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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.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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**BRIEF OF AMICI CURIAE BY RELIGIOUS  
ORGANIZATIONS**

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## INTERESTS OF AMICI CURIAE

The amici are a broad range of faith-based, nonprofit organizations located in Washington State that relieve the state of its burden of providing social services and education to tens of thousands of Washingtonians across the state. Amici have a direct interest in preserving the religious nonprofit exemption to shield them from the potential interference such claims would have on their religious missions and from the high costs of defending against discrimination claims.

### **A. Seattle's Union Gospel Mission**

Seattle's Union Gospel Mission provides transformational care to homeless and hurting men, women and children from across the Puget Sound area. Its purpose is to restore hope in individuals that leads to self-sufficiency, caring, and productive citizenship.

Services provided by the Mission include: emergency food and shelter, short and long-term residential recovery programs for individuals seeking to dramatically transform their lives, and outreach programs to targeted constituent groups. The Mission operates nine different facilities, providing living accommodations for up to 250 individuals in various stages of recovery. In treating

the whole person it also provides: daily needs, individualized care, counseling and training, educational and career opportunities, housing assistance and a variety of support services including free legal and dental services, clothing and household goods. In 2012, the Mission served nearly 780,000 meals, provided nearly 180,000 safe overnight stays, and conducted more than 25,000 counseling sessions.

#### **B. The Rescue Mission of Pierce County**

The Rescue Mission of Pierce County provides safe and secure emergency shelter and hot, nutritious meals for homeless men, women, and children. To address the issues that cause homelessness, The Rescue Mission is faith-based and provides life transformation programs including case management, free residential alcohol/drug rehabilitation for men, women, and families, adult literacy and GED (high school equivalency) test preparation, computer classes, help with resume preparation, job coaching, life skills classes such as budgeting and parenting, career coaching, transitional housing, and a youth program for children of homeless families residing at the Mission. In 2012, The Rescue Mission provided 177,000 beds in its shelters and served 297,000 meals.

**C. Washington State Catholic Conference on behalf of the Archdiocese of Seattle and Dioceses of Spokane and Yakima**

The social services provided by the Archdiocese of Seattle, the Diocese of Spokane, and the Diocese of Yakima, represented by the Washington State Catholic Conference, are rooted in the Catholic community's belief in the inviolate dignity of the human person, its tradition of service to the most vulnerable of society, and its firm commitment to a just and peaceful world. The Catholic Charities agencies operated by the Archdiocese and Dioceses are the largest private provider of social services in the State of Washington, providing affordable permanent housing, emergency shelter, counseling, adoption, foster care, and mental health and chemical dependency services to more than 200,000 Washington residents per year.

**D. World Vision**

World Vision Inc. is a nonprofit, Christian humanitarian organization that raises funds to provide services for the poor and victims of injustice in nearly 100 countries through World Vision International, an affiliated organization. The U.S. office of World Vision also assists the poor in major U.S. cities and Appalachia.

World Vision is dedicated to working with children, families, and

their communities world-wide to reach their full potential by tackling the causes of poverty and injustice. For 60 years, World Vision has been joining with local people to help find lasting ways to improve the lives of impoverished children and families. Motivated by their faith in Jesus Christ, World Vision's employees serve alongside the poor and oppressed as a demonstration of God's unconditional love for all people. World Vision serves all people, regardless of religion, race ethnicity, or gender.

#### **E. The Salvation Army**

The Salvation Army's mission is to preach the gospel of Jesus Christ and to meet human needs without discrimination. In Washington State, it currently operates ten emergency shelters and transitional housing facilities, housing nearly 750 men, women, children, veterans, and foster youth annually. The Salvation Army also meets the basic needs of families by its food banks, meal services, clothing distribution, rental and utility assistance, employment training, transportation assistance, and cold weather shelters. The Salvation Army has 27 Corps Community Centers and social service offices, three youth camp facilities, and several adult day care and senior living facilities in Washington. The Salvation Army has been serving in Washington State since 1887

and annually benefits some 18,000 Washington residents through its Northwest Division. Nine hundred Salvation Army employees in Washington are dedicated to its mission, working to help others in the spirit of “Doing The Most Good.”

