No. 97630-9
[W.D. Wash. No. C16-5237 BHS]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERT DISTRICT OF WASHINGTON

W.H., as guardian for her minor daughter, P.H.; W.H., individually; J.H., individually; B.M., as guardian for her minor daughter, S.A.; and B.M., individually,

Plaintiffs,

v.

OLYMPIA SCHOOL DISTRICT, a public corporation; JENNIFER PRIDDY, individually; FREDERICK DAVID STANLEY, individually; BARBARA GREER, individually; WILLIAM V. LAHMANN, individually; and DOMINIC G. CVITANICH, individually,

Defendants.

BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Defense Trial Lawyers (WDTL), established in 1962, includes more than 750 attorneys who practice civil-defense litigation in Washington. Its purpose is to promote the highest professional and ethical standards for Washington civil-defense attorneys and to serve its members through education, recognition, collegiality, professional development, and advocacy. One important way WDTL represents its members is through amicus-curiae submissions in cases that present issues of statewide concern to Washington civil-defense attorneys and their clients. This certified-question case implicates significant concerns for WDTL and its members about the scope of the Washington Law Against Discrimination's public-accommodation statute, RCW 49.60.215. More specifically, this case implicates this Court's case-law approach to resolving disputes about whether the Legislature intended "children" or "age" as a class to be entitled to the protection against discrimination in public accommodations.

II. SUMMARY OF ARGUMENT

Since statehood, protections against discrimination have come from the Legislature—not the courts. In the face of the United States Supreme Court's gutting of federal statutory protections against discrimination over a century ago, our first Legislature enacted a civil-rights statute criminalizing the denial of access to public accommodations based on race, color, or nationality. Washington courts offered no protection against discrimination under the common law. But they did allow damages actions

to be brought for discrimination that fell within the scope of the prohibition set forth in the Legislature's first civil-rights statute.

Sixty years later, the Legislature expanded its protection against discrimination by enacting the Washington Law Against Discrimination (WLAD). The WLAD prohibited discrimination in employment based on race, creed, color, or national origin. The Legislature created and empowered an administrative agency to administer and to enforce the law. This new protection against employment discrimination was to be secured through a process of negotiation, conciliation, and persuasion, and if necessary by decrees following an adversary hearing before the agency. Eight years later, the Legislature expanded the WLAD to add a ban on discrimination in public accommodations, which also would be secured by the same administrative processes set up to secure the statute's ban on employment discrimination. While the Legislature did not initially provide for a private right of action under the WLAD, damages actions against public-accommodation discrimination remained available for violations of the first civil-rights statute. The Legislature eventually added a private right of action for WLAD violations in 1973. And over the years it has expanded the scope of the classes protected against employment and public-accommodation discrimination by adding to the original four classes through a series of amendments additional protected classes to the statute's employment and public-accommodation prohibitions.

The job of the Washington courts in the field of antidiscrimination law is to interpret the statutes enacted by the Legislature so as to effectuate

their intended scope. Whether a party may pursue a claim under the WLAD for public-accommodation discrimination depends first and foremost on whether the party is a member of a class designated by the Legislature as entitled to the protection against discrimination.

This is a matter of legislative intent, and it is this Court's responsibility to determine that intent by applying our state's well-established context rule of statutory interpretation. This Court "must not add words where the legislature has chosen not to include them."[1] "It is not up to this court to rewrite . . . [a] statute nor to construe it free of the legislature's plainly expressed meaning."[2] Applying the context rule here compels the conclusion that the Legislature did not intend "age" or "children" to be classes protected against discrimination in public accommodations.

III. STATEMENT OF THE CASE

WDTL adopts the statement of the case as set forth in Defendants' Brief on Certified Questions.

IV. ARGUMENT

The District Court permitted the Plaintiffs to file an amended complaint to add a claim under the WLAD's public-accommodation statute after this Court issued its decision in *Floeting v. Group Health Cooperative*,

[1] *State v. Arlene's Flowers*, 193 Wn.2d 469, 509, 441 P.3d 1203 (2019) (interpreting the scope of the WLAD's public-accommodation protections) (internal quotation marks and citations omitted).

[2] *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 115, 75 P.3d 497 (2003).

192 Wn.2d 848, 434 P.3d 39 (2019). ER 89-99. Plaintiffs alleged the District could be liable for discrimination in public accommodations under RCW 49.60.215 based on *Floeting*. ER 255. The scope of RCW 49.60.215 is the issue before this Court.

A. Statutory interpretation is a question of law reviewed de novo. Washington courts resolve the issue of legislative intent by applying the context rule of statutory interpretation.

