tall-ism” would not alter the fact that it too, like “obesity,” is problematic not because it is a “disorder” (usually) but because it is an “excess” of an underlying continuous physical characteristic. Which is surely why HRC’s interpretive guidance specifies that such physical traits are not “impairments” under the WLAD unless they are the result of a physiological disorder. If those traits have some detrimental effect on an individual,

it is not because they are WLAD “impairments.”⁸

Most (but not all) doctors and public-health organizations agree with the authorities cited by the amici that excess (or too little) weight is physiologically maladaptive (unhealthy) in the current external environment (conditions outside the body itself). But the newest science does not attribute excess weight to a malfunctioning—or disorder—of the body.⁹ Human bodies were adapted for conditions of food scarcity and high levels of physical activity: the body naturally and normally stores fat generously and burns it (thermogenesis) sparingly to survive when food is not available. Today’s environment of abundant, available, and attractive high-caloric, high sugar content, low fiber, and additive-injected food (along with other factors in the

⁸ WELA responds that blood glucose level being too high (excess glucose) leads to diabetes, which is indisputably a disease. WELA Brf., 17. But the glucose content of blood is not a physical trait or characteristic like height, weight, and age. BNSF’s point is specific to physical characteristics—an excess in a characteristic does not change its nature from a characteristic to a disorder or medical “abnormality.”

⁹ Instead, the most current evidence-based science points to combined polygenic and epigenetic determinants of body weight, including of adipose (fat) tissue. See <https://www.ncbi.nlm.nih.gov/pub-med/30389725>.

external environment) together with lower levels of required and regular physical activity (sedentarism) result in *normally functioning* bodies retaining more fat than was retained in the historical environment of food scarcity and high levels of physical activity.¹⁰ There are rare genetic and other disorders that also cause excess weight.¹¹ But no amicus points to evidence that the prevalence of those disorders has increased over the period of the obesity “epidemic.” The changes in the relevant external environment, by contrast, are well documented and undisputed. Most obesity is thus now considered a behavioral and regulatory problem of managing and reducing a newly “obesogenic” *environment*.¹²

The foregoing is not a willpower, voluntary-conduct, or personal-responsibility explanation for the steadily increasing percentage

¹⁰ *See id.*

¹¹ *See* <https://www.nhlbi.nih.gov/health-topics/overweight-and-obesity> (“medical conditions”).

¹² *See* <https://www.ncbi.nlm.nih.gov/pubmed/17152319>; <https://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/obesity-in-adults-interventions1>; <https://www.sciencedaily.com/releases/2018/11/181128115006.htm>.

of persons categorized as obese. It does not deny the personal and public-health problems and complexities of concern to the medical authorities cited by amici. It does not attribute fault. But it does highlight that the body storing fat is an adaptive feature—not a bug—of human physiology. That the mean point of the weight bell curve has shifted toward the right tail in the last fifty years does not make the cause of the development a physiological disorder. And considering the ever-present possibility of a return to historical conditions of food scarcity and intense physical activity,¹³ the body’s design for fat storage and fat burning can no more itself be called a physiological *disorder* than can bipedalism or the fight-or-flight response.

The HRC was right in 2007 and again in 2012. No matter how physically or occupationally disadvantageous a physical trait or char-

¹³ <https://www.reuters.com/article/us-venezuela-food/venezuelans-report-big-weight-losses-in-2017-as-hunger-hits-idUSKCN1G52HA> (“Venezuelans reported losing on average 11 kilograms (24 lbs.) in body weight last year...”).

acteristic such as height, weight, or age may be, it is not a *WLAD impairment* unless it is the result of an underlying physiological disorder.¹⁴

D. The Court’s discussion in *Brown v. Scott Paper Worldwide Co.* of the word “includes” as used in the WLAD supports BNSF.

The WSAFJF cites *Brown v. Scott Paper Worldwide Co.*, 143 Wn. 2d 349, 20 P.3d 921 (2001), as another case in which the Court has pointed to use of “includes” in the WLAD as calling for a broader reading of the WLAD than otherwise similar federal employment-discrimination statutes. WSAFJF Brf., 19. *Brown* addressed whether individual supervisors can be liable under the WLAD. RCW § 49.60.040(3) states: “‘employer’ includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons.” The Court noted a fact also acknowledged by BNSF: “the word “includes,”...is a term of enlargement.” *Id.*, 359; *see*

¹⁴ AARP asserts, without citation, that BNSF argues “that obesity may never be an impairment under the WLAD.” AARP Brf., 1. That is not BNSF’s position, which instead is the same as the HRC’s: physical traits such as weight can be an impairment when caused by a physiological disorder or abnormality.

BNSF Brf., 23 (“‘includes’” is a word of expansion not limitation and the definitions that follow it are examples not an exhaustive list”).

But the question in *Brown* was not like the one presented in *Marquis* and *Kilian* discussed in BNSF’s opening brief: whether the subject of the dispute could possibly fall within the definition of the term preceding “includes”—in those cases, “right.” *Id.*, 23-26. An individual *can* obviously be an “employer.” The problem in *Brown* arose instead from the placement of the modifying phrase “directly or indirectly” and whether it meant that to be liable an individual supervisor had to employ eight or more persons. 143 Wn. 2d at 357. The expansive meaning of “includes” in *Brown* simply supported the principle that the WLAD definition of “employer” is generally broader than the definition in one federal discrimination statute. Here “includes” does not help amici’s (and the Taylors’) argument because physical characteristics such as weight are not abnormalities and thus are not within the range of possible meanings of the word that precedes “includes”—in this case, “impairment.” *See* BNSF Brf., 23-26.

