No. 88218-5

SUPREME COURT OF THE STATE OF WASHINGTON

Certification from the United States District Court
Western District of Washington

In

LARRY C. OCKLETREE,
Plaintiff,

v.

FRANCISCAN HEALTH SYSTEM, a Washington Corporation, D/B/A/ ST. JOSEPH HOSPITAL, and JOHN and JANE DOE(s) 1-10,
Defendants.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND ANTI-DEFAMATION LEAGUE

80772 JENNIFER LEE
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2601

80773 DANIEL MACH
ACLU Foundation
915 15th Street, NW, 6th Floor
Washington, DC 20005
(202) 548-6604

SARAH DUNNE
MARGARET CHEN
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amici Curiae* American Civil Liberties Union, American Civil Liberties Union of Washington, and Anti-Defamation League

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INTEREST OF *AMICI CURIAE*

See Appendix A.

STATEMENT OF THE CASE

Larry Ockletree began working at St. Joseph Hospital, a member of Franciscan Health Systems ("FHS"), as a contract security guard in the Emergency Department before being hired as an employee. (Dkt. 24 ¶3.3; Dkt. 17 at 2; Dkt. 25 ¶3.5.) According to its website, FHS operates five full-service hospitals in Washington, which are open to the public, and has nearly 8,400 employees and 1,550 medical staff.[1] It is undisputed that Mr. Ockletree "performed his job duties well." (Dkt. 24 ¶¶3.4, 3.6.)

On March 9, 2010, Mr. Ockletree suffered a stroke while working at the hospital and ultimately lost the use of his left arm. (Dkt. 24 ¶3.7-3.11) He did not sustain any other physical impairment that prevented him from performing his job duties. (Dkt. 24 ¶3.10.) When Mr. Ockletree returned to work, St. Joseph Hospital denied Mr. Ockletree's requests for accommodations and eventually terminated him. (Dkt. 24 ¶¶3.11-3.21.) Mr. Ockletree sued Defendants under state and federal antidiscrimination statutes in state court and Defendants removed the case to federal court. (Dkt. 1.) There, Defendants moved to dismiss Mr. Ockletree's complaint, arguing, in part, that it was exempt from the Washington Law Against Discrimination ("WLAD"). The district court certified to this Court

[1] *See* FHS, Facts & Figures, *available at* http://www.fhshealth.org/About-us/Franciscan-Facts-and-Figures/ (last accessed Apr. 8, 2013); FHS, About Us, *available at* http://www.fhshealth.org/About-Us/ (last accessed Apr. 8, 2013).

whether the broad exemption violated the state constitution. (Dkt. 63.) *Amici* adopt Plaintiff's position and respectfully argue that WLAD's blanket exemption for religious employers violates the state constitution's privileges and immunities clause and religious freedom clause.

SUMMARY OF ARGUMENT

In 1949, Washington became the first state west of New York to enact a law against discrimination, and the legislature has since repeatedly expanded the law's scope. Despite its comprehensiveness, WLAD contains a significant exemption for religious employers—broader than any religious exemption in federal antidiscrimination law—that permits this minority group that includes powerful and wealthy nonprofit organizations to discriminate against *any* employee, on *any* basis, and for *any* reason, based on the mere fact of religious affiliation.

As a result, more than 144,000 Washingtonians do not have a state law remedy for employment discrimination simply because they work for a religiously affiliated nonprofit. Today, an African-American woman who applies to one of the 58,000 jobs in one of Washington's 27 religiously affiliated hospitals could be rejected explicitly because of her race or gender. Under WLAD, this discrimination is permissible.

The Washington constitution, however, does not permit such favoritism. Legislation that grants a privilege or immunity on an unequal basis cannot pass muster under Const. art. I, § 12 unless there are "reasonable grounds" for the distinction and the disparity in treatment is

relevant to the purpose of the law in which it appears. There are no reasonable grounds to favor religious employers by granting them *complete* immunity from employment claims while subjecting their peers, secular nonprofits with identical charitable purposes and functions, to WLAD regulation. Moreover, this sweeping exemption is not necessary to protect the religious exercise of these religious employers in light of the constitutionally grounded "ministerial exception" that permits houses of worship to make employment decisions regarding their ministers without scrutiny from secular courts.

