No. 56455-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHEILA LAROSE,

Respondent,
v.

KING COUNTY, WASHINGTON,

Appellant,
And

PUBLIC DEFENDER ASSOCIATION
D/B/A THE DEFENDER ASSOCIATION (TDA),

Defendant.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY THE NATIONAL WOMEN'S LAW CENTER, WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, AND 38 ADDITIONAL ORGANIZATIONS

Cassandra Lenning, WSBA #54336
OUTTEN & GOLDEN LLP
1225 New York Ave NW, Ste 1200B
Washington, DC 20005
Tel: (202) 847-4400

Elizabeth Vogel
Liz Maria Chacko
Sunu P. Chandy
Jennifer L. Mondino
Gaylynn Burroughs
Emily Martin

Kendall Onyendu
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
Tel: (212) 245-1000

NATIONAL WOMEN'S LAW CENTER
1350 I St NW, Suite 700
Washington, DC 20005
Tel: (202) 588-5180

Attorneys for National Women's Law Center

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L. NEEDLE
705 Second Avenue, Suite 1050
Seattle, WA 98104
Tel: (206) 447-1560

Attorney for Washington Employment Lawyers Association

38 ADDITIONAL AMICI CURIAE

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A Better Balance
American Medical Women's Association
California Women Lawyers
Chicago Foundation for Women
Clearinghouse on Women's Issues
Coalition of Labor Union Women, AFL-CIO
Equal Rights Advocates
Feminist Majority Foundation
Girls for Gender Equity
Healthy and Free Tennessee
If/When/How: Lawyering for Reproductive Justice
International Action Network for Gender Equity & Law (IANGEL)
Lawyers Club of San Diego
Legal Aid at Work

Legal Momentum, The Women's Legal Defense and Education Fund
National Association of Social Workers
National Crittenton
National Employment Lawyers Association
National Women's Political Caucus
PPGNHAIK - Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky
QLaw Foundation of Washington
Religious Coalition for Reproductive Choice
Reproductive Health Access Project
Shriver Center on Poverty Law
The Sikh Coalition
The Women's Law Center of Maryland
Virginia Sexual and Domestic Violence Action Alliance
Washington Lawyers' Committee for Civil Rights and Urban Affairs
Women Employed
Women Lawyers Association Los Angeles
Women Lawyers On Guard Inc.
Women's Bar Association of the District of Columbia
Women's Bar Association of the State of New York
Women's Institute for Freedom of the Press
Women's Law Project
Women's Media Center
WV FREE

I. Identity and interest of applicants

The National Women's Law Center (NWLC) and the Washington Employment Lawyers Association (WELA) co-lead a group of 40 organizations seeking leave to file this amicus brief.

NWLC is a non-profit organization that fights for gender justice—in the courts, in public policy, and in our society—working across issues that are central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women. Since 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security. The NWLC Fund[1] administers the TIME'S UP Legal Defense Fund, which improves access to justice for those facing workplace sex harassment, including through grants to support legal representation. NWLC has participated as counsel or amicus

[1] The Fund provided support for Respondent LaRose's representation in earlier stages of this case.

curiae in numerous cases to advocate for correct interpretations regarding workplace civil rights laws.

The Washington Employment Lawyers Association has more than 180 members who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. WELA has appeared in numerous cases before this Court involving employee rights and is a chapter of the National Employment Lawyers Association.

The additional 38 groups that have signed on to this amicus brief share the interest of ensuring civil rights protections for workers, including protections against work-related sexual harassment by nonemployees, wherever such harassment takes place. Additionally, Amici note that the standards set in this matter will apply broadly to workplace harassment claims, including other forms of sex-based harassment – such as those tied to pregnancy, sexual

orientation, or gender identity – as well as harassment based on race, national origin, disability, religion, age, and other protected characteristics. Accordingly, Amici seek to highlight the importance of civil rights protections for workers, including for those who are members of one or more marginalized groups.

Amici also support a finding that reporting discrimination to one's supervisor counts as notifying one's employer, as requiring notification to "upper management" will create even more barriers to creating a workplace free of discrimination.

The undersigned are employees of NWLC, a representative of the WELA Amicus Committee, and attorneys at Outten & Golden LLP, and are authorized to file an Amicus Curiae brief on behalf of their respective organizations and the 38 additional listed Amici organizations.

II. Relief sought

Pursuant to RAP 10.6, NWLC and WELA seek leave to

file an Amicus Curiae brief in the above-entitled matter which is filed contemporaneously with this motion.

III. Applicants' familiarity with the issues involved and the scope of argument presented by the parties

The lead organizations are well versed with workplace civil rights laws and the relevant legal standards. Specifically, NWLC and WELA are familiar with the opinions in this case, the Opening Briefs of the parties, and portions of the record. This case is of particular interest to the undersigned organizations because it addresses the parameters of workplace civil rights protections including against sex harassment and other prohibited harassment. Specifically, it addresses an employer's liability for workplace harassment by third parties when that harassment occurs inside and outside an employee's physical place of employment, as well as to whom an employee must report harassment to impute knowledge and liability to an employer for failing to remedy it.

