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SUPREME COURT  
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CERTIFICATION FROM WESTERN DISTRICT OF WASHINGTON,  
UNITED STATES DISTRICT COURT

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.

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PLAINTIFF LARRY C. OCKLETREE'S ANSWER TO BRIEF OF AMICI CURIAE  
RELIGIOUS ORGANIZATIONS

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**A. INTRODUCTION**

Article I, section 12 of the Washington Constitution was enacted for the specific purpose of preventing legislation conferring a benefit to politically powerful minority groups. Amicus Curiae Religious Organizations (“the Religious Organizations”) contend that the appropriate standard of review is the most deferential standard, rational basis. Accepting the Religious Organizations’ position, however, would effectively write article I, section 12 out of the State Constitution because all legislation is subject to rational basis review. For the Special Privileges and Immunities Prohibition Clause to have any meaning, this Court must apply a heightened standard of review. Neither religious free exercise concerns, which are addressed through the ministerial exception, nor the financial burdens of complying with anti-discrimination laws, justify the Religious Organizations’ request to effectively nullify this provision of the Washington Constitution.

**B. STATEMENT OF THE CASE.**

The statement of the case submitted by the Religious Organizations outlines the various social and educational services provided by these groups. While the value of services provided by the organizations is not in dispute, nor the focus of the questions certified to this Court, it is important to note that secular non-profits provide

equally important and similar social and educational services. For instance, Community Health Care “is a private, non-profit organization” created to address “the problems of access to quality health care for the county’s low-income and uninsured residents[.]”<sup>1</sup> Similarly, Goodwill Industries International Inc. operates in Tacoma and has a secular mission “to enhance the dignity and quality of life of individuals and families by strengthening communities, eliminating barriers to opportunity, and helping people in need reach their full potential through learning and the power of work.”<sup>2</sup> Likewise, the mission of the non-profit Tacoma Community College Foundation is “making high-quality education and training available to adults in Tacoma and greater Pierce County.”<sup>3</sup>

While the Religious Organizations are exempt from the Washington Law Against Discrimination (WLAD), virtually identical secular non-profits are not. As explained by the Washington State Association for Justice Foundation (WSAJF), and in Ockletree’s briefing before this Court, article I, section 11 does not permit the state in the exercise of its police powers to exempt organizations from a statute of

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<sup>1</sup> Available at: <http://www.commhealth.org/about-us/> (viewed April 24, 2013).

<sup>2</sup> Available at: <http://www.goodwill.org/about-us/our-mission/> (viewed April 24, 2013).

<sup>3</sup> Available at: <http://www.tacomacc.edu/abouttcc/makeagift/tccfoundation/> (viewed April 24, 2013).

general application based on religious belief. Opening Br. at 47-48; WSAJF Br. at 7-17. This point is brought home by Ockletree's own situation where there is absolutely no connection to religion at issue, yet his employer is exempt from the state's anti-discrimination law.

C. ARGUMENT

1. Applying Rational Basis Review Would Effectively Render Article I, Section 12 Meaningless.

All legislative enactments, at a minimum, must pass rational basis review, under which “[t]he law must bear a logical relationship to the purpose it purports to advance.” *Golinski v. U.S. Office of Personnel Management*, 824 F.Supp.2d 968, 995 (N.D.Cal. 2012). Because this is the baseline review that all legislation must pass, accepting the argument advanced by the Religious Organizations would make the Special Privileges and Immunities Prohibition Clause insignificant. This Court will not interpret constitutional provisions as pointless. *Farris v. Munro*, 99 Wn.2d 326, 333, 662 P.2d 821 (1983).

The Washington Constitution's privileges and immunities clause was enacted for the purpose of preventing favoritism to minority groups, specifically referencing corporations, which were viewed as “manipulating the lawmaking process.” *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004). The facts of this case present that exact scenario. FHS, the second

largest private employer in Pierce County, is part of a subset of corporations, religious non-profit organizations, which are both politically and financially powerful.<sup>4</sup> In fact, Catholic Health Initiatives, which operates FHS, does business in 19 separate states.<sup>5</sup> Indeed, the list of Religious Organizations appearing in this case and the manner in which they have joined forces to oppose Ockletree further displays the power these groups hold.

Instead of applying a deferential standard of review, this Court should scrutinize the WLAD exemption asking whether or not the exemption is necessary to fulfill a compelling governmental interest, and if so, whether the means selected are the narrowest available. The Constitution mandates that this Court restrict acts of favoritism; the Court should not condone the bestowal of special favors on religious employers in the form of an exemption from a law of general applicability when the religious mission of such employers is not implicated.

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<sup>4</sup> For instance, just this week National Public Radio reported that out of the 25 largest health systems in the United States, 13 of these were religiously sponsored. NPR, *Family Doctors Considering Dropping Birth Control Training Rule* (April 25, 2013) ("If you think religious-based health care isn't becoming the norm, think again.") available at: <http://www.npr.org/blogs/health/2013/04/25/178863728/family-doctors-consider-dropping-birth-control-training-rule>

<sup>5</sup> Available at: <http://www.chiannualreport.net/pdf/OurOrganization.pdf> (viewed April 25, 2013).