**F. Seattle Pacific University**

Seattle Pacific University seeks to be a premier Christian university fully committed to engaging the culture and changing the world by graduating people of competence and character, becoming people of wisdom, and modeling grace-filled community. The University provides in-state educational opportunities for more than 4,000 students, awarding over 1,100 degrees in 2012 through more than 80 degree programs. The University is also heavily involved in local communities and seeks ways to engage the community through service in each major, from the community kitchen operated by its nutrition program to the focus on homelessness in the global development studies program to the annual community service projects by all students. The University does more than simply connect students with jobs, but challenges them to see the religious aspects of their vocational calling.

### **G. Bellevue Christian School**

Bellevue Christian School (BCS) is a private, nondenominational Preschool-12<sup>th</sup> grade Christian school emphasizing strong academics and service within a Christ-centered curriculum. The 1,300 member student body is drawn from a broad geographic area including King County and part of Snohomish County. BCS includes one high school, one junior high school, two elementary school campuses, and three preschools.

Some of the ways BCS serves its local community are through volunteer services, a food bank, the Maltby rescue mission, and ecological services and stream protection. BCS supports international ministries such as an orphanage in Thailand, two sister schools in Uganda, organizations fighting human trafficking, and an educational and community development center in El Salvador. BCS facilities also provide venues for local congregations, weddings, symphony performances, scouting meetings, and community athletic teams.

### **H. Evergreen Christian Community**

Evergreen Christian Community (ECC) is an Olympia-area church committed to serving the needs of the community around it as an expression of the Christian faith. ECC provides community

care services that include utility and rent assistance to needy families and individuals, a food bank, and low-cost auto repair with sliding scale fees. ECC assists the state by donating bus passes for DSHS clients, providing assistance for foster children turning 18 years old and exiting the state foster care system, and providing classroom supplies for public schools and backpacks filled with school supplies for students in need. ECC members also provide on-campus after-school activities and homework assistance for students and children in nearby low-income apartments. ECC operates a private Christian school and grants need-based scholarships to students who would otherwise be unable to afford private education.

#### **I. Northshore Christian Church and Academy**

Northshore is an independent, nondenominational church in Everett offering a wide variety of programs and services to families and individuals, including a food pantry, financial aid ministry, substance abuse recovery support groups, and donations of clothing and toys, among others. Northshore also partners with more than 20 missionary organizations serving the needs of communities throughout Snohomish County and the world, dedicating a portion of its income to the financial support of these

ministries. In addition, Northshore offers education to the community through Northshore Christian Academy, which partners with families to provide a superior Christian education developing spiritual, academic, and personal excellence in a Christ-centered environment.

#### **J. Washington Federation of Independent Schools**

The Washington Federation of Independent Schools (WFIS) is the umbrella organization for private education in Washington State. The mission of WFIS is to strengthen education as the advocate and voice of private schools. WFIS is the only statewide vehicle for regular communication and strategic development between the many different constituencies, nearly three-quarters of which are religious schools. Members include the Association of Christian Schools International (ACSI), Catholic schools, Christian Schools International (CSI), Hutterian Brethren schools, Islamic schools, Jewish schools, Lutheran schools, Montessori schools (AMI, AMS, PNMA), Pacific Northwest Association of Independent Schools (PNAIS), Seventh-Day Adventist schools, and Waldorf schools (AWSNA). WFIS supports high quality educational practices, advances mission-based learning, offers professional development opportunities

including conferences, and provides opportunities for different kinds of schools to meet and explore educational opportunities and topics.

**K. The Pacific Northwest Presbytery of the Presbyterian Church in America**

The Presbytery of the Pacific Northwest is affiliated with the Presbyterian Church in America (P.C.A.) and is the regional body of local Presbyterian congregations in Washington State and other Pacific Northwest states. Many of the Presbytery's local congregations are small with memberships and regular attendees of 200 or less, about half do not own their own buildings, and most employ between five and ten employees.