WLAD's exemption also disturbs the separation of church and state and impermissibly advances religion in violation of Const. art. I, § 11. It grants religious employers special treatment—which is not constitutionally required—simply because of their religious affiliation. *Amici* respectfully argue that this favoritism violates the privileges and immunities and religious freedom clauses of the state constitution.

ARGUMENT

I. WLAD CONTAINS AN EXEMPTION FOR RELIGIOUS EMPLOYERS, WHICH COLLECTIVELY ARE A POWERFUL MINORITY GROUP WITH LARGE CONCENTRATIONS OF WEATLH.

WLAD is a comprehensive antidiscrimination statute whose overarching purpose is "to deter and to eradicate discrimination in Washington." *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996); *see* Appendix B (History of the Washington State Human Rights Commission and Development of the WLAD). The legislature

enacted WLAD to fulfill "the provisions of the Constitution of this state concerning civil rights," recognizing that discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010.

Like federal antidiscrimination laws, WLAD prohibits discrimination on the basis of race, national origin, sex, religion, age, and disability. But WLAD reaches further and also prohibits discrimination on the basis of honorably discharged veteran or military status, sexual orientation, gender identity and expression, filing a complaint or advocating a right, or the use of a trained dog guide or service animal by a person with a disability. RCW 49.60.030(1); RCW 49.60.040(26); RCW 49.60.210. It prohibits discrimination in employment, public accommodations, and in other circumstances. RCW 49.60.030(1).

Despite its breadth, WLAD contains a significant exemption for religious employers that is broader than any religious exemption in federal antidiscrimination law. It excludes from the definition of "employer" "any religious or sectarian organization not organized for private profit." RCW 49.60.040(11). This exemption thus permits an entire class of religious employers—some of which, like Defendants, perform secular functions and serve the general public—to discriminate for any reason.

Although religious employers perform a wide range of valuable and important services in this state, collectively they are also a powerful minority group with large concentrations of wealth and have a significant

impact on Washington's economy and labor market. Currently, there are at least 27 hospitals,[2] 300 elementary and secondary schools,[3] 11 colleges and universities,[4] and 125 large charitable, social, and service organizations[5] affiliated with religious entities. Together, these organizations employ more than 144,000 people in Washington and generate billions of dollars of annual revenue.[6]

In most instances, these organizations hire from and serve the general public, and their employees perform the same functions as employees of their non-sectarian, nonprofit competitors.[7] In 2011, the five religiously affiliated health care corporations in Washington employed more than 58,600 people, generated more than $8.4 billion in total revenue, and possessed more than $4.5 billion in net assets. Defendant FHS employed nearly 9,500 people, generated more than $1.4 billion in

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[2] Adventist Health, Walla Walla Gen. Hosp., About Us, *available at* http://www.wwgh.com/about-us.php (last accessed Apr. 8, 2013); FHS, Hospitals, *available at* http://www.fhshealth.org/Hospitals/ (last accessed Apr. 8, 2013); Lourdes Health Network, Lourdes Locations, *available at* http://www.lourdeshealth.net/about/locations.html (last accessed Apr. 8, 2013); PeaceHealth, PeaceHealth, *available at* http://www.peacehealth.org/Pages/systemlanding.aspx (last accessed Apr. 8, 2013); Providence Health & Servs. Wash., Hospitals, *available at* http://washington.providence.org/hospitals/ (last accessed Apr. 8, 2013); Swedish Med. Ctr., Swedish Campuses, *available at* http://www.swedish.org/Locations (last accessed Apr. 8, 2013).

[3] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Private Sch. Universe Survey, 2009-10, *available at* http://nces.ed.gov/ccd/elsi/ (last accessed Apr. 8, 2013).

[4] *Amici* gathered a sampling of IRS Form 990s that are available to the public for religiously affiliated nonprofit organizations in Washington State, which are the source for the figures cited in this brief. For the Court's convenience, *amici* have attached the first page of each Form 990 at Appendix C. If the Court would like a full copy of the Form 990 for any of the organizations included in this sample, *amici* can supplement the Appendix. *See* Appendix C.