Respondent Sheila LaRose was sexually harassed by a

client both in and outside the workplace. The trial court ruled the defendant employers were not liable for a hostile work environment under the Washington Law Against Discrimination (WLAD) because the harassment was by a third party outside their control. This Court reversed, holding "an employer may be subject to liability for a hostile work environment claim based on a nonemployee's harassment of an employee," and citing federal case law that '"it makes no difference whether the person whose acts are complained of is an employee'" or not because "'[a]bility to 'control' the actor plays no role.'" *LaRose v. King County*, 8 Wn. App. 2d. 90, 97; 437 P.3d 701, 707 (2019) ("*LaRose I*") (*quoting Dunn v. Wash. Cty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005)). Following remand, a jury found in favor of Ms. LaRose and held King County was liable for permitting a sexually hostile work environment. King County now appeals, arguing it is not liable because the sexual harassment was perpetrated by a non-employee outside of the physical workplace and Ms. LaRose

did not report the harassment to "upper management." These are important questions that NWLC, WELA, and the organizations joining this brief have great interest in seeing resolved.

IV. Specific issues the Amicus brief will address

Amici detail that federal and state laws protect against workplace-related harassment by third parties, regardless of whether it occurs solely within or beyond a physical place of employment. Amici further explain how incorrectly limiting these protections to solely within the confines of a physical workplace ignores the many types of harassment, including stalking, that workers face and particularly harms teleworkers and others who work outside traditional offices.

Finally, Amici explain that informing one's supervisor of harassment constitutes notice to the employer and requiring employees to inform higher-level or "upper management" would impose substantial additional barriers to reporting, especially for junior-level and service workers, thereby

frustrating the purpose of workplace civil rights laws. Additionally, there is no basis in the law to deny LaRose her core workplace civil rights protections by only counting the complaints she made during the narrow three-week window when she was employed by King County and still represented the client. First, employees are protected from work-related harassment by third parties, regardless of whether they share an official work-related relationship. Second, King County's "upper management" had notice of this sex harassment and, as the jury concluded, is liable for failing to remedy the hostile work environment LaRose faced.

V. Reasons why additional argument is necessary

Amici include arguments and legal authorities not contained in parties' briefs, and also highlight the broader policy implications for workers, including survivors.

VI. Conclusion

For the forgoing reasons, the motion for Leave to File an Amicus Curiae Brief should be granted.

I certify that this brief contains 1,033 words.

Dated: June 22, 2023

Respectfully submitted,

By: */s/ Cassandra Lenning*

Cassandra Lenning, WSBA #54336
OUTTEN & GOLDEN LLP
1225 New York Ave NW, Ste 1200B
Washington, DC 20005
Tel: (202) 847-4400

Kendall Onyendu
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
Tel: (212) 245-1000

Elizabeth Vogel
Liz Maria Chacko
Sunu P. Chandy
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Gaylynn Burroughs
Emily Martin
NATIONAL WOMEN'S LAW CENTER
1350 I St NW, Suite 700
Washington, DC 20005
Tel: (202) 588-5180

Attorneys for National Women's Law Center

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L. NEEDLE
705 Second Avenue, Suite 1050
Seattle, WA 98104

Tel: (206) 447-1560

Attorney for Washington Employment Lawyers Association

CERTIFICATE OF SERVICE

I, Michaela Dougherty McCabe, swear under penalty of perjury under the laws of the State of Washington that on June 22, 2023, I caused the preceding document to be served via the following method(s):

Mary Ruth Mann James Kytle **Mann & Kytle, PLLC** 200 First Avenue West, Suite 550 Seattle, WA 98119 mrmann@mannkytle.com jkytle@mannkytle.com	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

Attorneys for Respondent

Susan B. Mindenbergs **Law Office of Susan B. Mindenbergs** 705 Second Avenue, Suite 1050 Seattle, WA 98104 susanmm@msn.com	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

Attorneys for Respondent

Philip A. Talmadge Gary Manca **Talmadge/Fitzpatrick** 2775 Harbor Avenue SW, Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com gary@tal-fitzlaw.com	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

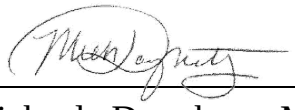
Attorneys for Respondent

David J. Hackett **King County PAO Civil Division** 516 3rd Ave, Ste W554 Seattle, WA 98104-2362 david.hackett@kingcounty.gov	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

Patricia Anne Eakes Damon Clay Elder **Morgan, Lewis & Bockius LLP** 1301 2nd Ave Ste 2800 Seattle, WA 98101-3808 patty.eakes@morganlewis.com damon.elder@morganlewis.com	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

Attorneys for Appellant
King County, Washington

Executed on this 22nd day of June, 2023.



Michaela Dougherty McCabe, Paralegal
OUTTEN & GOLDEN LLP
1225 New York Ave NW, Suite 1200B
Washington, DC 2005
Telephone: (202) 914-5097
Facsimile: (202) 847-4410
Email: mdougherty@outtengolden.com

OUTTEN & GOLDEN LLP

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- lchacko@nwlc.org
- lixi.colmenero@morganlewis.com
- matt@tal-fitzlaw.com
- mdougherty@outtengolden.com
- mrmann@mannkytle.com
- patty.eakes@morganlewis.com
- phil@tal-fitzlaw.com
- schandy@nwlc.org
- susanmm@msn.com

Comments:

Motion for Leave to File Amicus Brief Amicus Brief

Sender Name: Michaela Dougherty McCabe - Email: mdougherty@outtengolden.com
Filing on Behalf of: Cassandra Webster Esq Lenning - Email: CLenning@OuttenGolden.com (Alternate Email: amanuel@outtengolden.com)