This Court reviews the interpretation of a statute de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). This Court's objective when interpreting a statute is to ascertain and to carry out the Legislature's intent. *Id.* at 9-10. If a statute's meaning is plain, this Court must "give effect to that plain meaning as an expression of legislative intent." *Id.* Whether a statute's meaning is plain is determined by examining the statute's "context," which requires examining the statute as a whole as well as related statutes. *Id.* at 11.

B. Since statehood, the Legislature has been the source of Washington-law protections against discrimination, through the enactment of statutes that prohibit discrimination in employment and in public accommodations against specified protected classes.

Even before the Congress passed a federal civil rights act in 1875, several states had enacted statutes prohibiting discrimination in public accommodations. Wallace F. Caldwell, *State Public Accommodation Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841, 851 (1965). These statutes prohibited discrimination based on race and color in places that provided certain essential goods and services. When the

Supreme Court of the United States invalidated the public-accommodations sections of the 1875 Civil Rights Act, *see Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), the protection of persons of color in public accommodations was left to the states. *See* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 239 (1978).

The common law in Washington did not protect against discrimination in public accommodations. *Anderson v. Pantages Theater Co.*, 114 Wash. 24, 26-27, 194 P. 813 (1921); *Powell v. Utz*, 87 F. Supp. 811, 814 (E.D. Wash. 1949). At common law, private businesses were allowed freely to refuse service to anyone. *Anderson*, 114 Wash. at 27. In our state, the first Legislature filled this void by enacting a civil-rights statute criminalizing the denial of access to public accommodations based on race, color, or nationality. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 243-44, 59 P.3d 655 (2002). Twenty years later, the Legislature expanded the scope of what constituted places of public accommodation subject to the statutory bar against discrimination. *Id.* (citing *Powell*, 87 F. Supp. at 815).[3] In turn, this Court allowed persons of color to sue for civil damages when denied access to public accommodations subject to the statutory prohibition. *Anderson*, 114 Wash. at 26-28 (affirming the judgment and holding that a

[3] The language in the statute codified in 1909 reads substantially similar to how the current statute reads today. *Compare* LAWS OF 1909, ch. 249, § 434, *with* RCW 9.91.010(2).

theater was a place of public accommodation); *Randall v. Cowlitz Amusements*, 194 Wash. 82, 83-86, 76 P.2d 1017 (1938) (same); *see also In re Johnson*, 71 Wn.2d 245, 252, 427 P.2d 968 (1967) (holding that a barber shop was a place of public accommodation).

A year after this Court decided *Anderson*, it took a narrow view of what qualified as a place of public accommodation and held that a soda fountain inside a pharmacy was not one. *Goff v. Savage*, 122 Wash. 194, 198, 210 P. 374 (1922); *see also Finnesey v. Seattle Baseball Club*, 122 Wash. 276, 279, 210 P. 679 (1922) (suggesting that a baseball park was not a place of public accommodation). The Legislature responded by further expanding the scope of public accommodations subject to its original statutory bar against discrimination. LAWS OF 1953, ch. 87, § 2 (codified at RCW 9.91.010). That amendment undid the restrictive interpretations of "public accommodations" adhered to by this Court in *Goff* and *Finnesey*. *See Browning v. Slenderella Sys. of Seattle*, 54 Wn.2d 440, 445, 341 P.2d 859 (1959).

Four years after the end of World War II, the Legislature enacted the WLAD, outlawing employment discrimination based on race, creed, color, or national origin. *Fraternal Order*, 148 Wn.2d at 244 (citing LAWS OF 1949, ch. 183, §§ 1, 2, 7).[4] Initially the Legislature did not provide a private

[4] There can be no doubt that the Legislature was responding to the developing sea change in American race relations that began to take shape during the fight to defeat the openly racist, white-supremacist regime of Nazi Germany. By the time of the WLAD's enactment, the federal government was beginning to take its first, albeit hesitant, steps to oppose employment discrimination based on race or color. But the WLAD went much further, and it would not be until the passage of the Civil Rights Act of 1964 that federal law would catch up to Washington state law.

right of action for those injured by violations of the WLAD. *Id.* at 245. It instead created and empowered an administrative agency to administer and to enforce the WLAD's provisions. LAWS OF 1949, ch. 183, §§ 1, 4, 5, 8; *see also* Note, *Washington Legislation—1957*, 32 WASH. L. REV. 185, 185-86 (1957) (attached as Appendix A). These administrative procedures secured the civil rights of the statutorily recognized protected classes through negotiation, conciliation, and persuasion, and if necessary through decrees entered after adversary hearings held before the agency. *Browning*, 54 Wn.2d at 446. Eight years later, the Legislature expanded the WLAD to add a ban on discrimination in public accommodations, codified at RCW 49.60.215. *See Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