[5] *See* Appendix C.

[6] *See* Appendix C.

[7] Religiously affiliated charities and community service organizations employ more than 28,800 people and generated more than $1.9 billion in revenue in 2011. That same year religious colleges and universities employed 17,700 people and had more than $913 million in total revenue and $1.1 billion in net assets. *See* Appendix C.

total revenue, and possessed more than $738 million in net assets. Indeed, apart from its religious association, the Defendant hospital in this case is virtually indistinguishable from other large nonprofit, secular hospitals.[8] Religiously affiliated hospitals like those in FHS are among the most wealthy and powerful of religious nonprofit employers in Washington.

II. WLAD'S EXEMPTION VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE WASHINGTON CONSTITUTION.

By its terms, Const. art. I, § 12 prohibits the State from granting "privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." In *Grant County Fire Protection Dist. v. Moses Lake* ("*Grant County II*"), this Court held that this clause is to be interpreted separately from the federal Equal Protection Clause. 150 Wn.2d 791, 805, 83 P.3d 419 (2004) (citing and applying analysis from *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).[9]

Even if this Court does not accept the position set forth in Section D.2 of Plaintiff's Opening Brief, at a minimum, legislation that grants a privilege or immunity on an unequal basis cannot pass muster under Const. art. I, § 12 unless "there [are] reasonable grounds for distinguishing between those who fall within the class and those who do not, and . . . the disparity in treatment [is] germane to the object of the law in which it

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[8] For example, Virginia Mason is a secular, nonprofit health care corporation that is comparable to Defendant Franciscan Health System in size and services provided to the public. Virginia Mason employed fewer people and reported less revenue and assets than Franciscan Health System in 2011. *See* Appendix D.

[9] *Amici* adopt and agree with the position set forth in Section D.2 of Plaintiff's Opening Brief and will not repeat those arguments here.

appears." *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 367, 687 P.2d 186 (1984); *see also State ex. rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936) (overruled on other grounds by *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979)). This "reasonable grounds" requirement demands more than federal rational basis review—it requires a classification to "rest on real and substantial differences" and the "distinctions giving rise to the classification must be germane to the purposes contemplated by the particular law." *Huse*, 187 Wash. at 84-5.[10]

"[A]n exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others" can be an unlawful "privilege" under this provision. *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 607, 192 P.2d 306 (2008). As Defendants explain, when drafting Const. art. I, § 12 the framers were especially concerned with organizations with large concentrations of wealth receiving favoritism and wielding undue political influence. Def.'s

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[10] In *Griffin v. Eller*, this Court upheld under Const. art. I, § 12 WLAD's exemption for small employers. 130 Wn.2d 58, 922 P.2d 788 (1996). *Griffin* is inapplicable here because it preceded *Grant County II* and applied federal equal protection analysis. Because small employers are not a suspect class, the exemption survived judicial scrutiny under a rational basis standard. While WLAD's exemption for small employers was justified on the basis that "[t]he legislature could well have concluded [that] burdening so many employers to benefit so few employees was not, on balance, of sufficient public benefit to offset the burden," the same cannot be said of religious employers in Washington State that, taken together, employ tens of thousands of people and generate billions of dollars in revenue each year. *Id.* at 68. Moreover, here, religious nonprofit employers such as Defendant FHS are identical in purpose and function to secular nonprofit employers except for a single characteristic—religious affiliation. As such, there are no reasonable grounds for exempting religious employers from the burden of WLAD compliance while subjecting similarly-situated secular nonprofit employers to WLAD compliance. For more discussion, see *infra* Part II.

Answering Br. at 23-24 n.10; *see also Grant County II*, 150 Wn.2d at 806, 809 (noting concern was prevention of favoritism and special treatment for a few). Thus the fact that a statute confers a benefit to a powerful minority group at the expense of their competitors and the general public is a strong indicator that the statute likely does not involve a classification that rests on reasonable grounds. Here, WLAD's exemption grants a powerful minority class of employers blanket immunity from an otherwise comprehensive regulatory scheme aimed at eradicating discrimination in employment based on the mere fact of religious affiliation.