Address:
1225 New York Ave NW
Suite 1200
Washington, DC, 20005
Phone: (212) 245-1000

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Cassandra Lenning, WSBA #54336
OUTTEN & GOLDEN LLP
1225 New York Ave NW, Ste 1200B
Washington, DC 20005
Tel: (202) 847-4400

Elizabeth Vogel
Liz Maria Chacko
Sunu P. Chandy
Jennifer L. Mondino
Gaylynn Burroughs

Kendall Onyendu
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
Tel: (212) 245-1000

Emily Martin
NATIONAL WOMEN'S LAW CENTER
1350 I St NW, Suite 700
Washington, DC 20005
Tel: (202) 588-5180

Attorneys for National Women's Law Center

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L. NEEDLE
705 Second Avenue, Suite 1050
Seattle, WA 98104
Tel: (206) 447-1560

Attorney for Washington Employment Lawyers Association

38 ADDITIONAL *AMICI CURIAE*

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National Employment Lawyers Association
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STATEMENT OF INTEREST

The National Women's Law Center (NWLC) is a non-profit organization that fights for gender justice—in the courts, in public policy, and in society—working across issues central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women. Since 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security. The NWLC Fund[1] administers the TIME'S UP Legal Defense Fund, which improves access to justice including through grants. NWLC has participated in numerous cases to advocate for correct interpretations of workplace civil rights laws.

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of over 180 attorneys who practice law in Washington State. WELA advocates for

[1] The Fund provided support for Respondent's representation in earlier stages of this case.

employee rights in recognition that workplace fairness and dignity is fundamental to the quality of life.

The additional organizations similarly support workers' rights to be protected from discrimination, including workplace related sex harassment by nonemployees wherever it occurs.

INTRODUCTION AND STATEMENT OF THE CASE

Respondent LaRose is a former public defender who was employed by the Public Defender Association ("PDA") and later by King County in the same role. RP1_1587. In October 2012, LaRose was assigned to represent a client who subsequently sexually harassed her for almost a year. RP1_1552. LaRose's supervisors were aware this client had sexually harassed his prior attorney. RP1_1085-88. In March 2013, this client began calling LaRose repeatedly at work, sometimes up to 10 times per day, and making sexually inappropriate comments. RP1_1378-80, 1383; RP2_715-16. The client also sent LaRose sexual letters, waited for her in the nearby garage, and left her unwanted gifts. RP1_1365-66,

1409, 1423-26, RP2_1439.

In July 2013, King County moved its public defense services in-house under the same upper management. Appellant Br. at 6; RP1_1921; RP2_1393-94. The client's sexual harassment continued, both inside and outside the office, even after LaRose withdrew her representation. RP1_934-35, 1001-07, 1193, 1390; RP2_609-11. The harassment included over 1000 phone calls, stalking her at home, and breaking her bedroom window. RP1_841, 1409-14; RP2_611, 957-60.

LaRose repeatedly reported these incidents to supervisors, but they failed to take action for 11 months. RP1_1408-09. LaRose suffered extreme distress, was diagnosed with PTSD, and went on disability leave. RP1_1347-48. Following extended medical leave, the County terminated LaRose's employment. RP1_1794-95.

LaRose filed suit against PDA and King County under the Washington Law Against Discrimination ("WLAD"). CP_3647-55. The trial court granted dismissal, ruling

defendants were not liable for harassment by a third party outside their control. CP_4010-13. This Court reversed, holding "an employer may be subject to liability for a hostile work environment claim based on a nonemployee's harassment of an employee," and cited federal case law that '"it makes no difference whether the person whose acts are complained of is an employee'" because "'[a]bility to 'control' the actor plays no role.'" *LaRose v. King County*, 8 Wn. App. 2d. 90, 97; 437 P.3d 701, 707 (2019) ("*LaRose I*") (quoting *Dunn v. Wash. Cty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005)). Following remand, a jury found King County liable for permitting a sexually hostile work environment. CP_10297-98.

King County now appeals, arguing it is not liable because the sexual harassment took place outside the physical workplace by a "nonemployee" and LaRose did not report this to "upper management" during the narrow three-week window (between becoming a County employee and withdrawing representation), which the County erroneously agues cabins its

liability. Amici file in support of LaRose to outline the scope of workplace civil rights protections and highlight the broader policy implications. In Section I, Amici detail that federal and state laws protect against workplace-related harassment by third parties regardless of where it occurs. In Section II, Amici explain how incorrectly limiting these protections to within the physical workplace ignores the myriad types of harassment workers face and how this would particularly harms teleworkers. In Section III, Amici explain that informing one's supervisor of harassment constitutes notice to the employer. Conversely, requiring workers to inform "upper management" would impose additional barriers to reporting, especially for many junior-level and service workers, frustrating the purpose of workplace civil rights laws.

Notably, the standards set in this matter will apply to a range of workplace harassment claims, including additional forms of sex-based harassment – such as those tied to pregnancy, sexual orientation, or gender identity – as well as

harassment based on race, national origin, disability, religion, age, and other protected characteristics. Accordingly, Amici highlight the importance of civil rights protections for workers, including for those who are members of one or more marginalized groups.

ARGUMENT

I. Anti-discrimination laws protect against work-related third-party harassment regardless of whether it occurs within the physical worksite.