Because the WLAD did not initially provide for a private right of action, an aggrieved person wanting to sue for civil damages for discrimination in public accommodations had to bring a damages action based on a violation of the state's original civil-rights act. *Browning*, 54 Wn.2d at 445-46; LAWS OF 1957, ch. 37, § 2 (noting that the WLAD did not deny the right to any person to pursue any civil or criminal remedy based on an alleged violation of civil rights). Otherwise the person could proceed under the WLAD's administrative procedures. Then, in 1973, the Legislature established a private right of action under the WLAD to remedy violations of the general civil right to be free from discrimination and unfair practices. *Fraternal Order*, 148 Wn.2d at 247; LAWS OF 1973, ch. 141, § 3. The Legislature had already, by a series of amendments, begun the process

of extending the WLAD's protection against discrimination in employment and public accommodations beyond the original four classes enumerated in 1949; tellingly, "age" was added in 1961 to the classes protected against employment discrimination, but not to the classes protected against public-accommodation discrimination. *See Kilian v. Atkinson*, 147 Wn.2d 16, 34, 50 P.3d 638 (2002) (Madsen, J., concurring).

Throughout this process, the Washington courts did not independently contribute to the developing fight against discrimination. As this Court acknowledged nearly a century ago, if the issue had been left to the common law, persons of color subjected to discrimination would have been left with no remedy. *Anderson*, 114 Wash. at 26-27. Fortunately, from the beginning of statehood, the Legislature did not leave the matter to the common law, and over the decades the result has been a formidable statutory structure providing wide-ranging protection against discrimination for an array of classes. But it is a statutory structure—a reflection of a public policy shaped by the legislative branch of our state government. So it is the Washington courts' duty to give effect to the Legislature's intended scope of those protections.

C. The Legislature has never recognized "age" or "children" as classes protected against public-accommodation discrimination under the WLAD. This Court should honor that legislative decision and leave to the Legislature whether to extend that protection to either class.

The WLAD recognizes that the right to be free from discrimination is a civil right enforceable in private civil actions, but only for "members of

the enumerated protected classes." *Fraternal Order*, 148 Wn.2d at 237. A prima-facie case of discrimination in public accommodations requires plaintiffs first to prove that they are members of a protected class. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996). As explained below, the WLAD recognizes neither "age" nor "children" as a protected class in RCW 49.60.215.

Since banning discrimination in public accommodations based on race, creed, color, or national origin over seven decades ago, the Legislature has since amended RCW 49.60.215 eleven times and added six additional protected classes: sex; sensory, mental, or physical disability; sexual orientation; honorably discharged military status, breastfeeding-mother status; and the use of a trained dog guide or service animal by a person with a disability. But it has never amended RCW 49.60.215 to add age or children as classes protected against public-accommodation discrimination.

The negative-implication rule of statutory construction, also known as *expressius unius*, supports the conclusion that the Legislature has never intended age or children to be classes protected against public-accommodation discrimination. Under that canon, the expression of one thing in a statute implies the exclusion of others. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012). "Omissions are deemed to be exclusions." *Wash. State Dep't of Transp. v. Mullen Trucking 2005, Ltd.*, ___ Wn.2d ___, 451 P.3d 312, 320 (2019); *see also* SCALIA & GARNER, at 93 ("Nothing is to be added to what the text states or reasonably implies . . . . [A] matter not covered is to

be treated as not covered."). The Legislature initially created four protected classes under RCW 49.60.215: race, creed, color, and national origin. LAWS OF 1957, ch. 37, § 14. Over the last six decades, the Legislature has amended the statute eleven times and added six additional protected classes—none of which include children or age.[5] Plus, the Legislature has included "age" and "families with children status" as protected classes in other provisions of the WLAD,[6] but it has not chosen to do so in RCW 49.60.215, despite the many opportunities to amend the statute. When the Legislature "includes particular language in one section of a statute but omits it in another, the exclusion is presumed intentional." *Perez-Cristanos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 680, 389 P.3d 476 (2017).