This Court has historically invalidated exemptions that confer benefits on a small group to the injury of their peers and the public without sufficient justification. *See, e.g.*, *City of Seattle v. Dencker*, 58 Wash. 501, 108 P. 1086 (1910) (ordinance unconstitutional where it imposed a tax on the sale of certain goods by machine but not on merchants selling the same goods); *State v. W. W. Robinson Co.*, 84 Wash. 246, 146 P. 628 (1915) (state law that exempted cereal and flour mills from its provisions and authorized them to sell mixed feeding stuffs while placing conditions on other persons, companies, corporations, or agents selling the same thing violated Const. art. I, § 12); *City of Seattle v. Rogers*, 6 Wn.2d 31, 106 P.2d 598 (1940) (ordinance making it unlawful to conduct a charity campaign without licenses where part of the proceeds was withheld as compensation for promoters and solicitors violated Const. art. I, § 12, where ordinance exempted the Seattle Community Fund); *Ralph v. City of*

Wenatchee, 34 Wn.2d 638, 209 P.2d 270 (1949) (ordinance requiring license fees for only nonresident photographers unconstitutional).

In *Larson v. City of Shelton*, this Court struck down an ordinance that exempted honorably discharged veterans from having to pay for a license before peddling and selling goods. 37 Wn.2d 481, 224 P.2d 1067 (1950). The Court observed that licensing fees and permits for peddlers were principally aimed at protecting the public and concluded that while veterans are "deserving of special consideration," the legislature cannot favor veterans by enacting special laws for them "which suspend the operation of criminal laws or regulations enacted under the police power for the protection of the public." *Id.* at 490. The same is true here. Although religious employers provide valuable services to the public, the legislature cannot express its appreciation by arbitrarily exempting religious nonprofits but not secular nonprofits from comprehensive laws that protect the public from discrimination.

Similarly, in *Sherman Clay & Co. v. Brown*, this Court invalidated a provision from a statute that prohibited all secondhand merchants from disposing of goods for ten days, but exempted from the waiting period merchants selling stoves, furniture, or entire contents of houses. 131 Wash. 679, 231 P. 166 (1924). The statute was aimed at ensuring law enforcement had ample time to investigate whether secondhand items may have been stolen. The Court held the exemption violated the privileges and immunities clause because the statute gave exempted merchants an unfair

advantage over their non-exempt competitors. *Id.* at 683 (finding the distinction "abhorrent to the most primitive idea of fairness and equality").

WLAD's exemption likewise gives religious employers a competitive advantage by relieving them of the burdens and costs of complying with WLAD and avoiding liability. This is true even if such employers have no intention of discriminating—as Defendants have represented to the public. For example, employment lawyers recommend that a company seeking to defend against employment discrimination claims should have an effective compliance program that includes a compliance manager who works closely with an experienced employment attorney. Together, they should perform audits, periodic risk assessments, update policies, train employees, and establish a mechanism for reporting violations to senior management. Mary Beth Hogan & Jyotin Hamid, *Employment Law and Compliance: Overview and Guidance, in* COMPLYING WITH EMPLOYMENT REGULATIONS: LEADING LAWYERS ON KEY REGULATIONS, RECENT TRENDS, AND EFFECTIVE COMPLIANCE PRACTICES 7-32 (Eddie Fournier ed., 2009). So where a secular nonprofit would have to invest resources to avoid liability under WLAD, Defendant hospitals do not have to expend any such resources because they are entirely immune from liability under WLAD. This awards religious employers a significant competitive advantage over other secular nonprofit organizations, as they have more time and money to dedicate to operations and building assets.