**L. Faith Presbyterian Church**

Faith Presbyterian Church is a member congregation of the Pacific Northwest Presbytery and is located in Tacoma, Washington. Faith employs 11 employees, including the faculty in its small private high school of approximately 100 students. It has a vibrant ministry to the poor in the Tacoma area, providing rent assistance, food, and other emergency support to the community, regular financial support to The Rescue Mission and other Tacoma-area ministries addressing substance abuse and addictions,

and significant tuition assistance to those who cannot afford to attend its high school. Faith volunteers provide emergency support to between 30 and 50 people per month.

## I. INTRODUCTION

The amici represent a broad range of religious organizations that provide substantial benefits to Washington's local communities. While none would discriminate on the grounds alleged by Plaintiff Larry Ockletree, the exemption for religious nonprofits (the "exemption") found in the Washington Law Against Discrimination (WLAD), RCW 49.60.040(11), protects amici's religious freedom interests by shielding them from discrimination claims that could encroach on their religious missions and from burdensome and potentially destructive litigation. Amici urge the Court to uphold the statutory exemption.

## II. STATEMENT OF THE CASE

The amici provide humanitarian and crisis relief, and critical social and educational services to Washington State residents, thereby relieving the state of substantial financial obligations. The amici include social service organizations such as Seattle's Union Gospel Mission, The Rescue Mission of Pierce County, the Washington State Catholic Conference on behalf of the Archdiocese of Seattle and the Dioceses of Spokane and Yakima, World Vision, and The Salvation Army. Also included are religiously-affiliated educational institutions that provide important in-state educational opportunities for Washington residents, such as Seattle Pacific University, Bellevue Christian School, Evergreen Christian

Community, Northshore Christian Church and Academy, and the Washington Federation of Independent Schools. Equally important, among the amici are smaller religious organizations whose charitable ministries would be most impacted by a narrowing of the WLAD exemption, such as The Pacific Northwest Presbytery of the Presbyterian Church in America and Faith Presbyterian Church. Regardless of size, all the amici regard the exemption as an important shield from the threat of discrimination litigation to their religious freedom and from the potentially ruinous costs of such litigation so that they can devote their resources to those that they serve.

### III. ARGUMENT

1. **Private employment is not a fundamental right for purposes of article 1, section 12, so the appropriate standard of review is the deferential, rational basis standard, which the exemption easily satisfies.**

This Court previously determined that Washington's privileges and immunities clause qualifies for independent state analysis of its federal counterpart. *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 W.2d 570, 606, 192 P.3d 306 (2008).

The second step for examining a claim under the privileges and immunity clause is to determine whether the clause provides greater protections for Washington residents, focusing on "the state constitutional

provision *as applied to the alleged right in a particular context.*” *Id.*

(emphasis added). Rights under the clause involve “those fundamental rights which belong to the citizens of the state by reason of such citizenship.” *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

The question, then, is whether the plaintiff’s right to employment with the defendant is such a fundamental right. If there is no fundamental right at stake, there can be no violation of article 1, section 12. *Am. Legion*, 164 W.2d at 608.

This Court has concluded that the pursuit of private employment is a right, but it is not a *fundamental* right:

[W]hile it is clear that pursuing a lawful private profession or occupation is a protected right under the state and federal constitutions, it is equally clear that *such right is not a fundamental right, requiring heightened judicial scrutiny.* ... Instead, courts have repeatedly held that the right to employment is a protected interest subject to rational basis review.<sup>1</sup>

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<sup>1</sup> The United States Supreme Court has made clear that “rational basis review” is the appropriate standard for reviewing government regulation negatively impacting one’s job or livelihood. *Barry v. Barchi*, 443 U.S. 55, 61–62, 67–68, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (applying “rational basis” test in the equal protection context and upholding the regulation because the plaintiff did not establish that “the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker”) (quoting *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979)). See also *Medeiros v. Vincent*, 431 F.3d 25, 29 n. 3 (1st Cir. 2005) (explaining that it is “well-settled” that there is no fundamental right to pursue a livelihood or occupation and “that legislation or regulation impinging upon such a right therefore is subject only to ‘rational basis’ review, rather than ‘strict scrutiny’”); *Cornwell v. Cal. Bd. of Barbering and Cosmetology*, 962 F.Supp. 1260, 1271–72 (S.D. Cal. 1997) (substantive due process challenges to regulations of occupations are “subjected to rational basis review” and “[t]he regulation may only be struck down if there is no rational connection between the challenged statute and a legitimate government objective”); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14, 96 S.Ct. 2562, 49