As this Court recognized, employers may be liable under Title VII of the Civil Rights Act and the WLAD when third parties create a hostile work environment. *LaRose I*, 8 Wn. App. 2d. at 104. This rule "furthers the purposes of the WLAD," which recognizes "the right to hold employment without discrimination is a civil right." *Id.* at 110-11. Additionally, federal civil rights laws protect against work-related harassment occurring outside the physical workplace, and "Washington courts consistently look to federal case law … to aid in the interpretation of the WLAD." *Id.* at 110 (citation

omitted). Thus, based on analogous federal civil rights laws and the key policy reasons contained herein, this Court should affirm the WLAD protects against work-related harassment by third parties occurring outside the physical workplace.

a. The WLAD, consistent with federal law and many other state civil rights laws, protects employees from work-related third-party harassment.

Workplaces are often populated by third parties, including customers, clients, vendors, and independent contractors. As more employers outsource functions and rely on staffing agencies and work-sharing arrangements, employees of different entities frequently occupy common workplaces.[2] Given this, federal courts have uniformly confirmed that civil rights laws include protections from work-related harassment by non-employees. *See, e.g., Beckford v. Dep't of Corr.*, 605

[2] Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1176 (2017), https://core.ac.uk/download/pdf/231086979.pdf (citation omitted).

F.3d 951, 957 (11th Cir. 2010) (it is "well established that employers may be liable for failing to remedy the harassment of employees by third parties who create a hostile work environment."); *Dunn*, 429 F.3d at 691 (because the "employer's responsibility is to provide its employees with nondiscriminatory working conditions," "[t]he genesis of inequality matters not; what *does* matter is how the employer handles the problem.") (emphasis in original); *Lockard v. Pizza Hut*, 162 F.3d 1062, 1073-74 (10th Cir. 1998) ("[a]n employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a nonemployee, since the employer ultimately controls the conditions of the work environment.").

Similarly, in line with this Court's *LaRose I* decision, many state anti-discrimination laws, including those in Oregon, California, Massachusetts, Minnesota, and Missouri, protect employees from third-party sexual harassment. *See, e.g.*,

Christian v. Umpqua Bank, 984 F.3d 801, 811 n.10 (9th Cir. 2020) (citing *LaRose I* and holding "we construe the employer liability standards under Title VII and the WLAD to be functionally identical" in protecting against harassment by non-employees); Or. Admin. R. 839-005-0030(7) ("employer is liable for sexual harassment by non-employees in the workplace when the employer … should have known of the conduct unless the employer took immediate and appropriate corrective action."); Cal. Gov't Code § 12940, subd. (j)(1) (employers are "responsible for the acts of nonemployees, with respect to the sexual harassment of employees" where the employer "should have known of the conduct and fails to take immediate and appropriate corrective action.").[3]

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[3] *See also Diaz v. AutoZoners*, LLC, 484 S.W.3d 64, 77 (Mo. Ct. App. 2015) (under Missouri Human Rights Act "[w]hen an employee suffers discrimination by a third party who the employee comes into contact with because of the employment relationship … the employer breaches its duty if it … fails to take prompt and effective remedial action."); *Modern Cont'l / Obayashi v. Mass. Comm'n Against Discrimination*, 445 Mass. 96, 106 (2005) (under Massachusetts Commission Against

b. Workplace civil rights laws protect workers beyond their physical places of employment.

King County argues it is not liable for harassment by LaRose's former client that took place after her representation and "outside" the workplace. Appellant Br. at 14. However, there is ample Title VII precedent holding "harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace." *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008). Indeed, the Supreme Court considers out-of-work harassment as part of the full context when analyzing hostile work environment claims. *Meritor Savings Bank, SSB v. Vinson*, 477 U.S. 57, 60 (1986), cited by *Ratliff v. U.S. Postmaster Gen'l*, No. 06 Civ. 00115, 2008 U.S. Dist. LEXIS

Discrimination Guidelines employers may be "held liable for sexual harassment perpetrated by persons who are not employees"); *Costilla v. State*, 571 N.W.2d 587, 591 (Minn. Ct. App. 1997) (Minnesota Human Rights Act "requires an employer to protect its employees from non-employee sexual harassment.").

140534, at *17-18 (S.D. Ohio Feb. 1, 2008) ("numerous courts have considered out-of-work place harassment as part of the totality of the circumstances in hostile work environment cases.")

An employment relationship "comprises multiple dimensions of time and place that cannot be mechanically confined within the precise clockwork and four walls of the office." *Parrish v. Sollecito*, 249 F.Supp.2d. 342, 351 (S.D.N.Y 2003). It "often carries beyond the work station's physical bounds and regular hours." *Id*. But the County fails to consider "the spacial and temporal continuum of the 'work environment' encompassed within the scope of [prohibited] discrimination." *Id*. Federal courts considering the scope of these protections have held "[t]he proper focus of sexual harassment jurisprudence is not on any particular point in time or coordinate location," but "on whether the employer has created a hostile or abusive 'work environment' or a 'workplace.'" *Id.*; *accord Echevarria v. Utitech, Inc.*, No. 15 Civ. 1840, 2017 U.S.

Dist. LEXIS 159721, at *22-23 (D. Conn. Sept. 28, 2017); *Cromer-Kendall v. Dist. of Columbia*, 326 F.Supp.2d 50, 58 (D.D.C. 2004).

Multiple federal circuits have concluded workers are protected from work-related harassment beyond the physical walls of an office. *See, e.g.*, *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2001) ("[t]he nature of [plaintiff]'s employment extended the work environment beyond the physical confines of the corporate office," as "out-of-office meetings with potential clients was a required part of the job."); *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102 (8th Cir. 2001) ("offensive conduct does not necessarily have to transpire at the workplace in order for a juror to reasonably conclude that it created a hostile working environment.").