The Religious Organizations assert that article I, section 12 is limited only to those fundamental rights the United States Supreme Court has recognized.<sup>6</sup> As with the application of rational basis review, this Court should also not restrict the Washington Constitution's special prohibition against such privileges and immunities to only those circumstances implicating a federally recognized fundamental right because such a limited view would again leave article I, section 12 without relevance. Under federal law, legislation that affects a fundamental right will be subject to strict scrutiny. *Warden v. Nickels*, 697 F.Supp.2d 1221, 1226 (W.D. Wash 2010) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)) ("An equal protection claim merits strict scrutiny when the party alleges interference with a fundamental right or discrimination against a suspect class. . . . A suspect class exists when a classification rests on 'inherently suspect distinctions, such as race, religion or alienage.'").

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<sup>6</sup> The brief filed by the Religious Organizations focuses exclusively on whether the right to employment is a fundamental right. Amicus Br. at 3. The Religious Organizations assert inaccurately that the Court "has addressed the question - and resolved it squarely against the plaintiff's interpretation." *Id.* at 4. On the contrary, in *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 104 n.10, 178 P.3d 960 (2008), this court expressly declined to decide whether a general right to employment is "fundamental for purposes of our privileges and immunities clause."

The state constitution should be more than a pale reflection of the federal constitution. First, the term “fundamental right” is used differently in this Court’s article I, section 12 jurisprudence than it is in federal law, where it has come to refer to those few rights that trigger strict scrutiny. In this Court’s 1902 decision of *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902), the source of later references to fundamental rights in the article I, section 12 context, the Court made clear that the term included the right to “carry on business,” to “acquire and hold property,” and to defend the same at law. Decisions from this Court after *Vance* did not identify the “fundamental right” at stake before striking down a law as unconstitutional. *See, e.g., Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270, 273 (1949) (without articulating any fundamental right, holding that a law was “designed to serve private interests in contravention of common rights,” and “must be condemned as an abuse of the police power, and, therefore, unreasonable and unlawful”). Thus, in *Ex parte Camp*, decided three years after *Vance*, the Court considered an ordinance adopted by the City of Spokane “prohibiting the peddling of fruits, vegetables, butter, eggs, etc., within said [city] limits,” which exempted farmers “disposing of produce grown by themselves.” *Ex parte Camp*, 38 Wash. 393, 394, 396, 80 P. 547 (1905). The Court held

that “the classification made by the ordinance grants special privileges, in violation of section 12, art. I, of the State Constitution,” reasoning that “[o]ne class is permitted to indulge in the nuisance, and others are unconditionally prohibited.” *Id.* at 397. There was no mention of a fundamental constitutional right, and certainly no requirement that one exist before article I, section 12 would apply.

Irrespective of whether this Court views the WLAD religious exemption as an unconstitutional support for religion, the unconstitutional sanctioning of a breach of the peace, a violation of the police powers as argued by Amicus WSAJF, or as a situation where one class is permitted to indulge in the nuisance of discrimination, the WLAD religious exemption offends fundamental fairness and undermines the basis for both constitutional provisions at issue.<sup>7</sup>

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<sup>7</sup> As discussed by Amicus Washington Employment Lawyers Association, this Court has not required any form of fundamental right when analyzing whether there is an immunity, as opposed to a privilege. Ockletree argues that the WLAD religious exemption operates as both an immunity and a privilege. Opening Br. at 28-29. To the extent this Court views the exemption as an immunity, there has not been a fundamental right requirement, nor should there be such a restriction, which is not based on the text of the constitution.

**2. There Are No Free Exercise Concerns Implicated And Any Free Exercise Concerns That Might Arise In Other Situations Are Sufficiently Addressed By The Ministerial Exemption Under The First Amendment.**

In this case, Ockletree's employment has no connection to any religious activity, mission or purpose that FHS might advance. Nonetheless, the Religious Organizations assert that by rendering the religious exemption invalid, this Court will create a situation where the free exercise of a religion will be improperly hampered. Belying this argument, however, is the ministerial exemption as recognized recently by the United States Supreme Court in *Hosanna-Tabor v. EEOC*, 565 US \_\_\_, 132 S.Ct. 694 181 L.Ed.2d 650 (2012), which addresses the Religious Organizations' free exercise concerns.

The crux of the Religious Organizations' claim is that permitting an inquiry into the connection between an employee's work and the employer's religious activities is itself an unacceptable infringement on the practice of religion. This argument, however, is undermined by the holding of *Hosanna-Tabor* and the application of the ministerial exemption by this Court in *Erdman v. Chapel Hill Presbyterian Church*, 175 Wn.2d 659, 286 P.3d 357 (2012). In *Hosanna-Tabor*, the Court held that the First Amendment encompassed a ministerial exemption from discrimination laws, but this exemption was an affirmative defense, which the finder of fact assess considering "[t]he amount of

time an employee spends on particular activities,” along with “the nature of the religious functions performed” and other relevant considerations. 132 S.Ct. at 709. Indeed, the Court declined to “adopt a rigid formula for deciding when an employee qualifies as a minister.” *Id.* at 707. When applying this exemption to future cases, the Supreme Court was clear that the burden to prove the exemption was on the employer: “We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.” *Id.* at 709, n. 4.

