FILED
SUPREME COURT
STATE OF WASHINGTON
12/26/2023 3:45 PM
BY ERIN L. LENNON
CLERK

No. 101386-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ADELINA GABRIELA SUAREZ,

Respondent/Cross-Petitioner,

v.

THE STATE OF WASHINGTON, TAMMY WINEGARD and her community property, JULIANNE MOORE and her community property, and TAMMY MASTERS and her community property,

Petitioners.

BRIEF OF AMICI CURIAE WASHINGTON STATE HOSPITAL ASSOCIATION, WASHINGTON STATE MEDICAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION

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I. INTRODUCTION

The Washington healthcare system is suffering unprecedented staffing shortages as droves of healthcare workers left the field during the COVID-19 pandemic and never returned. Many healthcare facilities are in financial distress due to the ballooning costs of labor and because payor reimbursements have not kept up with those costs. Simultaneously, religious accommodation requests have recently proliferated.

Division III's heightened standard for what constitutes "undue hardship" with respect to granting religious accommodations under the Washington Law Against Discrimination (WLAD) will significantly impact healthcare employers' ability to deliver safe and comprehensive care.

For healthcare providers and facilities, following Division III's "significant difficulty or expense" standard would also create irreconcilable conflict between competing rights and public policies. It would lead to unresolvable conflicts between, on the one hand, employees' rights to religious accommodation

leave, and on the other hand, employees' seniority rights under a collective bargaining agreement (CBA), the rights of employees to sick leave under Washington law, and the statutorily protected right of healthcare workers to be free from mandatory overtime. Additionally, the "significant difficulty" test for undue hardship would make balancing the right of patients to be protected from exposure to infectious diseases with the religious rights of healthcare workers to refuse vaccination, masking, and other mitigation measures, far less clear than under current law. The outcome of this case presents an issue of enormous importance to hospitals, physicians, and the wellness of Washington's population. Amici urge the Court to adhere to the existing "undue hardship" standard as articulated in *Kumar v. Gate Gourmet Inc*., 180 Wn.2d 481, 325 P.3d 193 (2014).

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amicus Washington State Hospital Association (WSHA) is an association of over 100 hospitals and health systems, which seeks to improve the health of Washington's communities,

advocating on matters affecting the delivery, quality, accessibility, and continuity of healthcare. WSHA provides a unique voice on issues facing hospitals and health systems. Washington's Legislature has recognized WSHA's key role in public discourse on healthcare. *E.g.*, RCW 70.225.040 and 74.09.5225(2)(b)(iii).

Amicus Washington State Medical Association (WSMA) is the statewide association of physicians, surgeons and physician assistants, with over 12,500 members. WSMA provides physician-driven, patient-focused advocacy as a knowledgeable and interested party in matters impacting the practice of medicine and the availability of health services for patients. WSMA works with Washington's lawmakers on legislation and has participated in court cases as a party and as *amicus curiae* on issues affecting the practice of medicine.

Amicus American Medical Association's (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state

and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. The AMA Litigation Center is the voice of America's medical profession in legal proceedings across the country. AMA members practice in every medical specialty and in every state, including Washington.

The AMA and WSMA join in this brief on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

III. STATEMENT OF THE CASE

Amici adopt the facts as set forth in the State's Petition for Review, Brief, and Supplemental Brief.

IV. ARGUMENT

A. Division III's Heightened "Undue Hardship" Standard Will Exacerbate Serious Healthcare Staffing Shortages.

Division III's heightened standard requires a showing of "significant difficulty or expense," and goes beyond what the United States Supreme Court required under Title VII in *Groff v. DeJoy*, 600 U.S. 447, 470-71, 143 S. Ct. 2279, 216 L. Ed. 2d 1041 (2023). Division III's overly demanding "undue hardship" standard, as applicable to the WLAD, will only worsen the staffing shortages that medical facilities and doctors around Washington already face.

1. The Current Healthcare Staffing Crisis.

Washington hospitals, medical groups and clinics increasingly face financial crises and staffing shortages, which

for many have not improved since the height of the pandemic.[1] Prior to the pandemic, more than half of the nursing work force was close to retirement. Meanwhile, nursing schools have had to turn away thousands of qualified applicants due to lack of faculty and training sites. A 2021 survey from the Kaiser Family Foundation found nearly 60% of healthcare workers had worsened mental health because of the pandemic, and nearly 30% considered leaving the profession altogether.[2] There is a historic healthcare workforce crisis, with critical staffing shortages throughout the system.