Similarly, multiple state appellate courts have recognized "[c]onduct that takes place outside of the workplace has a tendency to permeate the workplace," and "contributes to the

hostile work environment." *Blakey v. Cont'l Airlines*, 164 N.J. 38, 56-58 (2000); *see also Doe v. Capital Cities*, 50 Cal. App.4th 1038, 1048 (1996) (harassment is actionable if it "*occur[s] in a work-related context*" or "is in some fashion work-related") (emphasis in original). Thus, both federal and state courts regularly "permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace." *See Crowley v. L.L.Bean, Inc.*, 303 F.3d 387, 409 (1st Cir. 2002) (trial court properly denied motion to exclude evidence of harasser's non-workplace conduct, including following the plaintiff home).

Here, LaRose was assigned to represent a client, and the sexual harassment arose out of that professional relationship. *Supra* at 2. His harassing conduct began during the representation and escalated to stalking her at the office, the parking garage, and her home. *Id.* Courts have held employers accountable for failing to remedy harassment in similar circumstances. *See, e.g., Umpqua Bank*, 984 F.3d at 806-07,

811-12 (bank could be liable for stalking that started in the workplace and extended to an off-site function); *McGuinn-Rowe v. Foster's Daily Democrat*, No. 94-623-SD, 1997 U.S. Dist. LEXIS 24439, at *8-9 (D.N.H. July 10, 1997) (employer could be liable for conduct "occur[ing] away from the workplace and outside normal working hours").

Thus, in line with this Court's practice of following analogous federal precedents, and in line with other states' protections, Amici seek confirmation that Washington's civil rights law protects workers against prohibited work-related harassment by third parties, including beyond the physical worksite.

II. Incorrectly denying workers protections from harassment by third parties when it takes place outside a physical workplace ignores the realities of sex harassment and the parameters of myriad work environments.

As discussed *supra*, an employer's responsibility to ensure a work environment free of discrimination, including sexual harassment, does not end at the office door, but rather

extends to other locations where an employee may interact with colleagues, customers, or clients. Notably, in one study of federal court sexual harassment opinions, 23 percent included conduct occurring outside the workplace, and 14 percent involved conduct occurring exclusively outside the workplace.[4] Among the former, 30 percent "included nonconsensual, off-premises conduct, such as phone calls, letters, or visits to the victim's home," as was true here.[5] To incorrectly limit hostile work environment claims to only conduct by third parties occurring exclusively within an employee's physical workplace ignores the realities of sex harassment, including stalking, and denies workers possible redress for these harms.

a. The WLAD and other workplace civil rights laws protect against stalking, which typically affects workers beyond their physical worksites.

Stalking is a course of conduct directed at a specific

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[4] Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 549, 563 (2001).

[5] *Id.*

person that would cause a reasonable person to feel fear. It is frequently sex-based, disproportionately impacts women,[6] and often intersects with other forms of sex-based violence.[7] Stalking can often manifest in the context of workplace-related harassment. Studies show in situations where the stalker and victim are acquaintances, about one-quarter first meet through work.[8] Workplace-related stalking behaviors include harassment (e.g., calling, texting, and sending letters or gifts to

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[6] Women are three times more likely than men to experience stalking in their lifetimes. Sharon G. Smith et al., Ctr. for Disease Control, Nat'l Ctr. for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report* 85 (2017). https://www.cdc.gov/violenceprevention/pdf/nisvs-statereportbook.pdf

[7] Stalking Prevention, Awareness and Resource Center and Futures without Violence, *Stalking and the Workplace Factsheet* https://www.workplacesrespond.org/wp-content/uploads/2017/01/SPARC-FUTURES-Workplace-Stalking-Fact-Sheet.pdf.

[8] Rachel Morgan & Jennifer Truman, U.S. Dep't. of Just. Bureau of Justice Stat., *Stalking Victimization, 2019* (2022) https://bjs.ojp.gov/content/pub/pdf/sv19.pdf.

the targeted person's workplace) and surveillance (e.g., looking through workplace windows and waiting for them outside work).[9] Stalking, by its very nature, involves repeated harassment over a period of time and space, and stalking that begins in the workplace frequently extends beyond the targeted person's worksite.

The negative impacts of work-related stalking are far-reaching, including diminished performance, work disruptions, and even feeling forced to leave one's job. A recent study of work-related stalking found as many as 50 percent of victims have curtailed or stopped work due to stalking.[10] Further, because the stalker in such cases is often aware of the

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[9] Jennifer E. Swanberg et al., *Intimate Partner Violence, Employment, and the Workplace: Consequences and Future Directions*, 4 TRAUMA, VIOLENCE AND ABUSE, 1-26 (Oct. 2005).