The administrative agency created by the Legislature, now known as the Human Rights Commission, was empowered to promulgate rules and regulations to carry out the provisions of chapter 49.60 RCW. *Wash. Water Power Co. v. Wash. State Human Rights Comm'n*, 91 Wn.2d 62, 67, 586 P.2d 1149 (1978). These interpretive regulations are also consistent with the conclusion that the Legislature did not intend for either age or children

[5] *See, e.g.*, LAWS OF 1979, ch. 127, § 7 (adding "the presence of any sensory, mental, or physical handicap" or "the use of a train dog guide by a blind or deaf person"); LAWS OF 1985, ch. 203, § 1 (adding "sex"); LAWS OF 1993, ch. 510, § 16 (adding "the use of a trained . . . service dog by a disabled person"); LAWS OF 2006, ch. 4, § 13 (adding "sexual orientation"); LAWS OF 2007, ch. 187, § 12 (adding "honorably discharged veteran or military status"); LAWS OF 2009, ch. 164, § 2 (adding "status as a breastfeeding her child"); *see also* RCW 49.60.175 (refusing to include "age" or "children" as a protected class); RCW 49.60.176 (same); RCW 49.60.178 (same).

[6] *See* RCW 49.60.180 (age); RCW 49.60.190 (same); RCW 49.60.200 (same); RCW 49.60.205 (same); RCW 49.60.222 (families with children status); RCW 49.60.223 (same); RCW 49.60.224 (same).

to be protected classes under RCW 49.60.215. Most notably, the Commission has not classified either age or children as classes having a protected status for schools as public accommodations under RCW 49.60.215. WAC 162-28-030. This Court has traditionally given great weight to the views of the Commission, when determining the scope of the protections of the WLAD, precisely because doing so is consistent with vindicating the structure for protections against discrimination intended by the Legislature. *See Marquis*, 130 Wn.2d at 111-12 (giving weight to the views of the Commission in holding that an independent contractor is not protected by the employment-discrimination provisions of the WLAD).

1. "Age" is not a class protected against public-accommodation discrimination under the WLAD.

RCW 49.60.215 does not list "age" as a protected class. *See Kilian*, 147 Wn.2d at 22 (holding that age is not listed as a protected class under RCW 49.60.030(1)).[7] The WLAD prohibits age discrimination in the employment context, RCW 49.60.180; in the labor-unions context, RCW 49.60.190; and in the employment-agency context, RCW 49.60.200, but only when the individual is at least 40 years old. *Compare* RCW 49.60.205 ("No person shall be considered to have committed an unfair practice on the basis of age discrimination unless the practice violates RCW 49.44.090."),

[7] *See also Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 311-13, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (holding that "age" is not a suspect or quasi-suspect class); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) (reaffirming and extending *Murgia* by holding that the states may discriminate based on "age" if the age classification is rationally related to a legitimate state interest).

with RCW 49.44.090 (requiring an individual to be at least 40 years of age for an age-discrimination claim); *see also* Wash. AGO 1976 No. 17, 1976 WL 168501, at *1 (analyzing the WLAD and concluding that it is not contrary to the WLAD for a person to discriminate on the basis of age in selecting a roommate); RCW 49.60.030(1) (declining to list "age" as a protected class in the WLAD's declaration of civil rights). Since the Legislature enacted RCW 49.60.215 sixty-three years ago, it has added age to several provisions of the WLAD,[8] but not to the provision barring discrimination in public accommodations. In those sixty-three years, the Legislature has amended RCW 49.60.215 eleven times; at none of those times did it amend the statute to add age as a protected class.

The "general/specific" canon of statutory implication reinforces the conclusion that the Legislature did not intend age to be a class protected against public-accommodation discrimination. Under that canon, when a conflict arises between a general provision and a specific provision, the specific provision prevails. SCALIA & GARNER, at 183. The WLAD contains a general policy statement declaring that discriminatory practices based on age are wrong and harmful and should be prevented and eliminated. RCW 49.60.010. It also contains a specific provision prohibiting discrimination in public accommodations—the same statute the Plaintiffs base their discrimination claim on. RCW 49.60.215. That

[8] *See* RCW 49.60.010 (LAWS OF 1973, ch. 141, § 1); RCW 49.60.020 (LAWS OF 1973, ch. 141, § 2); RCW 49.60.180 (LAWS OF 1961, ch. 100, § 1); RCW 49.60.190 (LAWS OF 1961, ch. 100, § 2); RCW 49.60.200 (LAWS OF 1961, ch. 100, § 3); RCW 49.60.205 (prohibiting age discrimination in employment, enacted in 1985).

provision does not include age as a protected class. *See Kilian*, 147 Wn.2d at 24 ("Simply because 'age' is included in the statement of purpose under RCW 49.60.010 does not support insertion by the court of 'age' in the list of protected classes specified in RCW 49.60.030(1)."). A "specific provision controls over one that is general in nature." *Miller v. Sybouts*, 97 Wn.2d 445, 448, 645 P.2d 1082 (1982). And a statutory policy statement has no operative force and "cannot trump the plain language of the [controlling] statute." *State v. Granath*, 190 Wn.2d 548, 556, 415 P.3d 1179 (2018).