Meanwhile, labor costs have soared.[3] Washington hospitals lost approximately $2.1 billion in 2022, largely due to

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[1] American Hospital Association, *Statement of the American Hospital Association for the Committee on Health, Education, Labor and Pensions of the U.S. Senate*, "Examining Health Care Workforce Shortages: Where Do We Go From Here?" (Feb. 16, 2023), https://www.aha.org/testimony/2023-02-15-aha-senate-statement-examining-health-care-workforce-shortages-where-do-we-go-here.

[2] American Hospital Association, *Strengthening the Health Care Workforce* (Nov. 2021), https://www.aha.org/system/files/media/file/2021/05/fact-sheet-workforce-infrastructure-0521.pdf.

[3] Joy Borkholder, *'The Whole Thing Is Broken': Temp Staffing Costs Strain WA Hospitals*, PBS Crosscut (Jan. 13, 2023), https://crosscut.com/investigations/2023/01/whole-thing-broken-temp-staffing-costs-strain-wa-hospitals.

the higher costs of labor and equipment.[4] In the first half of 2023, Washington hospitals lost $750 million.[5] In a survey of 98% of all acute care hospitals in Washington, only 12 of 81 hospitals had a positive operating margin in the first six months of 2023.[6] This is particularly true for rural access hospitals and healthcare providers.

At the same time, religious accommodation requests have risen dramatically from pre-pandemic levels, which has made it even more challenging for understaffed medical facilities to provide adequate care to the Washington community. For example, some critical access hospitals in Washington received religious accommodation requests from 20% of their staff. One reported that in other years, only 3% of staff sought religious

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[4] Elise Takahama, *How WA Lawmakers Tried This Year to Ease Hospitals' Financial Woes*, Seattle Times (Apr. 27, 2023, 6:00 AM), https://www.seattletimes.com/seattle-news/health/how-wa-lawmakers-tried-this-year-to-ease-hospitals-financial-woes/.

[5] Santiago Ochoa, *Washington Hospitals Lost $750 Million in the First Half of 2023; Yakima MultiCare Adding Staff*, Yakima Herald (Oct. 13, 2023), https://www.yakimaherald.com/news/topics/health_care/washington-hospitals-lost-750-million-in-the-first-half-of-2023-yakima-multicare-adding-staff/article_e4adda84-68e2-11ee-8997-07170355312f.html.

[6] *Id.*

accommodation. Another public hospital district reported religious accommodation requests by 30% of staff, while in the preceding decade it had *none*.

The staffing crisis is most severe in rural areas of Washington. Rural hospitals have already had to reduce or cut patient services, such as labor and delivery care, due to rising costs and staffing shortages.[7] Division III's heightened undue hardship standard will cause more service cuts to those most in need.

2. A Heightened "Undue Hardship" Standard Will Add to Staffing Shortages and Place Further Stress on an Already Overstressed Healthcare System.

The services provided by small clinics and solo practitioners are vital to the healthcare system; these clinics provide dialysis, imaging, primary care, and other non-hospital-based services that directly reduce hospital emergency room

[7] *See, e.g.*, Roni Caryn Rabin, *Rural Hospitals Are Shuttering Their Maternity Units*, New York Times (Feb. 26, 2023), https://www.nytimes.com/2023/02/26/health/rural-hospitals-pregnancy-childbirth.html.

visits. Small medical clinics typically have few staff. The ability of staff to cover for each other is a critical issue in determining time off, including religious leave. There is not a bevy of available staff on call to fill in for last minute absences. Yet, under Division III's more onerous "significant difficulty" test, forcing the few other staff who have already worked their full schedule to cover for an employee seeking a last-minute religious accommodation leave (in violation of employer notice policies) may not be considered "significant difficulty." Likewise, running short staffed or cancelling patient appointments may also not meet Division III's "significant hardship or expense" requirement. This in turn would further strain emergency departments that are already at or over capacity, as patients who cannot be treated in a clinic seek care in emergency settings.

3. The Lower Court's Decision Will Create Incompatible Conflict Between Collective Bargaining Agreements and Religious Accommodations.

Most Washington hospitals have unionized staff, and the lower court's decision threatens to pit their contractual commitments, such as the terms of a CBA or the terms of a seniority system, against conflicting obligations to provide reasonable accommodations for their employees' religious beliefs. Under Division III's analysis of the case at bar, Ms. Suarez's last-minute religious leave request implicated the terms of a CBA. Yet, Division III still found a genuine issue of material fact as to whether accommodating her leave request caused the facility undue hardship. This calls into question the extent to which other provisions of a CBA, such as seniority rights, can be trumped by a religious accommodation request and not be considered a "significant difficulty."

