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Brief of Amici Curiae Legal Voice and Korematsu Center

Fred T. Korematsu Center for Law and Equality

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NO. 75057-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CHRISTOPHER H. FLOETING,

Appellant/Plaintiff,

v.

GROUP HEALTH COOPERATIVE,

Respondent/Defendant.

BRIEF OF *AMICI CURIAE* LEGAL VOICE AND KOREMATSU CENTER

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I. INTERESTS OF *AMICI CURIAE*

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of all women in the Pacific Northwest through litigation, legislative advocacy, and legal rights education. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has been at the forefront of efforts to combat sex discrimination. Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country involving gender discrimination, including sexual harassment and sex discrimination in the workplace, educational settings, and in public accommodations, including serving as counsel in one of the few Washington Supreme Court cases involving a claim of sex discrimination in a place of public accommodation, *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655 (2002). Legal Voice serves as a regional expert advocating for legislation and for robust interpretation and enforcement of anti-discrimination laws to protect women and gender-nonconforming people. Legal Voice has a strong interest in ensuring that the Washington Law Against Discrimination is interpreted to protect against sexual, gender-based, and other forms of harassment, including in public accommodations.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a nonprofit organization based at Seattle

University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu who defied military orders during World War II that led to the internment of 110,000 Japanese Americans, and later became an advocate for civil rights of others who are victims of discrimination. The Korematsu Center has a strong interest in ensuring that effective remedies exist to address discrimination. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

II. INTRODUCTION

Though the immediate lawsuit seeks to vindicate Appellant Floeting's rights, much more is at stake here. This case – one of first impression under a provision of the Washington's Law Against Discrimination ("WLAD") that is rarely litigated – calls upon the Court to define what constitutes harassment (sex-based or otherwise) in a place of public accommodation and who is liable for it. If the Court adopts Respondent Group Health's view of the law, the entities that open their doors to the public will be liable for unfair practices in only the most limited circumstances, leaving deprivation of civil rights in our hospitals, civic spaces, restaurants, and hotels unmitigated. The Court should reject this invitation and instead adopt a rule of liability that is appropriate to the public accommodation context, consistent with the plain language of the

WLAD, and faithful to the highest policy objectives of the Act. On the facts of this case, such a rule of law would leave the determination of whether Mr. Floeting was deprived of his civil rights in the capable hands of the jury.

III. STATEMENT OF THE CASE

Amici Curiae adopt the Appellant's Statement of the Case.

IV. ARGUMENT

A. The WLAD Is Construed Liberally to Effectuate the Purpose of the Act.

Washington State has a long and proud tradition of being on the forefront of promoting civil rights. In 1949, the legislature enacted anti-discrimination laws targeting the workplace;[1] in 1957, it added further protections in places of public accommodations and publicly-assisted housing;[2] and in 1973, it passed anti-discrimination laws protecting persons with disabilities.[3] All of these enactments preceded similar provisions under the federal 1964 Civil Rights Act, the 1968 Fair Housing Act, and the Americans with Disabilities Act of 1990, respectively. What is more, Washington's Law Against Discrimination ("WLAD") has a broader reach than analogous federal laws; for example, it protects women, breastfeeding mothers, and gays and lesbians from discrimination

[1] Laws of 1949, ch. 183, § 1.
[2] Laws of 1957, ch. 37, §2.
[3] Laws of 1973, ch. 141 (adding sex, marital status and age); Laws of 1973, ch, 214 (adding disability); Laws of 2009, ch. 164 (adding breastfeeding).

in places of public accommodation.[4] RCW 49.60.040; *see also* WAC 162-32-040 (describing prohibited harassment based on gender identity/expression in place of public accommodation).

The purpose of the WLAD is, simply stated, to deter and eradicate discrimination in Washington. RCW 49.60.010 (declaring that "discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."). The law "embodies a public policy of the highest priority." *Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (internal citation and quotation omitted). In contrast to federal anti-discrimination legislation, our state statute includes express and emphatic language, directing the courts to construe the Act liberally to effectuate its purpose. RCW 49.60.020; *see also Fraternal Order of Eagles v. Tenino Aerie No. 564*, 148 Wn.2d 224, 247, 59 P.3d 655 (2002) (noting the statute should be liberally construed).