This Court is not writing on a blank slate here. On a certified question from a federal district court, this Court concluded nearly twenty years ago that an age-discrimination claim under the WLAD could not be asserted by an independent contractor. In *Kilian*, an independent contractor attempted to assert a WLAD claim for age discrimination against the City of Chelan, after the city refused to renew the contractor's right to operate a bumper-boat business. 147 Wn.2d at 18-19. The claimant relied on RCW 49.60.030, which is the WLAD's declaration of the right to be free of discrimination. Justice Smith's plurality opinion for the Court (joined by Justices Bridge and Owens) rejected the claim. Remarking that "age" was not listed as a protected class in .030, the plurality went on to observe that the Legislature had amended RCW 49.60.030 ten times but had never chosen to add "age" to the protected classes listed there:

> If we were to add 'age' to the list of protected classes under RCW 49.60.030, we would be inappropriately engaging in legislation. An amendment to add 'age' to that statute is a matter solely for the

> Legislature. Despite at least 10 amendments since 1949, it has chosen not to do so.

Id. at 29.

Justice Madsen, in a concurring opinion joined by Chief Justice Alexander and Justice Johnson, agreed that the Legislature did not intend to include "age" as a class protected under RCW 49.60.030. Unlike in RCW 49.60.030, the Legislature chose deliberately to add "age" as a protected class in several other provisions of the WLAD. *Id.* at 33-34. Justice Madsen refused to "rewrite the statute to include a class the Legislature has not included." *Id.* at 34 (noting that this "court should not presume the Legislature simply overlooked including 'age' as a classification entitled to protection under RCW 49.60.030(1)").[9]

Justice Chambers dissented. He would have resolved the issue by focusing on the open-ended language of RCW 49.60.010 (the statute's general statement of purpose) and the "not be limited to" phrase found in RCW 49.60.030(1). *See id.* at 36-37. From these provisions, he would have found an ambiguity that, in his view, licensed the court in the name of effectuating the WLAD's remedial purpose to import into .030 "age" as a further protected class, thus allowing the independent contractor's claim to proceed. *See id.* at 37-38.

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[9] Although Justice Smith's opinion was joined by only two of his colleagues, and Justice Madsen stated in her concurring opinion that she was reaching the same result "by an alternate route," 147 Wn.2d at 29, on the point relevant to the issue now before this Court Justice Smith and Justice Madsen were in accord. They both focused on the Legislature's evident decision not to add "age" to the classes protected by RCW 49.60.030, despite numerous opportunities to do so. The situation at issue here about the public-accommodations provision of the WLAD is identical.

A six-Justice majority of this Court rejected Justice Chambers' approach. But of even greater importance to the issue now before this Court is that Justice Chambers' approach failed to give the weight due to the context of the WLAD. The WLAD does not stand in isolation, like the typical "remedial" statute. The WLAD represents a stage in the Legislature's long-evolving policy against discrimination. That policy has been developing ever since the first Legislature enacted a civil-rights act to fill the gap left by the United States Supreme Court's abrogation of federal protection against discrimination in public accommodations in 1883. Properly applying our state's context rule of statutory interpretation must account for the evolutionary nature of the Legislature's policy against public-accommodation discrimination. Justice Smith's and Madsen's opinions in *Kilian* gave due weight to this context; Justice Chambers' dissent did not.

Juxtapose the Legislature's inaction following *Kilian* with its action following this Court's decision in *MacLean v. First Nw. Indus. of Am., Inc.*, 96 Wn.2d 338, 635 P.2d 683 (1981). In *MacLean*, the majority stated in dictum that the WLAD protected against sex discrimination in public accommodations, even though "sex" was not a protected class expressly listed under former RCW 49.60.040. *Compare id.* at 344 ("[W]e assume that the omission of any reference to sex in the definition of full enjoyment was inadvertent."), *with id.* at 349 (Utter, J., dissenting) ("[RCW 49.60.215] is like [former] RCW 49.60.040 in that both fail to mention sex. But, regarding [former] RCW 49.60.040, the majority concludes the omission

must have been inadvertent and accordingly reads it into the statute."). The Legislature recognized the need to fix the problem by doing what it had done before and adding "sex" to the list of classes protected, and it did just that four years later. *See* LAWS OF 1985, ch. 203 §§ 1, 2. This confirms that whether a class is protected under the WLAD is a matter of whether it has been designated for protection by the Legislature. The legislative-amendment process is how the Legislature has decided what classes get protected under the WLAD.