*Amunrud v. Board of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006) (emphasis added). Moreover, Ockletree’s asserted right to private employment free of discrimination does not even implicate state interference with that right. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 680, 807 P.2d 830 (1991) (correcting employee’s mischaracterization of her asserted right from a “right to private employment” to “right to hold specific private employment free from *unreasonable government interference*”). Protecting the fundamental right of religious freedom by relieving religious nonprofits of the burdens of the WLAD, does not constitute state interference with the plaintiff’s private employment.

*Amunrud* and *Farnam* belie the plaintiff’s assertion that this Court has not decided whether “the right to pursue any lawful calling, business, or profession is one of the privileges that citizens of this state enjoy.” Opening Br. 28-29. This court has addressed the question – and resolved it squarely against the plaintiff’s interpretation. Since the plaintiff’s private employment is not a fundamental right, much less a right interfered with

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L.Ed.2d 520 (1976) (no fundamental right to government employment and applying rational basis review to restrictions on government employment); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (no fundamental right to practice law); *Nebbia v. New York*, 291 U.S. 502, 527–28, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (the right to work in a particular profession or trade is a protected right and subject to rational regulation); *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 150, 639 P.2d 853 (1982) (holding that the right to employment is not fundamental and applying rational basis review).

by the government, it is not a privilege or immunity within the meaning of the privileges and immunities clause. *See Am. Legion*, 164 Wn.2d at 608.

The plaintiff also overstates the declared purpose of the WLAD in his search for a fundamental right where none exists. Contrary to the plaintiff's characterization, the WLAD does not "specifically define[] the right to be free from discrimination in employment ... to be one of the 'privileges of [the state's] inhabitants.'" Opening Br. 28 (emphasis in original). The actual language of the WLAD states simply that discrimination "threatens ... the rights and proper privileges of its inhabitants" without elaborating on the rights or privileges the WLAD is protecting from this threat. RCW 49.60.010. There is a significant distinction between the WLAD saying it *protects* certain rights and the plaintiff asserting that that protection *is itself* a fundamental right. And in light of *Amunrud*, the employment right that the WLAD protects from discrimination is a right – but not a fundamental right – and therefore not a privilege within the meaning of article 1, section 12.

The plaintiff's assertion that he has a constitutional right to be protected from discrimination *by a private party in a private employment setting* contains within it the fatal flaw of his article 1, section 12 argument. In none of this Court's cases construing article 1, section 12 did the Court conclude the right abridged involved the state's failure to

equally protect the livelihood of another from the actions of a private party. All of this Court's jurisprudence involved the "right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813, 83 P.3d 419 (2004).

Preventing discrimination in private employment is the creature of legislative action; absent state action, the courts have declined to prohibit workplace discrimination on constitutional grounds.<sup>2</sup> The plaintiff's assertion that he possesses a fundamental right to be protected from discrimination in private employment has no support in this Court's jurisprudence or any other state or federal court.

Because the plaintiff cannot establish a fundamental right of citizenship, the Court reviews the exemption on the rational basis standard. *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 104, 178 P.3d 960 (2008) (court must determine whether city acted reasonably even though there was no violation of article 1, section 12). "When state action does

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<sup>2</sup> See *Sorey v. Barton Oldsmobile*, 82 Wn. App. 800, 805-06, 919 P.2d 1276 (1996) (suits for discrimination under RCW 49.60 are "creatures of statute"); see also, *Moran v. GTech Corp.*, 989 F.Supp. 84, 93 (D. R.I. 1997) ("Because the right asserted by plaintiff here – to be free from discrimination by a private actor – is a creature of statutory enactment, it is not a right to which [42 U.S.C.] §.1985(3) extends protection."); *Am. Nat'l Ins. Co. v. Fair Employment & Housing Comm'n*, 32 Cal.3d 603, 619 (1982) (Mosk, J., dissenting); *Ky. Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981).