In the public accommodations context, the right to be free from discrimination includes the right to "full enjoyment" of those services and privileges. RCW 49.60.030. Denial or deprivation of such a right is an affront to personal dignity. *See Anderson v. Pantages Theater Co.*, 114 Wash. 24, 31, 194 P. 813 (1921) ("The act [of discrimination] alleged in itself carries with it the elements of an assault upon the person, and in such

[4] Laws of 2006, ch. 4 (adding sexual orientation).

cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering, are elements of actual damages."); *accord Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (the "fundamental object" of laws banning discrimination in public accommodations is "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.") (internal citation and quotations omitted). Said another way, public accommodation laws serve to "eliminate the unfairness, humiliation, and insult of … discrimination in facilities which purport to serve the general public." *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64, 67 (5th Cir. 1975).

B. Harassment Is a Form of Discrimination in a Place of Public Accommodation.

There can be no serious dispute that discrimination in a place of public accommodation includes conduct that falls short of an outright denial of service, such as humiliation, harassment, or insult. *See* RCW 49.60.040(14) (definition of "full enjoyment" includes the right to access "facilities" and "privileges" without being treated as "not welcome, accepted, desired, or solicited."). Contrary to Group Health's urging, any fair reading of the definition of "full enjoyment" in concert with the public accommodations provision (RCW 49.60.215, or "section 215") compels

such a conclusion. One Washington court has already recognized as much. *See Evergreen Sch. Dist. No. 114 v. Washington State Human Rights Comm'n, on Behalf of Johnson*, 39 Wn. App. 763, 775, 695 P.2d 999 (1985) (accepting the proposition that "a denial [of full and equal services] occurs when there is discriminatory or abusive treatment" and not just outright refusals of entry) (citing *King v. Greyhound Lines, Inc.*, 656 P.2d 349, 351 (Or. Ct. App. 1982)).

To conclude otherwise would mean that a barista could make disparaging and insulting comments toward a mother about her choice to breastfeed at a coffee shop and suggest she go to the toilet to do so, and no liability would attach so long as the salesperson does not refuse to take her order. Or it would permit a sales clerk to tease and humiliate a customer about her disability, and again, no liability would attach so long as the customer was not prevented from completing her transaction. Such a rule would ignore the chief harm resulting from discrimination that the WLAD was designed to guard against in the first place: the injury to an individual's self-worth and integrity. *See Anderson*, 114 Wash. at 31; *accord King*, 656 P.2d at 352. The liberal construction of the WLAD does not so permit.

Indeed, for this very reason, Washington courts have long-recognized harassment as a form of unlawful discrimination in the employment context, which of course does not take the form of outright

exclusion from the workplace, such as a termination or failure-to-hire. *See, e.g.*, *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985) (recognizing hostile work environment as form of sex discrimination under WLAD); *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 457, 166 P.3d 807 (2007) (recognizing claim of racially hostile work environment); *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 769 P.2d 318 (1989) (same); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43-44, 59 P.3d 611 (2002) (recognizing claim of disability-based hostile work environment); *accord Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (recognizing claim of sex-based hostile work environment under Title VII). Likewise, harassment is uniformly recognized as a form of discrimination under laws prohibiting discrimination in education,[5] housing,[6] and health care.[7]

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[5] Title IX has been interpreted to protect every student (and other individuals protected by Title IX) from sex-based harassment that limits their ability to participate in or benefit from the education program, or that creates a hostile or abusive educational environment. *See* U.S. Dept. of Educ., Office for Civil Rights, Sexual Harassment Guidance (1997), available at http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.

[6] 24 C.F.R. § 100. This rule was the specific subject of recent rulemaking. *See* U.S. Housing & Urban Development Department, Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63054 (Sept. 14, 2016).

[7] While the Department of Health and Human Services declined to include a separate harassment provision, it did unequivocally recognize that harassment was a form of discrimination: "OCR recognizes that various forms of harassment can impede an individual's ability to participate in or benefit from a health program or activity and can thus constitute unlawful discrimination under Section 1557 and this part. … Consistent with the well-established interpretation of existing civil rights laws, OCR interprets the final rule to prohibit all forms of unlawful harassment based on a protected characteristic." U.S. Health & Human Servs. Dep't, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31405-06 (May 18, 2016) (internal citations omitted).

C. The Court Should Adopt a Rule of Liability for Proving Harassment in a Place of Accommodation That Is Consistent with WLAD's Purpose to Eradicate Discrimination.

This case presents an issue of first impression under Washington law: What must the plaintiff show to establish unlawful harassment in a place of public accommodation?

