No. A19-1561

STATE OF MINNESOTA
IN SUPREME COURT

Whitney Hinrichs-Cady,
Respondent,

v.

County of Hennepin,
Appellant.

BRIEF OF *AMICUS CURIAE* GENDER JUSTICE

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STATEMENT OF INTEREST

Gender Justice is a non-profit legal advocacy organization that has been operating in Minnesota since 2010.[1] It advocates for gender equality through the law. Gender Justice's public interest mission includes helping courts, employers, schools, and the public better understand the causes and consequences of gender discrimination. Both through direct representation and by advising courts as *amicus curiae*, Gender Justice advocates for legal interpretations that properly account for all forms of gender bias and ensure equity.

As part of its impact litigation program, Gender Justice represents clients in Minnesota who have lost their jobs due to their pregnancy. Gender Justice client Tara Duncan, who was fired for taking pumping breaks so she could nurse her newborn, testified in favor of the Women's Economic Security Act at the legislature. Gender Justice cofounder Lisa Stratton also testified in favor of the law at the legislature. As an organization dedicated to gender equality, Gender Justice knows that when employers make it difficult or impossible for pregnant workers to keep their jobs, it contributes to a culture of unequal pay and reduced opportunities. Gender Justice has an interest in ensuring that pregnant and post-partum Minnesotans can work to support their families and in the proper interpretation of the Women's Economic Security Act.

BACKGROUND

The Women's Economic Security Act of 2014 ("WESA") is a package of nine pieces of legislation "designed to break down barriers to economic progress facing women—and all Minnesotans." Bryce Covert, *How One State Plans to Wipe Out Sexism at Work in a Single Bill*, ThinkProgress (Jan. 31, 2014, 2:08 P.M.), https://archive.thinkprogress.org/how-one-state-plans-to-

[1] The undersigned certifies, pursuant to Minn. R. Civ. App. P. 129.03, that this brief has been authored in whole by the undersigned and no portion of the brief was authored by counsel for a party. Further, the undersigned certifies that no person other than the undersigned amicus curiae, its members, or its counsel made any monetary contribution to the preparation or submission of the brief.

wipe-out-sexism-at-work-in-a-single-bill-3595965f1bf5. The bill passed with bipartisan legislative support and was signed into law on Mother's Day 2014. Eric Roper, *Dayton Signs Law to Give Women a Better Workplace*, Star Tribune (May 11, 2014, 9:03 P.M.), https://www.startribune.com/gov-dayton-signs-law-to-give-women-a-better-workplace/258830761. Among other provisions, WESA requires "about 1,000 state contractors to certify that they pay men and women equally for similar jobs, extends parental leave from six to 12 weeks and requires employers to make new accommodations for expectant and new mothers." *Id.* In addition, the law protects employees' discussion of their wages, raises the minimum wage, provides protection from discrimination based on familial status, increases protections for victims of sexual assault, domestic abuse, or stalking, permits safety leave and sick leave to care for relatives, and encourages women to enter non-traditional, high-paying jobs. Colleen Doescher-Train, *Brief Overview of the Women's Economic Security Act & Impact on Child Welfare*, University of Minnesota Center for Advanced Studies in Child Welfare (June 13, 2014), https://cascw.umn.edu/policy/wesa-child-welfare.

In 2014, Gender Justice was one of the founding members of the WESA Coalition established to advocate for passage of the legislation. *Coalition Members*, http://www.mnwesa.org/about-us/coalition-members. The legislation was informed in part by research from the Women's Foundation of Minnesota and the University of Minnesota Humphrey School's Center on Women, Gender, and Public Policy. Caitlin M. Gadel, *Will the 2014 Minnesota Women's Economic Security Act Achieve its Intended Goals?*, 39 With Equal Right 1 (2014), https://mwlawyers.org/page/WERFall14Feature1; Nancy Crotti, *For Supporters, WESA Win Was a Long Time Coming*, St. Paul Ledger Capitol Report (June 4, 2014), http://www.debrafitzpatrick.com/wp-content/uploads/2015/07/For-supporters-WESA-win-was-a-long-time-coming-_-Politics-in-Minnesota-3-copy.pdf. Gender Justice's board chair, Debra Fitzpatrick, was the lead researcher on the Women's Foundation study and a crucial advocate for the