As this Court recognized in *Kilian*, the Legislature had chosen not to recognize "age" as a protected class under RCW 49.60.030(1). It still has not done so. And nor should this Court do so under the guise of statutory construction. *Kilian*, 147 Wn.2d at 29.

2. "Children" are not a class protected against public-accommodation discrimination under the WLAD.

Nor did the Legislature add children as a protected class in any of the WLAD's provisions. The closest the WLAD comes to protecting children is prohibiting discrimination based on "families with children status." RCW 49.60.222, .223, .224 (prohibiting such discrimination only in the real-property context); *see also* RCW 49.60.040(13) (defining "families with children status"). But the controlling statute here, RCW 49.60.215, does not list "families with children status" as a protected class. And it likewise has not designated "being a child," "being under the age of majority," or "being a minor" as a protected class under RCW 49.60.215.

A group seeking protected-class status must demonstrate political powerlessness or minority status; obvious, immutable, or distinguishing characteristics defining a discrete group; and a history of discrimination. *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527 (1986). Both the United States Supreme Court and this Court have held that children are not a suspect or quasi-suspect class.[10] "Holding that . . . children are a suspect class would hamstring governmental decision-making, potentially foreclosing even run-of-the-mill decisions such as prioritizing construction of a new senior center over construction of a new playground or allocating state money to veterans' healthcare rather than to the public schools." *Juliana v. United States*, 339 F. Supp. 3d 1062, 1103 (D. Or. 2018), *dismissal directed on standing grounds*, ___ F.3d ___, 2020 WL 254149 (9th Cir. 2020). "Applying strict scrutiny to every governmental decision that treats young people differently than others is unworkable and unsupported by precedent." *Id.*

> Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

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[10] *See, e.g.*, *Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000); *In re Boot*, 130 Wn.2d 553, 572-73, 925 P.2d 964 (1996); *State v. Schaaf*, 109 Wn.2d 1, 18-19, 743 P.2d 240 (1987); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). As far as counsel for the WDTL has been able to discover, "[n]o cases have ever held . . . that children are a suspect class." *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) (declining to hold that children are a suspect class).

Cleburne, 473 U.S. at 472-73 n.24 (Marshall, J., concurring in part and dissenting in part).

The Legislature's refusal to grant children a protected-class status under the WLAD merely recognizes that places of public accommodation routinely discriminate when it comes to children. And for good reason. For instance, a municipality may impose curfews on children to protect the public safety. RCW 35.21.635. Businesses charge lower admission prices, or none at all, to the junior and the senior. Amusement parks may impose height restrictions on certain attractions. Children are prohibited from buying alcohol or tobacco products. And children aged 5 through 20 may receive a free public education. *Tunstall*, 141 Wn.2d at 210 (citing RCW 28A.150.220(5)(a)).

No court—let alone our Legislature—has ever recognized "children" as a protected class. If recognized, it would dramatically expand the reach of the WLAD beyond what our Legislature intended and eliminate salutary reasons allowing differing price treatment for children, which for decades has given children better access to public accommodations. It would threaten not just museums but also golf courses, movie theaters, sporting events, and the like.

That the Legislature has not accorded children protected-class status anywhere in the WLAD should end the debate. "It is not the role of the judiciary to second-guess the wisdom of the legislature[.]" *Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010). This Court has routinely stated that it will "not read into a statute matters that are not in it and may not

create legislation under the guide of interpreting a statute." *Kilian*, 147 Wn.2d at 21. An omission does "not justify judicial legislation." *Ebert v. Poston*, 266 U.S. 548, 554, 45 S. Ct. 188, 69 L. Ed. 435 (1925). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566 (1926). To do so here would frustrate the WLAD's plain language and upset the historical role our Legislature has instrumentally played for over 130 years in regulating our state's antidiscrimination laws.

Lastly, our intermediate appellate courts have consistently and correctly refused to recognize protected classes not listed expressly under the WLAD. *See, e.g.*, *Rocha v. King County*, 7 Wn. App. 2d 647, 435 P.3d 325 (2019) (holding that the WLAD does not recognize "economic status" as a protected class); *Davis v. Fred's Appliance*, 171 Wn. App. 348, 361, 287 P.3d 51 (2012) (holding that the WLAD does not recognize "perceived sexual orientation" as a protected class). Because the WLAD does not recognize children as a protected class under RCW 49.60.215, this Court should refuse to recognize them as a protected class here.