There were two concurring opinions in *Hosanna-Tabor*, one by Justice Thomas, and another by Justice Alito, joined by Justice Kagan. While Justice Thomas’ opinion was the most deferential to the church, even he required evidence demonstrating the church “sincerely considered [the Plaintiff] a minister.” 132 S.Ct. at 711 (J. Thomas concurring). On the other hand, Justices Alito and Kagan explained that “courts should focus on the function performed by persons who work for religious bodies.” *Id.* (J. Alito concurring). This same rule of law was applied by this Court in *Erdman* when it remanded to the Pierce County Superior Court for a factual determination as to whether the ministerial exemption applied because “the record is not developed sufficiently to make the determination.” *Erdman*, 175

Wn.2d at 666. Thus, contrary to the Religious Organizations' argument, courts can and do inquire into the connection between an employee's work and any religious practices by the employer. To date, this inquiry into whether or not an employee functions as a minister has not led to the destruction of religious freedom.

**3. The Financial Burdens Of Compliance With WLAD Do Not Provide a Basis to Allow For Special Treatment to Religious Non-Profit Organizations.**

Initially, FHS is no small employer. In Pierce County, it is the second largest private employer, only behind MultiCare.<sup>8</sup> Ignoring the size of the defendant in this case, the Religious Organizations assert that there would be significant financial impact on smaller religious organizations. This argument, however, is in no way unique to religious organizations because many non-profit secular organizations provide important community services but are subject to the WLAD and the attendant financial obligations. A few of these organizations are outlined in this brief above. Moreover, to the extent these smaller religious groups employ fewer than eight full time employees, they will be exempt from WLAD as are secular small employers. The argument advanced by the Religious Organizations serves only to highlight why

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<sup>8</sup> Economic Development Board for Tacoma-Pierce County available at: <https://www.edbtacomapierce.org/page.aspx?nid=5> (viewed April 26, 2013). MultiCare "is a not-for-profit health care organization" that is "committed to providing high-quality, patient-centered care." [www.multicare.org/home/multicare-8](http://www.multicare.org/home/multicare-8) (visited April 26, 2013).

singling out religious non-profit organizations for special treatment lacks legitimate justification.

**D. CONCLUSION**

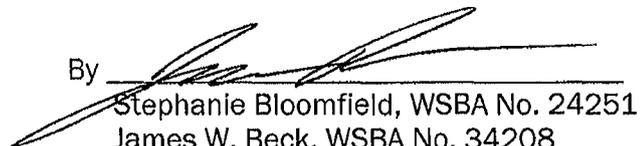
Rational basis review is not the appropriate standard for evaluating WLAD's religious exemption. The adoption of such a deferential standard here would render an important constitutional provision essentially meaningless. The legislative exemption before this Court is precisely the type of favoritism to a minority group of corporations that article I, section 12 was enacted to prevent. This Court should give full effect to the constitutional text by striking down the exemption. Neither free exercise concerns nor the financial burdens of compliance with WLAD justify the devaluation of this constitutional mandate.

Dated this 29<sup>th</sup> day of April, 2013.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By



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DECLARATION OF SERVICE

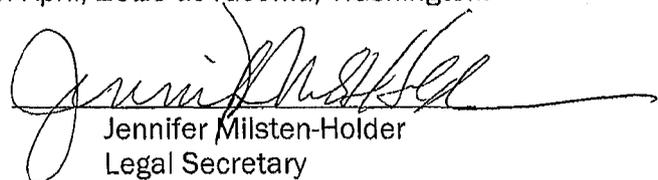
I, Jennifer Milsten-Holder, declare that on this 29<sup>th</sup> day of April, 2013, I provided to the Washington State Supreme Court for filing a copy of Plaintiff Larry C. Ockletree's Answer to Brief of Amici Curiae Religious Organizations via email and served upon the parties indicated below:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 29<sup>th</sup> day of April, 2013 at Tacoma, Washington.

  
Jennifer Milsten-Holder  
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Attached for filing in .pdf format are (1) Plaintiff Larry C. Ockletree's Answer to Brief of Amici Curiae Religious Organizations and (2) Plaintiff Larry C. Ockletree's Answer to Brief of Amicus Curiae Pacific Northwest Conference of the United Methodist Church, Olympia Diocese of the Episcopal Church, and the Presbytery of Seattle of the Presbyterian Church USA in *Ockletree v Franciscan Health System*, Supreme Court Cause No. 88218-5. The attorneys filing this brief are James W. Beck, WSBA No. 34208, (253) 620-6500, e-mail [jbeck@gth-law.com](mailto:jbeck@gth-law.com); Stephanie Bloomfield, WSBA No. 24251, (253) 620-6500, e-mail [sbloomfield@gth-law.com](mailto:sbloomfield@gth-law.com); and Dwayne L. Christopher, WSBA No. 28892, (253) 830-5787, e-mail: [Dwayne@dlclawgroup.com](mailto:Dwayne@dlclawgroup.com).

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