law. According to Fitzpatrick's research, women are the majority of Minnesota's workforce, at 51%, and nearly 80% of Minnesota's women with children are in the paid labor force. Debra Fitzpatrick, *Status of Women & Girls in Minnesota: Research Overview*, (February 2012), https://www.issuelab.org/resources/24512/24512.pdf. This is one of the highest rates of working moms in the nation. Aimee Blanchette, *Minnesota Has Second-Highest Rate of Working Mothers*, Star Tribune, (May 5, 2016), https://www.startribune.com/minnesota-has-second-highest-rate-of-working-mothers-in-the-nation/377808151. One of the coalition's key goals in advocating for pregnancy accommodations was to "[a]llow[] mothers to stay in the workforce…" *WESA Summary*, http://www.mnwesa.org/wp-content/uploads/2014/05/WESA-SUMMARY-FINAL.pdf.

With regard to pregnancy accommodations, WESA "requires employers to provide accommodations for pregnant employees so they can stay on the job such as more frequent breaks or taking on light duty if they have lifting restrictions. Despite the fact that the majority of expecting mothers work while pregnant and the majority need some sort of small change to continue doing so, more than a quarter million are denied their requests for an accommodation each year." Bryce Covert, *This State Just Took Action to Eliminate Sexism at Work*, ThinkProgress (May 14, 2014, 12:56 P.M.), https://archive.thinkprogress.org/this-state-just-took-action-to-eliminate-sexism-at-work-df254589c05e. Social science research underscores the need for legislative action on pregnancy accommodation. According to one review of the literature on pregnancy discrimination, "[a]lmost half of all working women in western countries have experienced tangible discrimination on this basis, such as being denied training opportunities, changes to job descriptions, criticism of their performance or appearance, reduced working hours and dismissal without good reason after the announcement of pregnancy." Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 Duke J. Gender L. & Pol'y 67, 68 (2013). Another "leading study found that mothers were seventy-nine percent less likely to be hired, were only half as likely to be

promoted, were offered an average of $11,000 less in salary, and were held to higher performance and punctuality standards than identical women without children. Other studies have documented discrimination against pregnant women specifically. As a result, women who seek accommodations for a condition arising out of pregnancy frequently meet with hostility fueled by gender stereotyping." Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97, 103 (2013). While "there is no inherent conflict between pregnancy and paid work . . . pregnancy can interfere with job performance and job performance can interfere with healthy pregnancy. The effects on job performance stem largely from the inevitable physical changes that accompany a woman's pregnancy, such as weight gain, a shifting center of gravity, a loss of balance, and unstable joints . . . These changes can affect a woman's ability to perform a wide variety of job-related tasks, either because she is physically unable to do them or is unwilling to risk the potential consequences to maternal or fetal health." Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Geo. L.J. 567, 579, 581 (2010).

"The lack of an absolute right of accommodation necessitates legislative action. Pregnant women should not have to rely on the whim or generosity of employers to gain the accommodations they might need to continue working, particularly when those accommodations can be made with little or no effort by the employer." Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Approaches Full Term*, 52 Idaho L. Rev. 825, 859 (2016) (noting the "key shift" in pregnancy discrimination law "from federal to state law," as "gaps in federal law, particularly relating to accommodation rights, have been resistant to being filled," *id.* at 860). WESA fills a critical gap in the law and allows pregnant workers to continue working, increasing their workforce participation and earnings. Stephanie A. Pisko, *Towards Reasonable: The Rise of State Pregnancy Accommodation Laws*, 23 Mich. J. Gender & L. 147, 176 (2016). These accommodations may be particularly important for workers

"of lesser socio-economic status, who are often living paycheck-to-paycheck and do not have the means or ability to take pregnancy leave . . . [an accommodation] solves the tension between losing their jobs and income and being able to continue working." *Id.* at 185. The pregnancy accommodation provision became effective immediately upon WESA's passage.