D. A public-accommodations-discrimination claim based on sex discrimination under the WLAD is not actionable when the former employee abused both boys and girls.

The District Court declined to certify the question of whether the Plaintiffs will be able to prove sex discrimination because discovery was still ongoing on the issue whether the former employee sexually abused both male and female children. ER 263. Yet it also stated that this Court should consider itself free to reach that issue. ER 263.

Federal law would not support a sex-discrimination claim where the wrongdoing has extended to members of both genders. *See*, *e.g.*, *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 516-17 (7th Cir. 1996) (holding in the Title VII context that harassment inflicted equally on both genders is not actionable "because the harassment is not based on sex"); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (stating in the Title VII context that harassment would not be based on sex when both genders are accorded like treatment); *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 394-95 (E.D. Penn. 2017) (same in the Title IX context). No valid textual basis exists for concluding that the Legislature would not follow these federal examples.

V. CONCLUSION

This Court should answer the certified questions in the negative and hold that neither "age" nor "children" are protected classes under RCW 49.60.215 and that a public-accommodation-discrimination claim based on sex is not actionable when both genders are equally abused.

Respectfully submitted: January 27, 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury pursuant to the State of Washington that I caused to be filed and served a copy of the foregoing AMICUS CURIAE BRIEF FROM WASHINGTON DEFENSE TRIAL LAWYERS on the 27th day of January, 2020 as follows:

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Executed this 27th day of January, 2020.

S/ Rozalynne Weinberg
Rozalynne Weinberg, Legal Assistant

APPENDIX A

WASHINGTON LAW REVIEW

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CIVIL RIGHTS

Administrative Prevention of Racial Discrimination—Its Expansion to Most Real Property and Business Transactions. By Chapter 37, Session Laws of 1957, the Washington legislature greatly expanded the scope of administrative control and enforcement of the prevention of discrimination on account of race, creed, color or national origin. Until now, that control had been only in employment; henceforth it extends to places of public resort (defined most liberally) and to publicly-assisted housing (again defined most liberally).

Administrative control in this area was first provided in Washington in 1949, when the Board Against Discrimination in Employment was created. In the seven years of its existence, the board has made steady progress in the employment field. Education, conciliation and persuasion so far have been the means used by the board for effectuating the purposes of the legislation. For example, the annual report of the board for 1956 shows the handling of 274 "formal" and 143 "informal" complaints since 1949, and of the 148 complaints upon which affirmative action was taken, all were disposed of by conciliation. Mr. Alfred Westberg, Chairman of the Board, informs us that no case has yet gone to the stage of formal administrative hearing, much less to court.

The administrative board has now been granted, by this 1957 legislation, an enormously broader field; significantly, its name is now simply the Board Against Discrimination. Except for the expansion in coverage, however, the purposes and method of operation of the board remain basically unchanged. In general, the statute now, as it did before, provides elaborate definitions of essential terms, machinery for conduct of the board's business, and administrative remedies to the person who, after filing his complaint with the board, is found to be the victim of discrimination. These remedies may include the application of the board's efforts in working with the alleged offender by conference, conciliation and persuasion, and then, failing that, the issuance of orders to cease and desist from specified unfair practices, including such affirmative relief as requiring hiring, reinstatement or up-grading of employees, requiring admission or restoration of a complainant to membership in an organization, or requiring such other action as will effectuate the purposes of the legislation. Provisions are made for opportunity to the complainant and the alleged offender to

be heard, with right of counsel, for the board to require compulsory attendance of witnesses, and for superior court review of administrative decisions. Although the findings of the administrative tribunal are to be conclusive if supported by substantial and competent evidence, the reviewing court may admit additional evidence if believed necessary for proper decision.

The first major addition to the coverage is the subjection of places of "public resort, accommodation, assemblage or amusement" to the application of administrative relief and control.