E. No amicus addresses the consequences of “obesity” being “always” an impairment under the WLAD in settings other than employment.

BNSF observed in its opening brief that the WLAD’s definitions of “impairment” and “disability” apply in several contexts other than employment. BNSF Brf., 43-44 & n.26. No amicus mentions the consequences of the obesity-is-always-an-impairment argument in those other settings. This Court’s recent decision in *Floating v. Group Health Coop.*, No. 95205-1, 7-8 & n.3. (Wash. Jan. 31, 2019), illustrates one such potential consequence. If “obesity” is a protected disability under the WLAD, the science of body weight discussed in the OAC/DRW brief when published on a state department of public health website or taught by a professor of public health at a college or university could well be a violation of the public-accommodations provisions of the WLAD, RCW § 49.60.030(1)(b), by “directly or indirectly causing persons...with...[a]...physical disability...to be treated as not welcome, accepted, desired, or solicited,” RCW § 49.60.040(14), because that science characterizes “excess” body weight as a “disease” contrary to those who sincerely feel otherwise.

Floating, at 7. The science discussed in this brief could have the same effect on persons who firmly believe that “excess” body weight *is* a “disease.” The very real risk of chilling scientific and public debate about important public-health issues is a further reason to leave to the legislature whether to make physical characteristics such as height, weight, muscle tone, and age protected “disabilities.”

F. Amici agree that obesity is “always” an impairment under the WLAD but not on a definition of “obesity.”

Despite unanimously contending that obesity is always an impairment under the WLAD, only one amicus proposes a definition of the term. *See* WSAFJF Brf., 13 (“a Body Mass Index (BMI) of 30 or greater”)(footnote omitted).¹⁵ There is in fact no agreed scientific, medical, or public-health definition of “obesity” nor is there consensus on when the continuous physical characteristic “body weight” is

¹⁵ BMI is a person’s *weight* in kilograms (kg) divided by his or her *height* in meters squared. Thus, the only definition of obesity proposed by the amici simply states the relationship between two *physical characteristics*, with no medical or health component. Yet all amici directly or indirectly criticize BNSF for allegedly failing to acknowledge a purported difference between weight and the “disease” of obesity.

too little, too much, or just right—for health or any other purposes. Declaring that the Legislature meant to make “obesity” a protected status would thus be akin to holding that the WLAD prohibits discrimination against the “victimized” or the “deserving”—praiseworthy in principle but impossible to implement in practice given the uncertainty about who qualifies as protected. The Court presumes that the Legislature does not intend the impracticable. *See In Re Young*, 122 Wn.2d 1, 39-41, 857 P.2d 989 (1993), *citing In Re Harris*, 98 Wn.2d 276, 283-4, 654 P.2d 109 (1982); *cf. Central Puget Sound Regional Transit Authority v. WR-SRI 120th North LLC*, 191 Wn.2d 223, 249-50, 422 P.3d 891 (2018), *citing State ex rel. Lyle Light, Power & Water Co. v. Superior Court*, 70 Wash. 486, 490, 127 P. 104 (1912).

CONCLUSION

It would in no way detract from Washington’s long tradition of broader legal protections from discrimination than are provided by federal law for the Court to hold that in this one distinctive instance the statutory text, context, structure, and purpose, reinforced by the legislative history, converge to make clear that when enacting RCW §

49.60.040(7)(c) the Legislature intended to adopt the prevailing and workable federal understanding of what is a physical or mental impairment for purposes of prohibiting discrimination against persons with disabilities.

If the Court remains unpersuaded of that view, the text, context, structure, and purpose as well as the administrative and public interpretations of the WLAD itself, considered independently, point beyond reasonable doubt to the same conclusion: the Legislature did not mean to make “obesity” —or too much or too little of any physical characteristic like weight that is not the result of a physiological disorder—an impairment or a disability under the WLAD.

But should the Court conclude that what the Legislature meant when adopting RCW § 49.60.040(7)(c) is subject to reasonable dispute, the legal, medical, and scientific complexities of defining “obesity” and the far-reaching practical—and public-health—consequences of recognizing it as a protected status under the WLAD counsel decisively in favor of the doubt being resolved through legislation, not adjudication.

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Respectfully submitted,

s/ Bryan P. Neal
Bryan P. Neal
Texas Bar No. 00788106
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
bryan.neal@tklaw.com
Telephone: (214) 969-1700
Facsimile: (214) 969-1751

s/ Britenae Pierce
Britenae Pierce, WSBA #34032
Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
pierce@ryanlaw.com
Telephone: (206) 464-4224
Facsimile: (206) 583-0359

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed and served on all counsel of record, a copy of this brief, on the 12th day of February, 2019.

s/Bryan P. Neal
Bryan P. Neal

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THOMPSON & KNIGHT LLP

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Address:
1722 Routh Street, Suite 1500
Dallas, TX, 75201
Phone: (214) 969-1762

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