1. The Definition of Harassment.

Group Health urges the Court to blindly apply all elements of an employment discrimination claim (section 180 of RCW 49.60) for purposes of determining whether an entity is liable for an unfair practice in a place of public accommodation (section 215). Yet, the public policies underlying the two are distinct and, arguably, the protections are much broader under the latter provision. Section 215 declares it an unfair practice to commit an act that results "*directly or indirectly*" in (1) "*any* distinction, restriction, *or* discrimination" in a place of public accommodation, or (2) requires any person to pay more than the uniform rates charged other persons, or (3) "refus[e] or withhold[]" admission from any person. RCW 49.60.215 (emphasis added). The employment provision has different aims altogether: it declares it an unfair practice for an employer to (1) "refuse to hire any person" because of her protected status, (2) "discharge or bar" a person from employment because of her protected status, (3) to discriminate in compensation or in any terms or conditions of employment, or (4) to, *inter alia*, discriminate in advertising for a position. RCW 49.60.180.

Engaging in conduct that results in "any" "distinction, restriction, *or* discrimination" in the "full enjoyment" of public accommodation services is simply not the same conduct that courts (and juries) have deemed sufficient to alter the terms and conditions of employment (e.g., severe or pervasive harassment). This is not to say that the decades-long effort of defining and refining what constitutes "harassment" in the workplace is meaningless. To the contrary, the pattern jury instruction for outlining a plaintiff's burden of proof in the employment setting provides a useful starting point for the instant case. But reflect the statutory text of section 215 and the concept of "full enjoyment." *Amici* suggest the following:

> To establish [his] [her] claim of harassment on the basis of [protected status], plaintiff has the burden of proving each of the following propositions:
>
> (1) That there was language or conduct [of a sexual nature, or racial nature, as appropriate];
>
> (2) That this language or conduct was unwelcome in the sense that Plaintiff regarded the conduct as undesirable and offensive, and did not solicit or incite it;
>
> (3) That this conduct or language was so offensive or pervasive that it ~~altered the conditions of (name of plaintiff's) employment~~ directly or indirectly altered the plaintiff's full enjoyment of a place of public accommodation; and
>
> (4) That the language or conduct was carried out by the defendant [or the defendant's agent or employee, as appropriate].

See 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.23 (6th ed.) (strike-throughs and modifications added).[8] This articulation of the plaintiff's burden balances a subjective test of what constitutes offensive language or conduct (element 2) with how a reasonable person would view such language or conduct (element 3) and requires, simply enough, that the plaintiff show a causal connection between the misconduct and the alleged deprivation or alteration of services. This rule of liability would not render Group Health or other entities liable for "casual, isolated, or trivial" remarks because the conduct or language must be offensive enough to directly or indirectly alter the plaintiff's full enjoyment in a place of public accommodation.

2. The Scope of Liability for Acts of Employees

The fourth and last element suggested above identifies *who* can be held liable for the harassing conduct. Borrowing from the employment context, Group Health spends considerable time on a mashup of state and federal common law agency-related concepts, urging the Court to adopt a negligence standard for imputing liability to entities for the acts of their

[8] This burden of proof recognizes that requiring a victim of harassment to identify a comparator makes little sense. By contrast, where there is an allegation of disparate treatment in a place of public accommodation, a plaintiff may seek to prove her case through such evidence. *See Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 525, 20 P.3d 447 (2001) (setting out elements of a claim of disparate treatment in public accommodations).

non-supervisory employees. Br. at 33-36. This argument ignores the plain language of the statute, which this Court cannot do.[9]

The public accommodations provision of the WLAD imputes liability to entities (persons) for the acts of employees:

> It shall be an unfair practice for any person or the person's agent *or employee* to commit an act which directly or indirectly results in any distinction, restriction, or discrimination….[in a place of public accommodation].

RCW 49.60.215 (emphasis added). The provision is plain on its face: any "person" is liable for the unfair acts of his or her (or its) "employee" separate and apart from when those employees are acting as agents for the entity.[10] Indeed, the legislature calls out the concept of agency separately, in the disjunctive, by using the term "agent" separate and apart from "employee." *Id*. No other construction of the statute is required; Group Health is liable for T.T.'s misconduct because, simply enough, T.T. is Group Health's employee.