This presents a real risk of increased litigation, expense, staffing shortages, and reduced capacity for healthcare employers.

4. <u>The Lower Court's "Undue Hardship" Standard Creates Impossible Conflict Between Religious Accommodations and Other Statutory Rights</u>.

Division III's heightened "undue hardship" standard will also create conflicts between religious accommodations and other statutory rights, such as the rights of employees to sick leave under Washington law, and the right of healthcare workers to be free from mandatory overtime.

Washington law mandates that employers provide sick leave to all employees, regardless of their full-time, part-time, or temporary status. RCW 49.46.210. An employee's statutory right to sick leave is grounded in the public policies of promoting health, family stability, and economic security. RCW 49.46.200. Under existing law, employers are prohibited by law from interfering with an employee's statutorily protected sick leave to

cover the last-minute religious leave request of another employee.

Similarly, mandatory overtime for healthcare workers is generally prohibited by Washington law. RCW 49.28.140. Healthcare facilities are prohibited from "attempt[ing] to compel or force employees to work overtime" and, where a healthcare worker accepting overtime "works more than twelve consecutive hours," the worker must be given the option to take "at least eight consecutive hours of interrupted time off" after working an overtime shift. RCW 49.28.140(1), (4).

In light of these statutory rights, an understaffed hospital weighing a last-minute religious leave request under Division III's heightened standard has few options and would be in an impossible situation. The hospital would be forced to grant the religious leave request *as well as* comply with the mandatory overtime prohibition statute and accommodate last minute sick leave requests. The result would be a further reduction in staffing, with potential adverse impact on patient outcomes.

B. Beyond Leave Requests, Division III's Heightened "Undue Hardship" Standard Will Create Irreconcilable Conflict with Public Health Policies.

1. The Lower Court's Standard Will Create Unresolvable Conflict Between Healthcare Employers' Mitigation Measures, Such as Vaccine Mandates, and Religious Accommodation Requests.

Healthcare employers are already tasked with balancing two conflicting public policies: The obligation to implement mitigation measures to ensure patient health and safety and the obligation to provide reasonable accommodations for their employees' religious beliefs. The public health and safety measures have included government mandated vaccination and use of face masks, employer policies on vaccinations, such as the flu vaccine, and other infection control measures. Even under the "undue hardship" standard articulated in *Kumar*, reconciliation of these competing duties has been challenging for Washington healthcare employers. Division III's far more stringent "undue hardship" standard puts providers and patients in an even more precarious position.

Hospitals and clinics were required to comply with vaccine mandates[8] and other mitigation measures, such as mandatory masking.[9] Healthcare workers have long been required (either by employer policy or law[10]) to get vaccinated and to mask given their "risk for exposure to serious, and sometimes deadly, diseases" and because they "work directly with patients or handle material that could spread infection."[11] During the COVID-19 pandemic, these mitigation measures prompted an unprecedented increase in religious accommodation requests.

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[8] Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555 (Nov. 5, 2021), https://www.federalregister.gov/documents/2021/11/05/2021-23831/medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-vaccination.

[9] Washington State Department of Health, *Masking Requirements in Healthcare, Long-Term Care, and Correctional Facilities to End April 3* (Mar. 3, 2023), https://doh.wa.gov/newsroom/masking-requirements-healthcare-long-term-care-and-correctional-facilities-end-april-3#:~:text=OLYMPIA%20%2D%2D%20Effective%20April%203,people%20age%205%20and%20older.

[10] *See* Governor Inslee's Proclamation 21-14.5 (COVID-19 Vaccination Requirement).

[11] *Recommended Vaccines for Healthcare Workers,* Centers for Disease Control (May 2, 2016), https://www.cdc.gov/vaccines/adults/rec-vac/hcw.html.