The economic benefit conferred upon Defendant by the exemption is illustrated by its use of the statutory exemption as a bargaining chip in negotiations when it waives the exemption for employees covered by union agreements.[11] At St. Joseph Hospital, where Mr. Ockletree worked, SEIU Healthcare 1199NW's two collective bargaining agreements cover 800 employees ranging from licensed practical nurses to mailroom attendants.[12] Both agreements include an Equal Opportunity provision that states, "The Employer and the Union shall not discriminate on account of an employee's race, creed, color, religion, age, sex, marital status, veteran's status, national origin, disability, or sexual orientation provided that bona fide occupational requirements and the ability to perform the requirements of the job are not thereby waived." This list is nearly identical to WLAD's list of protected characteristics. *See* RCW 49.60.030(1). The arbitrary effect is that SEIU's members are protected by WLAD, while 76% of St. Joseph's employees are left without any state law remedy for employment discrimination.[13] It seems implausible that the legislature exempted religious employers from antidiscrimination laws so

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[11] For more examples of union collective bargaining agreements in which Defendant and religious nonprofit corporations have waived the statutory exemption, see http://www.seiu1199nw.org/category/worksites/ (last accessed Apr. 8, 2013).

[12] 2012-2013 Employment Agmt. By and Between St. Joseph Medical Center (SJMC) and SEIU Healthcare 1199NW Licensed Practical Nurses (Nov. 2, 2012), *available at* http://www.seiu1199nw.org/files/2012/12/SJMC-LPN-2012-2013.pdf; 2011-2013 Employment Agmt. By and Between SJMC and SEIU Healthcare 1199NW (Nov. 2, 2012), *available at* http://www.seiu1199nw.org/files/2011/05/SJMC-SVC-2011-20131.pdf (covering other service workers listed at Appendix A of agreement).

[13] Based on SEIU's representation of 800 employees out of 3,336 total employees at St. Joseph Medical Center. SEIU Healthcare 1199NW, SJMC, http://www.seiu1199nw.org/2011/05/21/st-joseph-medical-center/ (last accessed Apr. 8, 2013); FHS, Our Report to the Community for 2012, http://www.fhshealth.org/Annual-Report/2012/Statistical-Highlights/ (last accessed Apr. 8, 2013).

that they could exploit waiving the exemption as leverage in union negotiations. The fact that religious employers readily waive the exemption for some employees but not others also demonstrates the speciousness of the exemption in the first instance.

And as Defendants note in their Answering Brief at page 22, note 9, the Washington legislature has twice considered eliminating WLAD's exemption for religious employers out of concern that the exemption violates Const. art. I, § 12. *See* S.B. 2482, 45th Leg. (1977); S.B. 4623, 48th Leg. (1984). The legislative record reveals that the 1984 legislature recognized that the broad exemption "provided to religious organizations in the employment setting may possibly be unconstitutional." Summary of the Effect of §28 of Substitute Senate Bill #4623 on the Application of RCW 29.60 to Religious Organizations, at 2 (Appendix E). In fact, there was concern that "the exemption *immunizes* virtually every endeavor undertaken by religious organizations in which they employ individuals, thus allowing such organizations to discriminate in employment on any basis, not just on the basis of religion." *Id.* (emphasis added).[14] Further, "[t]he exemption's benefits extend to the non-religious commercial enterprises of sectarian organizations, *favoring* them over other employers, even when a religious organization chooses to submerge itself in

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[14] Legislators in 1984 were specifically concerned about the type of case presented by Plaintiff here, where a religious hospital could discriminate with impunity on the basis of race or sex. Hearing on SSB 4623, H. Comm. On State Gov't, 48th Leg. (Feb. 22, 1984), *available at* http://www.digitalarchives.wa.gov/Record/View/D9F383F85D70639BB9F5B9981308F8E5.

commercial activities." *Id.* (emphasis added). Such statutory favoritism is precisely the type of statutory enactment that our state's constitutional framers intended to guard against. The 1984 legislation passed the Senate and the House State Government Committee recommended passage, but failed to get a floor vote. As the hearing audio reveals, hesitation to pass the 1984 legislation was largely based on misplaced concern that elimination of the exemption would result in government interference in internal church affairs and church-state entanglement. As discussed *infra* Part III, the ministerial exception protects the employment decisions of houses of worship from scrutiny.