ANALYSIS

The Court of Appeals correctly held that an employee need not have worked for an employer for 12 months before requesting non-leave pregnancy accommodations under WESA. WESA added protections for non-leave pregnancy accommodations to a section of Minnesota's employment laws that, up to that point, dealt solely with parenting leave. The existing definition of "employee," which was geared toward employees seeking leave, is ambiguous in its application to workers seeking non-leave accommodations. The Court of Appeals applied a common-sense definition of "employee" to resolve this ambiguity, and this Court should do the same. Second, the Court of Appeals' holding permitting any worker, regardless of tenure, to seek non-leave pregnancy accommodations comports with the purpose of WESA, which is to expand protections for pregnant workers and to fill gaps left by other laws. Specifically, WESA prohibits employers from claiming that certain pregnancy accommodations impose an undue hardship; because these accommodations can never be unduly burdensome, it is no more difficult for employers to provide these accommodations to new employees as to long-tenured employees. Finally, while the Court of Appeals correctly found that the Minnesota Human Rights Act ("MHRA") did not bar Ms. Hinrichs-Cady's claims under WESA, it erred to the extent that it suggested that the MHRA does not apply to issues of pregnancy accommodation. The MHRA specifically refers to pregnancy and related conditions in its prohibition on sex discrimination, and certain pregnant workers may be protected by the MHRA's prohibition on disability discrimination. Accordingly, this Court should

find that the MHRA may apply to cases of workers seeking pregnancy accommodations, but that its exclusivity provision does not necessarily bar claims under WESA.

I. The Court of Appeals Correctly Decided that an Employee Need Not Have Worked for an Employer for Over a Year to Receive Non-Leave Pregnancy Accommodations Under the Women's Economic Security Act

WESA, enacted on Mother's Day 2014, is a comprehensive package of laws designed to combat gender-based inequalities and institutional barriers in the workplace. In addition to pregnancy and parenting leave, WESA includes protections for workers seeking non-leave pregnancy accommodations from their employers, such as more frequent restroom, food, and water breaks, seating, and limits on lifting over 20 pounds. Minn. Stat. § 181.9414. These protections were incorporated into a group of statutes that, prior to WESA's passage, dealt solely with parenting leave. *See* Minn. Stat. § 181.940-.944 (2012). Like the federal Family and Medical Leave Act, the definition of "employee" in these statutes included a tenure requirement: to be eligible for leave, an individual must have worked for the employer for at least 12 months. Minn. Stat. § 181.940, subd. 2. WESA did not contain its own definitions section, and the portion of WESA regarding non-leave pregnancy accommodations was inserted into this group of statutes. As the Court of Appeals correctly decided, applying this definition of "employee" to WESA creates ambiguity as to whether workers seeking non-leave pregnancy accommodations, such as more frequent restroom, food, and water breaks while at work, must have worked for the employer for 12 months to be eligible for such accommodations.

Issues of statutory construction are reviewed *de novo*. *See, e.g.*, *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999). The first step in statutory interpretation is to decide whether the statute's language is ambiguous on its face; a statute is ambiguous "when the language therein is subject to more than one reasonable interpretation." *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). "While statutory construction focuses on the language of the provision at issue, it is

sometimes necessary to analyze that provision in the context of surrounding sections." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000) (citing *Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958)). Basic canons of statutory construction instruct that words and phrases are to be construed according to their plain and ordinary meaning. *See Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

Here, the statutory definition of "employee" is ambiguous as it applies to workers seeking non-leave pregnancy accommodations. An employee is defined as "a person who performs services for hire for an employer from whom a leave is requested under sections 181.940 to 181.944" for "at least 12 months preceding the request." Minn. Stat. § 181.940, subd. 2. This definition was unambiguous when this section of the law referred solely to parenting leave, but the inclusion of non-leave pregnancy accommodations under WESA creates ambiguity as to whether this definition applies to workers who are not seeking leave, but rather seek pregnancy accommodations that would permit them to continue working.

The plain language of the statute indicates that this definition should not apply to workers seeking non-leave pregnancy accommodations. Because the statute defines "employee" by specifically referring to seeking leave from an employer, it is inappropriate to apply this definition to workers who are not seeking leave. In interpreting a statute, courts may look to the context of surrounding sections; here, the definition of "employee" is a vestige from the time before WESA, when this part of the statute dealt solely with parenting leave. Rather than attempt to apply a definition of "employee" that refers specifically to leave to workers seeking non-leave accommodations, "employee" should instead be construed based on its plain and ordinary meaning. The Court of Appeals applied a common-sense definition of "employee" that resolves this ambiguity and is more consonant with the purpose of WESA, and this Court should do the same.