Historically, the common recommended or required vaccines for healthcare workers include influenza, MMR (measles, mumps, and rubella), and hepatitis B vaccines.[12] COVID-19's unprecedented circumstances made healthcare worker vaccinations even more imperative. In July 2022, Washington joined other states[13] in mandating that healthcare workers be vaccinated against COVID-19.[14] Under this mandate, healthcare workers were "not required to get vaccinated against COVID-19" if doing so would "conflict[] with their sincerely held religious beliefs, practice, or observance," and the request could be reasonably accommodated without undue hardship (*i.e.*,

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[12] *Recommended Vaccines for Healthcare Workers*, Centers for Disease Control (May 2, 2016), https://www.cdc.gov/vaccines/adults/rec-vac/hcw.html; *Seasonal Flu: Employer Guidance: Reducing Healthcare Workers' Exposure to Seasonal Flu Virus*, U.S. Department of Labor Occupational Safety and Health Administration, https://www.osha.gov/seasonal-flu/healthcare-employers#:~:text=Basic%20Precautions%20for%20All%20Work%20Activities&text=The%20CDC%20strongly%20recommends%20that,encourage%20them%20to%20get%20vaccinated (last visited: Dec. 16, 2022) (the Centers for Disease Control and Prevention ("CDC") "strongly recommends" that healthcare employers "provide the seasonal flu vaccine" to their employees "and encourage them to get vaccinated).

[13] *Vaccine Requirements for Healthcare Workers During the Coronavirus (COVID-19) Pandemic, 2021-2022,* Ballotpedia.org, https://ballotpedia.org/Vaccine_requirements_for_healthcare_workers_during_the_coronavirus_(COVID-19)_pandemic,_2021-2022 (last visited: Dec 16, 2022).

[14] *See* Governor Inslee's Proclamation 21-14.5 (COVID-19 Vaccination Requirement).

more than a *de minimis* cost). The Washington State Department of Health also mandated universal masking of healthcare workers considering the COVID-19 pandemic.[15]

Vaccine mandates and mask requirements were workable under *Kumar*'s "undue hardship" standard for hospitals and clinics because employers could consider the health and safety of patients, employees, and the community in evaluating religious accommodation requests. However, the Division III opinion threatens to drastically increase the burden and exposure on healthcare employers in navigating religious accommodation requests while protecting patients' needs or the health needs of other employees. It will require already strained healthcare employers to analyze impacts to determine whether an employee's vaccine or mask religious exemption request presents a "significant difficulty or expense." Under current law, the potential for negative impacts on patients and co-workers

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[15] *See infra*, footnote 8.

could be considered. The lower court's test seemingly would require more.

For example, a nurse's religious opposition to a hospital's vaccine and masking mandate who works in neonatal intensive care or with immunocompromised cancer patients may present a "significant difficulty," but what about the clinic nurse who sees a general patient population? Will healthcare employers now be required to show specific adverse medical events are likely in the patients exposed to show undue hardship?

If the current "undue hardship" standard is replaced by Division III's far more onerous standard, Washington hospitals and clinics are likely to experience many more unvaccinated and unmasked workers, which can adversely affect the health of patients.

C. A Heightened "Undue Hardship" Standard Will Add Complexity to the Administrative Burdens of an Already Distressed Healthcare System.

If employers are forced to use Division III's "undue hardship" definition in assessing religious accommodation

requests, individual physician offices, small medical clinics, and overstretched hospitals will need to undertake the far more complex ten-factor analysis set forth in WAC 82-56-020 for each request, with uncertain results. Division III also found that providing employees information about open positions which could accommodate religious leave was not enough. Rather, a level of administrative "handholding" was required by the lower court before undue hardship could arise. This is simply not possible for Washington's severely understaffed healthcare systems. Nor is Division III's heightened test sensible: Would closing a dialysis center for a day, or cancelling oncology patient appointments, or extending emergency department wait times by five hours constitute a "significant difficulty or expense?" Would forcing a respiratory therapist to "voluntarily" work on her first day off in two weeks be "undue hardship" to the employer? These are the real-world questions for which the lower court provides no answer.

V. CONCLUSION

Healthcare facilities are overburdened and struggling to meet the public's high demand for healthcare. The lower court's ruling will make the situation worse, affecting not only healthcare employers, but the public at large. The COVID-19 pandemic has not only increased the number of patients who need medical attention but has also affected the number of illness-free staff who can provide needed care. The lower court's opinion creates a major shift in how religious accommodation requests would need to be addressed and will exacerbate the staffing issues that continue to threaten the ability of providers to function and adequately address public need. A heightened "undue hardship" standard would also make it even more challenging for healthcare providers across the state to balance religious accommodation requests with other, equally significant public policies and statutory rights. Amici urge the Court to adhere to the existing "undue hardship" standard under the WLAD.

RESPECTFULLY SUBMITTED this 26th day of December 2023.

This document contains 2,805 words, in compliance with RAP 18.17(c)(6).

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I hereby certify that on December 26, 2023, the foregoing document was electronically filed with the Supreme Court of the State of Washington's CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/Luci Brock
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December 26, 2023 - 3:45 PM

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Superior Court Case Number:	20-2-01132-0

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