[10] Rachel Horman, Brit. Ass'n for Counselling and Psychotherapy, *When Stalking Comes to Work* (2016), https://www.bacp.co.uk/bacp-journals/bacp-workplace/winter-2016/when-stalking-comes-to-work/ (citation omitted).

employee's work location, schedule, email, and phone number, victims frequently need to change addresses, contact information, routines, and clients.[11]

The fact that such stalking frequently extends beyond the physical workplace "should not distract from the real focus … the degree to which, wherever [harassment] occurs, its consequences may be felt in the victim's 'workplace' or 'work environment.'" *Parrish*, 249 F.Supp.2d. at 351. If this Court were to limit claims of third-party harassment to a narrowly defined physical workplace, survivors would lose these vital protections from work-related stalking and harassment. Workers like LaRose, who only interacted with her harasser because of her employment relationship, should not be deprived of recourse when an employer's failure to take remedial action results in the harassment escalating to include conduct outside

[11] Lorraine Sheridan et al., *Stalking in the Workplace*, 6 J. OF THREAT ASSESSMENT AND MGMT., 1, 6 (2019) https://www.researchgate.net/publication/333837793_Stalking_in_the_workplace.

the physical workplace. *See Doe v. Oberweis Dairy*, 456 F.3d 704, 715-16 (7th Cir. 2006) (the "sexual act need not be committed in the workplace" if the harassment is "an episode in a relationship that began and grew in the workplace.").

b. Protecting workers in Washington State, including teleworkers, requires the WLAD to extend beyond the walls of a physical office.

Increasingly, employees do not work exclusively in a traditional office; they work in multiple physical locations, they work remotely, and they interact with other employees, customers, and clients off-site, online, and by phone. If the Court were to accept King County's invitation to limit workplace protections against third-party harassment only to the confines of an employee's worksite, this would harm large segments of the workforce.[12]

[12] Federal law protects workers against third-party harassment and work-related harassment that goes beyond the walls of a physical office. Title VII only applies to employers with 15 or more employees, however, while the WLAD protects workers with employers with eight or more employees. If this Court rules against LaRose, workers protected solely by Washington

Additionally, those who work outside the confines of a traditional office, including teleworkers, should maintain legal protections against work-related harassment. Technological developments and the pandemic have made it more likely for workers to communicate with each other and with customers and clients electronically.[13] However, this same technology that enables remote work can also be used as a tool for harassment. A 2021 survey of remote workers, primarily in the technology industry, found more than one-fourth of workers, 98 percent of whom self-identified as women or non-binary, reported experiencing gender-based harassment more often during the Covid-19 pandemic while teleworking.[14] People of

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law would be denied vital civil rights protections in these contexts.

[13] Project Include, *Remote work since Covid-19 is exacerbating harm: What companies need to know and do*, 12 (2021) https://projectinclude.org/assets/pdf/Project-Include-Harassment-Report-0321-F3.pdf.

[14] *Id.* at 9.

color were disproportionately impacted; more than two-thirds of Asian, Latinx, and multi-racial women and nonbinary people reported an increase in sexual harassment compared to a quarter of women broadly.[15]

If this Court limits employers' obligation to protect workers from third-party harassment to a traditional physical worksite, this would leave employees without adequate workplace civil rights protections under Washington law.

III. Informing one's supervisor of workplace harassment constitutes notice to an employer, and requiring higher-level reporting would increase barriers to reporting harassment.

King County faults LaRose for purportedly failing to complain to "upper management" (Appellant Br. at 23), but this is factually and legally incorrect. LaRose discussed the harassment with both the Director and Deputy Director of King County's Department of Public Defense. RP1_1806-10; CP_12982-83. The fact that she did not do so during the three

[15] *Id.* at 8.

weeks she represented the client as a County employee is no basis for denying LaRose workplace civil rights protections. The same upper management had notice of the harassment before and after LaRose became a County employee, and the County's obligations did not end with the conclusion of representation. As outlined above, employees are protected from workplace harassment by third parties and no particular relationship with the harasser is required.

Further, employees are not required to report harassment to upper management to obtain protection against workplace discrimination. Employers are on notice and must take prompt and adequate corrective action anytime an employee reports harassment to their supervisor or Human Resources ("HR"). Employees already face substantial barriers to reporting; this Court should not add to these obstacles.

a. Neither Washington state nor federal law requires employees to report harassment to "upper management" to show the employer had notice.

King County argues that to find an employer liable for a hostile work environment, a plaintiff must provide proof an '"owner, manager, partner or corporate officer' knew about the alleged harassment." Appellant Br. at 23. This is incorrect. Specifically, the language the County cites from *Glasgow v. Georgia-Pac. Corp.*, has nothing to do with *to whom* an employee must report harassment, rather only which perpetrators of harassment *automatically* impute liability to the employer. 103 Wn.2d 401, 407 (1985). *Glasgow* distinguished between: (1) harassment perpetrated by a higher level "manager," which is automatically imputed to the employer, and (2) harassment perpetrated by a lower level "supervisor," or a "coworker," for which liability is imputed by showing the employer knew about the harassment and failed to take remedial action. *See Robel v. Roundup Corp.*, 148 Wn.2d 35,

47; 59 P.3d 611, 617 (2002).

King County further argues employers are only liable for third-party harassment "when an employee complains to a manager who is high enough up the chain of command to qualify as 'the employer's alter-ego.'" Appellant Br. at 24. But the case King County quotes from, *Davis v. Fred's Appliance, Inc.*, provides no support for this proposition. 171 Wn. App. 348, 363; 287 P.3d 51, 59 (2012). *Davis* considered when a manager's harassment is *automatically* imputed to the employer without a separate showing that the employer had notice of the harassment. *See id.* at 362-363 ("The two-part rule for imputing harassment suggests that … to automatically impute harassment to an employer, the manager's rank in the company's hierarchy must be high enough that the manager is the employer's alter ego."). *Davis* has no bearing on the present action, which does not involve harassment by either a "manager" or "supervisor;" rather, the second *Glasgow* framework for harassment by lower-level supervisors,

coworkers, or third parties applies. Specifically, the County knew LaRose was being harassed but failed to take corrective action.[16] *See Campbell v. State*, 129 Wn. App. 10, 20; 118 P.3d 888, 892 (2005) ("This element can be established by showing that complaints were made to the employer and the employer's actions were not of such a nature to end the harassment.").