not affect a fundamental right, the proper standard of review is rational basis.” *Amunrud*, 158 Wn.2d at 222. Under rational basis review, the statute is presumed to be constitutional and the plaintiff must show that the classification drawn by the statute is not rationally related to any legitimate state interest. *Andersen v. King County*, 158 Wn.2d 1, 31, 138 P.3d 963 (2006). Here, the context and operation of the WLAD exemption easily demonstrate that it is rationally related to important state interests.

**2. The WLAD exemption is a rational policy choice by the Legislature for constitutional and practical reasons.**

The WLAD exemption supports the twin purposes of preserving the broad religious freedoms guaranteed under Washington’s Constitution and increasing the availability of charitable and social services to citizens of Washington by minimizing the burden on religious nonprofits that rely on donations or tuition primarily from co-religionists. The exemption easily satisfies rational basis review.

**A. The exemption protects the religious freedoms guaranteed by Washington’s Constitution.**

The exemption properly accommodates the broad protections to religious sentiment, belief, and practice afforded by Washington’s Constitution. Article 1, section 11 of the State Constitution provides greater protections for religious freedom than the First Amendment. *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 491, 899 P.2d 803 (1995)

(citing *First Covenant Church v. Seattle*, 120 Wn.2d 203, 226, 840 P.2d 174 (1992)). The Legislature gave effect to these greater protections by choosing to avoid potential entanglements between the state and religion through the enactment of the WLAD exemption.

“Absolute freedom of conscience in all matters of religious sentiment, belief and worship” are “guaranteed” and bars conduct that merely “disturbs” another “on account of religion.” Const. art. I, § 11; *First Covenant*, 120 Wn.2d at 224. This constitutional guaranty of free exercise is “of vital importance.” *Bolling v. Superior Court*, 16 Wn.2d 373, 381, 133 P.2d 803 (1943). The conduct prohibited by article 1, section 11 is not religious activity that “disturbs” others, but actions that disturb another person “*on account of* [his or her] religion.” The government’s potentially intrusive foray into the religiously-based decision-making of nonprofits in the context of discrimination inquiries is the type of conduct the Legislature sought to avoid by enacting the exemption.

Even where there is no direct conflict between the practices of a religious nonprofit and the scope of the anti-discrimination statutes, the indirect effect of initiating or significantly expanding an area of liability for religious organizations also raises free exercise concerns. Where the coercive effect of an enactment operates against a party in the practice of

its religion, it unduly burdens that party's free exercise. *Witters v. State Comm'n for the Blind*, 112 Wn.2d 363, 371, 771 P.2d 1119 (1989) (citing *Sch. Dist. v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). This Court jealously protects the boundaries of those rights:

It is one of the most important duties of our courts to ever guard and maintain our constitutional guarantees of religious liberty, and to see to it that these guarantees are not narrowed or restricted because of some supposed emergent situation, or because it may be considered that the enforcement of some law or regulation circumscribing religious liberty would be of little consequence as possibly affecting only a few persons, or because the consequences of the impingement upon the constitutional guarantees may appear insignificant.

*Bolling*, 16 Wn.2d at 385-86.<sup>3</sup>

The wide scope of the WLAD justifies the similarly broad reach of the exemption for religious nonprofits in order to avoid entanglement concerns. In addition to the classes covered by Title VII, such as race,

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<sup>3</sup> "Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have "act[ed] as critical buffers between the individual and the power of the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 619, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). In a case like the one now before us—where the goal of the civil law in question, the elimination of discrimination against persons with disabilities, is so worthy—it is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs. The Constitution guarantees religious bodies "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, et al.*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 694, 712, 181 L.Ed.2d 650 (2012).

color, religion, and sex (42 U.S.C. § 2000e-2), the WLAD extends employment discrimination protection to areas such as age, sexual orientation, gender identity, and marital and veteran status (RCW 49.60.030, RCW 49.60.180). Even the plaintiff stresses how different these two statutes are. *See* Opening Br. 31. But it is that difference that makes it rational to provide a broader exemption under the WLAD than Title VII. The Legislature, by enacting a broad exemption to the WLAD, made a policy choice to avoid the potential pitfalls of secular bureaucrats and courts trying to reconcile Washington’s ever-growing list of protected categories – many with an arguably religious aspect – with a myriad of religious belief systems.