Workers seeking non-leave accommodations should not be governed by a statutory definition that explicitly requires the employee to seek leave to be eligible.

Applying a common-sense definition of "employee" to workers seeking non-leave pregnancy accommodations will not lead to an absurd or unreasonable result. Multiple provisions of Minn. Stat. § 181 use "employee" without providing a definition. *See, e.g.*, Minn. Stat. § 181.939 (nursing mothers); Minn. Stat. § 181.938 (nonwork activities; prohibited employer conduct); Minn. Stat. § 181.970 (employee indemnification). Interpreting and applying the plain language of a statute is well within the judicial ken. *See, e.g.*, *Burt v. Rackner, Inc.*, 902 N.W.2d 448, 457 (Minn. 2017); *Nelson v. Productive Alts., Inc.*, 715 N.W.2d 452, 454 n.1 (Minn. 2006) (applying a plain-language definition of employee to "employees who are discharged in retaliation for refusing to take a lie-detector test" in violation of Minn. Stat. § 181.75). Just as the Court has applied a common-sense definition of "employee" to other sections of Minn. Stat. § 181, applying such a definition in this instance—when the statutory definition creates, rather than resolves, ambiguity—will not lead to an absurd or unreasonable result.

Further, within the statute's definition section itself, "employee" already takes a common-sense definition without engendering confusion. Immediately following the definition of an employee as one who seeks leave, an employer is defined in the statute as "a person or entity that employs 21 or more employees . . . ." Minn. Stat. § 181.940, subd. 3. Routinely, courts have applied a plain-meaning definition of employee here, despite its placement immediately following the statutory definition of "employee." If it did not, then only employers who had 21 workers who each sought pregnancy leave and worked for the employer for 12 months would be required to provide an accommodation.

Instead, courts have construed the definition of an elible employer to be one with 21 or more workers, regardless of how long those workers have worked for the employer or whether

those workers have requested leave. An employer is defined by its number of workers, regardless of their tenure. Even within the same statute and group of statutes, therefore, "employee" may take a common-sense, plain-meaning definition without leading to absurd or unreasonable results. Applying a plain-meaning definition of "employee" resolves the ambiguity created by WESA's placement within a group of statutes focused on leave and better comports with the legislature's intent in enacting WESA.

II. The Court of Appeals' Ruling is Consistent with the Purpose of the Women's Economic Security Act, which is to Expand Protections and Fill Gaps Left by Other Laws

The goal of statutory construction is to ascertain and effectuate legislative intent. *Am. Family Ins. Grp.*, 616 N.W.2d at 278. The legislature's intent in enacting WESA was to expand existing protections for pregnant workers. Because existing protections, such as those in the MHRA, do not include a tenure requirement for pregnant workers to receive non-leave accommodations, such a requirement should not be read into WESA.

WESA adds to existing protections at the state and federal level for pregnant and parenting workers. WESA specifically states that its pregnancy accommodation provision shall not "be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or health conditions related to pregnancy or childbirth under any other provisions of any other law." Minn. Stat. § 181.9414, subd. 2. The pregnancy accommodations that WESA provides are intended to be additive and to fill gaps in existing law.

Protection for other sorts of pregnancy accommodations existed in Minnesota law prior to WESA's passage. In particular, the MHRA includes a process by which a pregnant employee may request a reasonable accommodation from the employer, which is obliged to grant the accommodation unless it would impose an undue hardship on the employer. Minn. Stat. § 363A.08,

subd. 6. WESA increases protections for pregnant workers by stating that for certain non-leave pregnancy accommodations, an employer cannot claim that such an accommodation imposes an undue hardship, and accordingly the employer must provide these accommodations. Minn. Stat. § 181.9414, subd. 1. Specifically, an employee need not obtain the advice of a licensed health care provider or certified doula to receive accommodations in the form of more frequent breaks, seating, and limits on lifting over 20 pounds. *Id.*

A 12-month employee tenure requirement for pregnancy accommodations under WESA is expressly counter to the statute's intent, which is to expand protections for pregnant workers above and beyond those already offered. The MHRA, for example, does not contain a tenure requirement for pregnant workers seeking reasonable accommodations at work. Under the MHRA, an employee is "an individual who is employed by an employer and who resides or works in this state." Minn. Stat. § 363A.03, subd. 15, and an employer is "a person who has one or more employees." Minn. Stat. § 363A.03, subd. 16. These definitions are expansive, and the purpose of the statute is to broadly eradicate discrimination across the state. *See* Minn. Stat. §§ 363A.02, 363A.03. WESA's guarantee of certain non-leave pregnancy accommodations, forbidding an employer from claiming that these accommodations constitute an undue hardship, is meant to expand upon existing protections. Accordingly, it would be inconsistent to apply a 12-month tenure requirement for employees seeking non-leave pregnancy accommodations under WESA.