While protecting the religious freedom of religious employers is an important concern, the exemption in WLAD bears no relationship to this objective. In this case there is no dispute that Mr. Ockletree's termination was unrelated to Defendant's religious affiliation. An exemption that permits such broad discrimination can have no reasonable or just relationship to protecting religious exercise and therefore no reasonable relationship to any legitimate state interest. And the "ministerial exception" otherwise adequately protects the free exercise interests of religious employers. *See infra* Part III.

Put simply, there are no reasonable or just grounds to favor religious nonprofits by granting them *complete* immunity from employment claims while subjecting their competitors, secular nonprofits with the same charitable purposes, to WLAD regulation.

III. WLAD'S EXEMPTION ADVANCES RELIGION IN VIOLATION OF THE RELIGIOUS FREEDOM CLAUSE OF THE WASHINGTON CONSTITUTION.

As noted, WLAD's exemption for religious employers is breathtaking in scope and unprecedented in federal law. Unlike the constitutionally derived ministerial exception, or the narrower statutory exemption under Title VII, WLAD's exemption allows religious employers to discriminate against any employee for any reason.

Both this Court and the U.S. Supreme Court have recognized a constitutionally grounded "ministerial exception" that permits houses of worship to make employment decisions regarding their ministers without scrutiny from secular courts. *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, ___ U.S. ___, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012); *Erdman v. Chapel Hill Presb. Church*, 175 Wn.2d 659, 286 P.3d 357 (2012). In *Hosanna-Tabor*, the U.S. Supreme Court explained that

> Requiring a church to accept or retain an unwanted minister. . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause . . . . [and] violates the Establishment Clause . . .

132 S. Ct. at 697. In *Erdman*, this Court echoed these concerns: "Introducing government standards into the selection and retention of the church's spiritual leaders would 'significantly, and perniciously, rearrange the relationship between church and state.'" 175 Wn.2d at 678.

This means that religious employers are permitted to discriminate on any basis—including race, sex, or religion—but only when selecting their ministers. When it comes to non-ministerial employees, such as receptionists at the Salvation Army or security guards at St. Joseph Hospital, neither the state nor federal constitutions' religion clauses give religious employers special permission to discriminate. Because this narrow exception is constitutionally derived, it is implied in all antidiscrimination statutes and need not be explicitly included.

Title VII contains a different—though still narrow—exemption for religious employers. Under Title VII, employers are prohibited from discriminating on the basis of race, sex, national origin, or religion. 42 U.S.C. § 2000e-2. However, § 702 of Title VII allows religious employers to discriminate on the basis of religion and hire only co-religionists. 42 U.S.C. § 2000e-1(a).[15] That is, a Catholic school can have a policy of hiring only Catholic teachers, or a Baptist soup kitchen can prefer to hire only Baptist cooks. But that Catholic school is still prohibited from hiring only white teachers, and that Baptist soup kitchen cannot hire only male cooks. It is crucial to note, however, that Title VII's narrow exemption is not constitutionally required. It is merely an accommodation that gives religious employers broader latitude to hire co-religionists.

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[15] The Americans with Disabilities Act contains a similar exemption. *See* 42 U.S.C. § 12133(d)(1) ("This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities.").

Importantly, the exemption under WLAD is both broader and deeper than either the ministerial exception or Title VII's exemption. It gives religious employers *carte blanche* to discriminate against any employee, on any basis, for any reason, even when it is unrelated to the employer's religious purpose. *Amici* respectfully argue that this exemption crosses the line and impermissibly advances religion.

Article I, Section 11 guarantees, in relevant part, that

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . .

Const. art. I, § 11. Although the First Amendment more succinctly guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." both clauses aim to protect religious exercise rights while ensuring the separation of church and state. The U.S. Supreme Court has recognized that Washington's test for separation of church and state is "far stricter" than the federal Establishment Clause. *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (quoting *Witters v. State, Comm'n for the Blind*, 102 Wn.2d 624, 626, 689 P.2d 53 (1984) ("*Witters I*")). Specifically, when the challenged government action involves the use of public funds the state's

religious freedom clause is interpreted separately from the federal Establishment Clause and is an absolute bar on the use of government funds for religious purposes. *Witters v. State, Comm'n for the Blind*, 112 Wn.2d 363, 368, 771 P.2d 1119 (1989) ("*Witters II*") (undergoing *Gunwall* analysis).