For sixty-seven years there has been a criminal statute on the books making it a misdemeanor to discriminate in places of public accommodation.[1] In 1909 the present language appeared, *i.e.*, "public resort, accommodation, assemblage or amusement".[2] What constitutes such a place of public resort? The quoted language, as it appeared in the 1909 statute, was interpreted by the Washington Supreme Court to include a theatre,[3] but not a soda fountain in a drug store.[4] Then, in 1953, the legislature amended the criminal statute by providing, still as a criminal statute,[5] a detailed definition of this same phrase, greatly expanding the previous conception, and extending the meaning of these terms far beyond their dictionary definition. Although we must admit a certain lack of confidence in our analysis because of ambiguity in the statute, we set forth the scope of this new definition of a place of public resort:

It includes (but is not limited to) any public place, being or having the following attributes:

a) being kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted
    1) for the entertainment, housing or lodging of transient guests or for the benefit, use or accommodation of those seeking health, or rest, or
    2) for the sale of goods and merchandise, or
    3) for the rendering of personal service, or
    4) for public conveyance or transportation, or
b) where food or beverages are sold for consumption on the premises, or

[1] Wash. Sess. Laws 1889-90, c. 16, p. 524.
[2] Wash. Sess. Laws 1909, c. 249, § 434.
[3] Anderson v. Pantages Theatre Co., 114 Wash. 24, 194 Pac. 813 (1921).
[4] Goff v. Savage, 122 Wash. 194, 210 Pac. 374 (1922).
[5] RCW 9.91.010.

c) where public amusement, entertainment, sports or recreation is offered with or without charge, or
d) where medical service or care is made available, or
e) where the public gathers for amusement, recreation or public purposes, or
f) places constituting public halls, public elevators, public washrooms of buildings occupied by two or more tenants (or landlord plus one or more tenants), or
g) any public library or educational institution wholly or partially supported by public funds, or
h) schools of special instruction, or nursery schools, or day care centers, or children's camps.

This criminal statute excludes from its reach any "institute," bona fide club, or place of accommodation which is by its nature distinctly private, though where public use is permitted that use is to be covered. It also excludes any educational facility operated or maintained by a bona fide religious or sectarian institution.

In the 1957 legislation affording administrative protection to prospective patrons of places of "public resort" this same definition, with some changes, has been carried along. The changes referred to are:

a) The definition no longer is prefaced with the phrase, "any public place;" now it reads merely, "any place."
b) It expands the previous phrase, "for the sale of goods and merchandise" (see item a-2, above), to include sales of "services and personal property."
c) It removes from the classification of "any public library or educational institution" (see item g, above) the qualification that it must be wholly or partially supported by public funds.
d) It specifically includes fraternal organizations among those places which are exempt from the provisions of the legislation.

Needless to say, with this comprehensive and sweeping definition of a place of "public resort," the old *Goff* decision which refused to classify the soda fountain in the drug store as within the definition has passed into limbo. Viewed in a more realistic manner, the definition, like that of admissible hearsay, might better have been expressed in the converse terms of including everything, with specific exceptions—merely that every place is within the definition except the private club, the private "institute," the religious school, that real property which is not included in the "publicly-assisted housing" described below, the business loca-

tion which is disassociated from transactions with the customer, and the private home.

The second major addition to the coverage is the extension of the board's power to the sale, use and financing of "publicly-assisted housing." This phrase too enjoys a very elaborate and sweeping definition. It includes any building used or to be used for the residence or sleeping quarters of one or more persons the acquisition, construction, rehabilitation, repair or maintenance of which is either (a) financed by a loan guaranteed or insured by the federal or state governments or any agency thereof, so long as such loan remains so guaranteed or insured, or (b) subject to an outstanding commitment for such loan.

It should be pointed out that the 1957 legislation is in addition to, and not in substitution of, other enforcement measures in the civil rights area. There yet remain, for example, the criminal sanctions applicable to places of "public resort" as discussed above. Also, the person aggrieved by discriminatory practices in violation of the criminal statute has still a right to civil damages from the offender, as illustrated by the case cited earlier.[6] One qualification must here be observed: The 1957 legislation providing for administrative enforcement does require the aggrieved person to make an election of his remedies—of civil recovery or of administrative assistance. The details of the election are not specified, but it is to be presumed that either the commencement of the civil action or the filing of the complaint for administrative relief would constitute such an election.

The implications and scope of application of the administrative power as thus created in this 1957 legislation are, of course, awesome. The ideals of equality of treatment are thus brought much closer to the lives of all than most persons may have realized or, for that matter, than many may wish to realize. For example, every home upon which there is an FHA loan, nay, even an FHA commitment for a loan, is now subject to the board's power. And this power apparently includes the specific enforcement of real estate transactions which would have been entered into but for the race, creed, color or national origin of the prospective purchaser.

CRIMINAL LAW

Perjury by Deposition—An Abortive Re-Definition. Chapter 46, Session Laws of 1957, re-defining perjury, is the child of an unfortunate 1938 supreme court decision and the belated labor of a confused 1957

[6] See footnote 3, *supra.*

CARNEY BADLEY SPELLMAN

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