The legislative purpose behind enacting a tenure requirement for employees seeking leave is to minimize burdens on employers when new employees immediately need extended leaves. When the Family and Medical Leave Act was under consideration, "the first family and medical leave bills included no exclusion based on time of service. Each subsequent version of the bill, however, increased the required period of employment before eligibility . . . these changes were made at the behest of the business community, which had concerns that employers should not have to pay for

benefits when an employee had limited attachment to the employer." Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 Berkeley J. Empl. & Lab. L. 1, 43–44 (2007). Non-leave pregnancy accommodations that permit employees to continue working, by contrast, do not impose this sort of burden on employers. "Although it may seem costly to businesses to provide accommodation to pregnant women, there has been no proof of negative economic effects to employers," particularly when the "potential cost of reasonable accommodations is nominal, such as water breaks and schedule adjustments." Pisko, 23 Mich. J. Gender & L. at 178–79. Indeed, WESA indicates that these sorts of pregnancy accommodations categorically do not burden employers, as employers may not claim undue hardship and must provide the requested accommodation. It is no more burdensome for an employer to grant more frequent bathroom breaks to a new employee as to one who has worked for the employer for over 12 months. Moreover, rather than imposing a burden on employers, research indicates that "providing accommodations in the workplace could actually help businesses' economic success," including "improved recruitment and retention of employees; increased employee commitment; increased productivity; reduced absenteeism; and increased diversity." *Id.* at 179. Accordingly, there is no policy reason to require an employee to have worked for the employer for 12 months to be eligible for non-leave pregnancy accommodations.

III. While the Court of Appeals Properly Found that the Exclusivity Provision of the Minnesota Human Rights Act Does Not Bar Claims Under the Women's Economic Security Act, the Minnesota Human Rights Act Does Apply to Pregnancy, Childbirth, and Related Conditions

The Court of Appeals properly found that Ms. Hinrichs-Cady's claims under WESA and the Minnesota Whistleblower Act were not barred by the exclusivity provision of the MHRA. The Court of Appeals erred, however, to the extent that it suggested that the MHRA may not apply to issues of pregnancy accommodation. The MHRA prohibits sex discrimination in employment. Minn. Stat. § 363A.08, subd. 2. "Sex," for purposes of the MHRA, "includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth." Minn. Stat. § 363A.03,

subd. 42. In addition, the MHRA requires employers to provide reasonable accommodations to certain employees with disabilities, including disabilities related to pregnancy or childbirth. Minn. Stat. § 363A.08, subd. 6. Accordingly, the MHRA's protections apply to workers who experience sex discrimination based on their pregnancy or related conditions, as well as pregnant workers who meet the definition of a qualified individual with a disability or who are regarded as having a disability.

As to the MHRA's exclusivity provision, the undersigned amicus curiae Gender Justice has reviewed and agrees with the argument of amici Employee Lawyers Association of the Upper Midwest and Minnesota NELA. To avoid duplication, as instructed by this Court, the undersigned adopts the arguments made by Employee Lawyers Association of the Upper Midwest and Minnesota NELA. While an employee who has been denied pregnancy accommodations may have claims under both the MHRA and WESA, the Court of Appeals correctly held that the exclusivity provision of the MHRA does not categorically bar such claims under WESA, and this Court should affirm that holding.

CONCLUSION

The Minnesota Supreme Court should affirm the decision of the Court of Appeals.

Respectfully Submitted,

Dated: September 28, 2020

GENDER JUSTICE

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the following requirements:

1. The brief was drafted using Microsoft Word 365 word-processing software.
2. This brief was drafted using Garamond 12-point font, compliant with the typeface requirements; and
3. There are 3693 words in this brief.

Dated: September 28, 2020

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