There are fourteen different "unfair practices" provisions under the WLAD, and the legislature chose just two instances in which the acts of employees would be automatically imputed to the entity: (1) the public

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[9] The starting point for determining legislative intent is the language of the statute. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). If the language is plain on its face, as here, the Court goes no further. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) ("Plain language does not require construction.").

[10] There is no dispute that Group Health is a "person," subject to the WLAD, as it is broadly defined to include, *inter alia*, "any owner, lessee, proprietor, manager, agent, or employee…." RCW 49.60.040(19). Likewise, there is no dispute that Group Health, because it provides medical services, qualifies as a place of public accommodation.

accommodations provision (section 215), quoted above, and (2) the provision that follows it, concerning discrimination against persons with disabilities who use service animals in eating establishments (section 218). Both use the identical imputed-liability phrase ("a person or a person's agent or employee"), in stark contrast to the other dozen provisions. *See, e.g.*, RCW 49.60.176 (making "any person" liable for unfair practices in connection with credit transactions); .178 (same as to insurance transactions); 180 (making any "employer" liable for employment discrimination);.222 (making "any person" liable in connection to real estate transactions);.190 (making any "labor union or labor organization" liable for discrimination in union membership); .200 (making any "employment agency" liable for discrimination); 223 (making any "person" liable as to rental or sale of property in a given neighborhood).

We must presume this addition of imputed liability – in just two of a dozen provisions – was intentional and not by accident. *Cf. In re Det. of Williams*, 147 Wash.2d 476, 491, 55 P.3d 597 (2002) (presuming that the use of language in one provision of a statute that differs from another was intentional, applying "expressio unius" canon of statutory construction); *accord Keenfe Corp. v. United States*, 508 U.S. 200, 208, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)) (reasoning that where legislature includes particular language in one section of a statute but

omits it in another, it is presumed that the legislature acts "intentionally and purposely in the disparate inclusion or exclusion.").

Group Health not does explain why this Court should look to agency liability principles developed in one of the fourteen "unfair practices" provisions (section 180) in order to construe WLAD's public accommodation provision (section 215). The logic of adopting common law agency principles in defining the scope of employer liability for workplace discrimination is beyond the scope of what is presented here; suffice it to say that it is not an altogether clear path, albeit one that is well-worn. *See Glasgow*, 103 Wn.2d at 407 n.2 (citing federal appellate decisions construing Title VII as instructive for determining the elements of a sexual harassment claim in the employment context).[11] And, in the employment context, the adoption of various agency principles is not without its critics and problems – namely, inconsistencies from one statutory framework to the next. *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 Wm. & Mary Bill Rts. J. 755, 757

[11] That is, no Washington court has articulated why the WLAD's scope of employer liability should be coterminous with that under Title VII when the text of the two statutes differs in many respects. *Compare* RCW 49.60.040(11) (definition of "employer" includes "any person…who employs….") *with* 42 U.S.C. 2000e(b) ("Title VII") (definition of "employer" includes "a person engaged in an industry affecting commerce … and any agent of such a person…"); *and Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (reasoning that Congress intended the courts to interpret Title VII based on agency principles in light of the fact that "employer" is defined under Title VII to include "agents.").

(1999) (discussing the "puzzle of the inconsistency" for imputing liability and advocating for a simple vicarious liability rule across all civil rights statutes).[12]

The salient fact is that our legislature chose to do something different with respect to treatment members of the public, such as consumers, in places of public accommodation and with respect to those with service animals. Undoubtedly, this is the province of the legislature – to establish standards of conduct and attendant rules of liability in pursuit of public policy and the greater good. *See, e.g., Callan v. O'Neil*, 20 Wn. App. 32, 578 P.2d 890 (1978) (recognizing liability of tavern owner for harm caused by intoxicated minor, reasoning that the legislature proscribed certain conduct, thus establishing a duty different from that at common law); *accord United States v. Park*, 421 U.S. 658, 672-73, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975) (recognizing congressional intent to impose higher standard of care on food sellers, imposing criminal liability even where no awareness of wrongdoing, incentivizing those in position to act to prevent hazards). In drafting section 215 to impute liability to the employer for the employee's unfair practices, the legislature has incentivized companies to take proactive steps to train and supervise their

[12] To add to the confusion, courts acknowledge that "common-law principles may not be transferable in all their particulars to Title VII." *Burlington Indus., Inc.*, 524 U.S. at 755 (quoting *Meritor Savings*, 477 U.S. at 72). But when, why, and how they apply is not always clear; the Court should tread carefully in looking to employment cases as persuasive authority.

rank and file employees – (i.e., the people who actually interact with the customers) – to ensure compliance with the law. *Cf. United Park*, 421 U.S. at 672-73.