Indeed, the County does not cite any Washington authority addressing "the question of who, within an employer's hierarchy, must receive notice in order for the employer to be deemed to have received knowledge of harassment." *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 859; 991 P.2d 1182, 1189 (2000). To the contrary,

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[16] Even if the Court were inclined to turn *Glasgow* on its head and apply the distinction in managerial or supervisory status to limit who must receive notice of the harassment, the "alter-ego" definition of "manager" in *Davis* is not binding on this Court and should be rejected because it conflicts with binding Washington Supreme Court precedent. *See Robel*, 148 Wn.2d at 48 n.5 ("Managers are those who have … the authority and power to affect the hours, wages, and working conditions of the employer's workers"). Additionally, as noted above, LaRose's top management were aware of the harassment.

Washington courts, including this one in *LaRose I*, routinely find employers may be liable for workplace harassment where employees have notified their supervisor or HR. *See, e.g.*, *LaRose I*, 8 Wn. App. 2d at 113 (sufficient evidence on imputation where LaRose repeatedly complained to her supervisors, such that the County "had notice of the harassment"); *Campbell*, 129 Wn. App. at 20 (triable question of fact whether employer knew of harassment where plaintiff emailed HR and her union representative about it); *Francom*, 98 Wn. App. at 856, 859-61 (jury could find plaintiff reporting harassment to her supervisor gave employer constructive knowledge).

As noted above, Washington courts look to analogous federal precedents for guidance and here, too, federal courts routinely hold informing one's supervisor constitutes notice to an employer regarding workplace harassment. *See, e.g.*, *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 423 (4th Cir. 2014) (jury could conclude employer knew of harassment where the

plaintiff "complained to her supervisor on multiple occasions" and the supervisor was "aware of [the harasser's] on-going inappropriate behavior and comments"); *Gallagher v. C.H. Robinson Worldwide Inc.*, 567 F.3d. 263, 277 (6th Cir. 2009) (employer is generally considered to have sufficient notice of harassment when it is "reported to any supervisor or department head who … is reasonably believed by a complaining employee to have been authorized - to receive and respond to or forward such complaints to management."); *Williamson v. City of Houston*, 148 F.3d 462, 466 (5th Cir. 1998) (duty to report up sufficient to trigger liability on part of company). Thus, under federal workplace civil rights law and the WLAD, employees are not required to notify anyone above their supervisor to provide employers notice of discrimination.

b. Requiring employees to report harassment to "upper management" would erect additional barriers to reporting and particularly harm low-paid and entry-level workers who are disproportionately women and people of color.

Employees face many barriers to reporting workplace

harassment. Employees' reasons for not reporting harassment include fear they will not be believed, nothing will be done about it, they will be blamed, or they will be retaliated against.[17] These fears are well-founded, as multiple studies have shown employees who reported harassment were treated with indifference, trivialization of their harassment, hostility, or reprisal.[18] Indeed, over 70 percent of sexual harassment charges filed with the Equal Employment Opportunity Commission ("EEOC") also include a charge of retaliation.[19]

Workplace harassment is systemically underreported.

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[17] Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace*, 6 (2016) https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686303 (citation omitted).

[18] *Id* at 22.

[19] Amanda Rossie et al., *Out of the Shadows: An Analysis of Sexual Harassment Charges filed by Working Women*, National Women's Law Center, 8-9 (2018) https://nwlc.org/resource/out-of-the-shadows-an-analysis-of-sexual-harassment-charges-filed-by-working-women/#.

Approximately 70 percent of individuals who experience workplace harassment never speak with a supervisor, manager, or union representative about it.[20] Reporting is even lower in cases of sexual harassment.[21]

To improve reporting, experts recommend employers provide multiple options for reporting harassment, both informal and formal procedures, and "choices among multiple 'complaint handlers'" (e.g., immediate supervisor, others in the chain of command, HR, etc.) to increase the chances victims find at least one viable option.[22] Conversely, limiting to whom employees must report such harassment would further suppress reporting.

Requiring employees to report harassment to "upper management" also would disproportionately harm lower-level

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[20] Feldblum and Lipnic, *supra* note 19, at 22.

[21] *Id.*

[22] *Id.* at 46.

workers, who are likely to have limited or no access to managers beyond their immediate supervisors. For example, service workers, including restaurant, retail, and hotel workers, who make up a significant portion of U.S. employees,[23] are often far-removed from upper management, yet are at increased risk of harassment by third parties, particularly customers. Indeed, the EEOC has found harassment is more likely to go unchecked "where corporate offices are far removed physically and/or organizationally from front-line employees" or "representatives of senior management are not present."[24] EEOC data also shows one-quarter of all sexual harassment claims arise in the "accommodation and food services" or the "retail trade."[25] Many of the jobs in these industries "are low-

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[23] Bureau of Labor Stat. of U.S. Dep't of Labor, *Employment Projections — 2014–24 News Release* (Dec. 8, 2015). https://www.bls.gov/news.release/archives/ecopro_12082015.htm.