However, when claims do not involve the appropriation of public money or property for religious purposes, "the proper Section 11 analysis appears to be an open question." *Donelson v. Providence Health & Servs.-Wash.*, 823 F. Supp. 2d 1179, 1187 (E.D. Wash. 2011). In at least one case, decided between *Witters I* and *Witters II*, the court of appeals explained that "[i]n determining whether a state statute impermissibly establishes religion under article 1, section 11 of our constitution, our Supreme Court has adopted the [*Lemon*] 3-prong test developed by the United States Supreme Court in making the identical determination under the first amendment to the United States Constitution." *State, Dep't of Labor & Indus. v. Wendt*, 47 Wn. App. 427, 432, 735 P.2d 1334 (1987) (internal citations omitted). Because this case does not involve the use of public funds and both the state and federal constitutions prohibit the establishment of a religion, federal law may at least be a highly persuasive guide.

A statute whose primary effect is to advance religion violates the separation of church and state. By wholly immunizing religious employers from liability for discrimination under WLAD, the state has conveyed a

message of endorsement of their religious affiliation, improperly delegated to them unbounded authority to veto the civil rights of their employees, and given them a competitive advantage over their secular peers.

"In its most general sense, 'religious establishment' refers to the prohibition against governmental creation of a state religion. . . . [T]he state should not . . . place the imprimatur of the state on a particular religious doctrine, or the preference of religion over no religion." *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 468, 48 P.3d 274 (2002). The legislature has exempted from this state's comprehensive antidiscrimination statutory scheme all employers that are affiliated with religious organizations, including those that perform secular functions and hire from and serve the general public. This special treatment—which is otherwise not constitutionally required—unmistakably conveys to the public the government's endorsement of religion.

In *Texas Monthly, Inc. v. Bullock*, the U.S. Supreme Court invalidated a tax exemption that applied to publications by religiously affiliated nonprofit organizations only. The Court explained that a tax exemption is a form of subsidy, and observed,

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that . . . burdens nonbeneficiaries markedly . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community.

489 U.S. 1, 15, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (plurality) (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (O'Connor, J., concurring)). Likewise in *Estate of Thornton v. Caldor*, the Supreme Court struck down a law that entitled all employees who observe a Sabbath to not have to work on their Sabbath, regardless of the third party effects of such accommodations. The Court explained that the statute crossed the line from accommodating religion to improperly endorsing religion by "command[ing] that Sabbath religious concerns automatically control over all secular interests at the workplace." 472 U.S. 703, 709, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985). The exemption in this case goes farther than those struck down in *Texas Monthly* and *Caldor* since it favors certain employers because of their religious affiliation and it permits them to engage in a practice that is unrelated to free exercise of religion and threatens the general welfare.

Moreover, the exemption undermines the purpose and intent of WLAD by stripping employees of religious employers of their important statutory rights to work free from discrimination. The legislature recognized a life free from discrimination was a civil right and identified protecting its citizens from discrimination as one of its most important duties. But in granting religious employers a blanket exemption, the state improperly delegated to such employers the power to arbitrarily discriminate without any compelling justification. *See Larkin v. Grendel's*

Den, Inc., 459 U.S. 116, 125, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982) (noting churches' broad power under statute is standardless, allows them to override third party interests, and provides a symbolic benefit to religion).

Finally, by exempting religious employers from WLAD the state impermissibly confers on such employers an economic advantage over non-sectarian employers, as explained above, *supra* Parts I and II. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 299, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) (rejecting a religiously affiliated employer's claim for an exemption from minimum wage laws because payment of substandard wages would give them a competitive advantage over their competitors).

CONCLUSION

For the foregoing reasons the exemption under the WLAD violates the privileges and immunities clause and religious freedom clause of the Washington Constitution.

Respectfully submitted this 8th day of April, 2013.

By Sarah Dunne

Sarah Dunne, WSBA #34869
Margaret Chen
ACLU OF WASHINGTON FOUNDATION

Jennifer Lee
Daniel Mach
ACLU FOUNDATION

Attorneys for *Amici Curiae*