A plain language reading of section 215 to allow for vicarious liability also makes sense as applied to real world conditions. Unlike dealings in the workplace, most consumer interactions are fleeting. Take, for example, a lifeguard who levels anti-immigrant, islamophobic insults toward a Somali man and his hijab-wearing daughter. The most likely outcome is that the father will simply take his daughter elsewhere, leaving the lifeguard to repeat her offenses on the next Muslim family. In the very unlikely event the father summons the courage to complain, the very most he will get, according to Group Health, is an apology. Under Group Health's view, the pool owner is never liable for the unquestionably unfair practice of its lifeguard unless she also happens to be the pool manager (i.e., the owner's "agent") or unless upper-management had notice of prior, similar incidents and failed to take action. Absent one of these two conditions, Group Health argues, no liability attaches to the owner no matter how offensive, degrading, or harmful the lifeguard's conduct. Not only does this argument run afoul of the plain language of the imputed-liability provision in the statute, it has the perverse effect of creating a "no liability" rule in the vast majority of cases: consumer encounters will almost always be with rank-and-file employees – clerks, salespeople,

receptionists, servers – and not managers. *Cf. Arguello v. Conoco, Inc.*, 207 F.3d 803, 810 (5th Cir. 2000) (rejecting strict adherence to agency principles in public accommodation context because "a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule."). And it does very little if anything to incentivize owners and operators to train and supervise their staff to avoid harassment.[13]

Moreover, the Court should view any argument that adopting Amici's proposed standard of liability will open the floodgates to lawsuits with a heavy dose of skepticism. The public accommodation provision of the WLAD has existed for over a half-century; and laws protecting against race discrimination in public accommodations go back twice as far. *See Anderson*, 114 Wash. 24. Yet, the dearth of reported cases (and indeed, the fact that this case presents one of first impression) reveals a very serious problem of under-enforcement. That is: there is no reason to believe that discrimination on the basis of race, sex, religion, disability, and the like is any *less* prevalent in our theaters, pools, and coffee shops than it is in our workplaces, but while the latter has led to a vast body of decisional authority, there are by comparison almost no cases vindicating civil rights in places of public accommodations. The reality is, this form of

[13] The concern in *Arguello* for avoiding perverse results is equally warranted here, but this Court is not so constrained by the common law backdrop as the Fifth Circuit was in construing claims under federal civil rights statutes (section 1981 and 1983) which include no such statutory-imputed liability as here.

discrimination, however unconscionable, does not typically bring with it significant monetary damages. Few people will be inclined to endure the stress of litigation for what amounts to a moral victory (particularly by the time the costs of suit are paid). And plaintiffs' attorneys, more often than not paid on contingency, are unlikely to be willing to take on the risk of litigating such claims when the potential for recovery is effectively limited to fees.

In sum, the Court should adopt a standard of liability that tracks the text of the statute, is faithful to Act's purpose of eradicating discrimination and promoting full enjoyment in places of public accommodation, and one that reflects the reality of consumer-type transactions.

D. Discrimination, Including Harassment, Poses Barriers to Accessing Health Care, with Resulting Negative Impacts on Public Health.

Finally, *Amici* respectfully request the Court to consider the specific context of this case: Rev. Floeting was seeking health care services. In the health care context, harassment not only can itself create negative health impacts, but it also can result in denial and/or impairment of access to care in important and harmful ways.

Critically, sexual or other forms of harassment in health care can discourage people from seeking care.[14] For example, a provider who uses

[14] When patients do not feel comfortable as a result of harassment or because of a provider's perceived implicit or explicit bias, they are less likely to get comprehensive

derogatory language when talking to a woman who is unmarried and sexually active or pregnant may create a hostile environment that could keep her from accessing needed reproductive health care.[15]

Discrimination in health care settings can be particularly pronounced when individuals identify with more than one protected class. For example, African American women generally receive lower quality medical services than White women, with disparities in early diagnosis of breast cancer and maternal death rates worsening in recent years.[16] In addition, the percentage of women reporting that their provider did not listen, explain things clearly, respect what they had to say, or spend enough time with them was higher among Black women than White women.[17]

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medical care. *See, e.g.*, Irene Blair et al., Clinicians' Implicit Ethnic/Racial Bias and Perceptions of Care Among Black and Latino Patients, 11 Annals of Family Med. 43, 43 (2013) (finding that "clinicians' implicit bias may jeopardize their clinical relationships with black patients, which could have negative effects on other care processes"); Valerie Ulene, Doctors and Nurses' Weight Biases Harm Overweight Patients, L.A. Times (Dec. 13, 2010), http://articles.latimes.com/2010/dec/13/health/la-he-the-md-weight-bias-20101213 (discussing negative health implications of stigma and bias by providers against obese and overweight patients).