[24] Feldblum and Lipnic, *supra* note 19, at 35.

[25] Amanda Rossie et al., *supra* note 21, at p. 8 – 9.

paying and occupied predominantly by women"[26] and people of color. Indeed, women hold 56.6 percent of service jobs (compared to 46.8 percent of all jobs), and people of color hold 46.2 percent of service jobs (compared to 34.7 percent of all jobs).[27] Importantly, a study of female fast food restaurant workers in non-managerial positions found of those who experienced sexual harassment, 33 percent reported it to a superior within their own store, while only five percent reported it to corporate headquarters or HR.[28] Other studies similarly have found most employees who report workplace harassment (55 percent) turn to their supervisors instead of HR or others

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[26] *Id.*

[27] U.S. Dep't of Labor, Bureau of Labor Stat., *Labor Force Statistics from the Current Population Survey: 2016*, Table 11 Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity, (last updated Dec. 29, 2020) https://www.bls.gov/cps/cps_aa2016.htm.

[28] Hart Research Associates, *Key Findings from a Survey of Women Fast Food Workers*, 1 (October 5, 2016) https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf.

within the company.[29]

Courts have recognized the unfairness and impracticality of requiring workers to report harassment to top management. *See EEOC v. Cromer Food*, 414 Fed. Appx. 602, 607-08 (4th Cir. 2011) (rejecting argument employer lacked notice because plaintiff failed to follow policy of reporting harassment to the company President, instead reporting it to his supervisors and HR). As the Fourth Circuit explained:

> the company's policy itself is somewhat questionable in requiring the employees of a 100-person cadre to report directly to the president. An employee might be easily intimidated and fail to report it such that the company would be technically insulated from liability. We do not find such a result just or proper … Finally, as here, an employee may lack knowledge of the higher-ups; we do not think such ignorance is justification for inaction on the part of the company sued.

414 Fed. Appx. at 608.

King County asks the Court to ignore that it had ample

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[29] Allvoices.co, *The State of Workplace Harassment*, (September 21, 2021) https://www.allvoices.co/blog/the-state-of-workplace-harassment-2021.

notice LaRose was being sexually harassed (through her repeated complaints to supervisors, their own observations, and conversations with the Director and Deputy Director), and insulate the County from liability. Informing one's supervisor of workplace harassment is sufficient to constitute notice to an employer; no reporting to upper management is required. This Court should reject King County's request to impose this additional and burdensome barrier when workers seek to enforce their civil rights protections.

CONCLUSION

For the foregoing reasons, and those stated in Respondent's brief, this Court should affirm the jury's verdict holding King County liable for LaRose's hostile work environment.

I certify that this brief contains 4,984 words in compliance with RAP 18.17(b).

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Respectfully submitted,

By: */s/ Cassandra Lenning*

Cassandra Lenning, WSBA #54336
OUTTEN & GOLDEN LLP
1225 New York Ave NW, Ste 1200B
Washington, DC 20005
Tel: (202) 847-4400

Kendall Onyendu
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
Tel: (212) 245-1000

Elizabeth Vogel
Liz Maria Chacko
Sunu P. Chandy
Jennifer L. Mondino
Gaylynn Burroughs
Emily Martin
NATIONAL WOMEN'S LAW CENTER
1350 I St NW, Suite 700
Washington, DC 20005
Tel: (202) 588-5180

Attorneys for National Women's Law Center

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L. NEEDLE
705 Second Avenue, Suite 1050
Seattle, WA 98104
Tel: (206) 447-1560

Attorney for Amicus Curiae Washington Employment Lawyers Association

CERTIFICATE OF SERVICE

I, Michaela Dougherty McCabe, swear under penalty of perjury under the laws of the State of Washington that on June 22, 2023, I caused the preceding documents to be served via the following method(s):

Mary Ruth Mann James Kytle **Mann & Kytle, PLLC** 200 First Avenue West, Suite 550 Seattle, WA 98119 mrmann@mannkytle.com jkytle@mannkytle.com	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

Attorneys for Respondent

Susan B. Mindenbergs **Law Office of Susan B. Mindenbergs** 705 Second Avenue, Suite 1050 Seattle, WA 98104 susanmm@msn.com	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

Attorneys for Respondent

Philip A. Talmadge Gary Manca **Talmadge/Fitzpatrick** 2775 Harbor Avenue SW, Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com gary@tal-fitzlaw.com *Attorneys for Respondent*	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File
David J. Hackett **King County PAO Civil Division** 516 3rd Ave, Ste W554 Seattle, WA 98104-2362 david.hackett@kingcounty.gov	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File
Patricia Anne Eakes Damon Clay Elder **Morgan, Lewis & Bockius LLP** 1301 2nd Ave Ste 2800 Seattle, WA 98101-3808 patty.eakes@morganlewis.com damon.elder@morganlewis.com *Attorneys for Appellant* *King County, Washington*	☐ Via Hand Delivery ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail ☒ WA Appellate E-File

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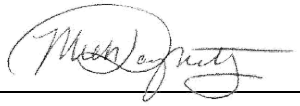

Michaela Dougherty McCabe, Paralegal
OUTTEN & GOLDEN LLP
1225 New York Ave NW, Suite 1200B
Washington, DC 2005
Telephone: (202) 914-5097
Facsimile: (202) 847-4410
Email: mdougherty@outtengolden.com

OUTTEN & GOLDEN LLP

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