[15] Texas Policy Evaluation Project, Barriers to Family Planning Access in Texas 1 (May 2015), http://www.utexas.edu/cola/txpep/_files/pdf/TxPEP-ResearchBrief_Barriers-to-Family-Planning-Access-inTexas_May2015.pdf (showing that 30% of respondents reported "Don't feel comfortable with healthcare providers" as a barrier to accessing reproductive health care.).

[16] Agency for Healthcare Research & Quality, U.S. Dep't of Health & Human Servs., AHRQ Pub. No. 13-0003, National Healthcare Disparities Report 2012 10-5 (2013), available at http://www.ahrq.gov/research/findings/nhqrdr/nhdr12/nhdr12_prov.pdf.

[17] Agency for Healthcare Research & Quality, U.S. Dep't of Health & Human Servs., AHRQ Pub. No. 12-0006-3-EF, Disparities in Healthcare Quality Among Minority Women: Findings from the 2011 National Healthcare Quality and Disparities Reports 6 (2012), available at https://archive.ahrq.gov/research/findings/nhqrdr/nhqrdr11/minority-women.pdf.

Along with African American and undocumented individuals, many transgender and gender non-conforming individuals also report being verbally, and sometimes physically, harassed in medical settings.[18] A 2010 study found that 70 percent of transgender respondents and nearly 56 percent of lesbian, gay, and bisexual respondents reported experiencing at least one instance of discrimination or patient profiling when attempting to access health services.[19] Further, 28 percent of transgender and gender nonconforming individuals report facing harassment in medical settings, and 19 percent report being refused medical care altogether due to their transgender status."[20] The negative impacts of such discrimination are striking: 48 percent of transgender and gender non-conforming individuals report postponing seeking care when sick or injured and 50 percent report postponing or avoiding preventive care."[21]

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[18] Jaime M. Grant et al., Nat'l Ctr. for Transgender Equal. & Nat'l Gay & Lesbian Task Force, National Transgender Discrimination Survey Report on Health & Health Care 5-6 (Oct. 2010), available at http://transequality.org/PDFs/NTDSReportonHealth_final.pdf. *See also* Nat'l Ctr. for Transgender Equal., Report of the 2015 U.S. Transgender Survey, available at http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF (reporting survey results showing that in the past year, 23% of respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person).

[19] Lambda Legal, When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV 5 (2010), available at http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf

[20] *See* Jaime M. Grant et al., Nat'l Gay & Lesbian Task Force & Nat'l Ctr. for Transgender Equal., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 72 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

[21] *Id*. at 76.

Patients often do not have much choice in providers or health systems. Indeed, most health insurance covers care for its insured that is limited to a network of providers. Thus, they are in effect a captive audience for services that can literally have life or death consequences.

Because of the potentially low monetary damages involved – one may be tempted to diminish the significance of discriminatory conduct in places of public accommodation. As this discussion about access to health care reveals, discrimination in the provision of services has implications beyond dignitary harm. Indeed, Floeting could not simply "shop" elsewhere for the services he needed, nor should the law require him to.

V. CONCLUSION

Our legislature recognized long ago that the evil of discrimination "menaces the institutions and foundation of a free democratic state." RCW 49.60.010. The Court has the opportunity to announce a standard of liability for what constitutes harassment in a place of accommodation and who is liable for such misconduct. In doing so, Amici urge the Court adopt a standard of liability that draws from the definition of workplace harassment where appropriate, but avoids the miasma of that body of law where it is not. To do otherwise frustrates the purpose of the Act to promote full participation in public life and in the marketplace, regardless of a person's gender, the color of her skin, the place of her birth, the god she worships, the service animal by her side.

Respectfully submitted this 12th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I caused a copy of the foregoing to be delivered via E-Mail and U.S. Mail, postage, pre-paid, to the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated: December 12, 2016, at Seattle, Washington.

s/Darla Moran
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