The exemption advances an important state interest – protecting religious freedom by avoiding state interference with religious autonomy and practice. In *Amos*, Justice White succinctly explained the chilling effect narrower exemptions have on religious organizations when they are left to wonder what is and is not considered “religious”:

Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. *Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.*

*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (emphasis added). Eliminating this fear provides a rational basis for legislative bodies to choose broad exemptions to avoid these issues, and similarly broad exemptions have been upheld.<sup>4</sup>

For religious nonprofits like amici, predicting which of their activities the Washington State Human Rights Commission or a secular court will consider religious creates a real chilling effect. Secular bureaucrats, judges and juries in discrimination litigation would weigh the sincerity of a religious employer's belief and the credibility of its application as the basis for an employer's decision to discharge an employee. Once a plaintiff makes out a prima facie case of discrimination, the burden shifts to the employer to provide a legitimate, non-discriminatory basis for the dismissal. If the employer carries this burden, the employee must put on evidence that the employer's non-discriminatory reason is unworthy of belief or pretextual. *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005); *Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn. App. 369, 371, 803 P.2d 841 (1991). An employee can show that the employer's

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<sup>4</sup> *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F.Supp.2d 970, 997 (C.D. Cal. 2000) (finding California's blanket exemption of all religious nonprofit organizations from the state antidiscrimination statute constitutional).

proffered reason is pretextual in several ways: (1) the company's reasons have no basis in fact; or (2) if they have a basis in fact, by showing that they were not really motivating factors; or (3) if they are factors, by showing they were insufficient to motivate the adverse employment decision. *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, 90, 272 P.3d 865 (2012); *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 859 n. 14, 851 P.2d 716 (1993).<sup>5</sup> Accordingly, because of the evidentiary standards for discrimination claims, the legislature could rationally conclude religious organizations should be shielded from the burden of requiring them, on pain of substantial liability, to predict when their religious beliefs would be regarded as sufficient justification for a discharge decision.

The WLAD exemption also accommodates the unique associational nature of religious organizations. Religious organizations routinely make employment decisions based on religious criteria that coincide with protected classes (e.g., pacifist religions that shun military service, denominations that do not ordain women, celibate priests and nuns that may not marry, etc.). For these organizations and their employees, religious faith is expressed through their employment and is not limited to service attendance on Sundays. Exempting them from the reach of the WLAD relieves both the courts and the organizations from the

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<sup>5</sup> Summary judgment in favor of employers is often inappropriate in employment discrimination cases. *Sellsted*, 69 Wn. App. at 860.

formidable task of scribing the line between religious practice and proscribed conduct.

**B. The exemption protects the limited resources religious nonprofit organizations receive from co-religionists to spend on the most vulnerable.**

Another equally sufficient rational basis supporting the exemption is its practical benefits not only for the government and the organizations but to society at large by allowing religious nonprofit organizations, most of which operate entirely on charitable donations from co-religionists, to devote their financial resources to the social services they provide. This, in turn, meets critical needs of the most vulnerable and others in the community and lessens the burden on governmental assistance programs. Even for the K-12 schools and colleges that do not rely primarily on donations, it is well-known that education costs continue to spiral upward while the incomes of most American students and their families remain flat. Protecting religious educational organizations from costly discrimination litigation is a rational basis for exempting such nonprofits.

No one doubts the costs that accompany compliance with the WLAD, not to mention the costs should a jury conclude that an organization violated it.<sup>6</sup> Even the plaintiff characterizes the costs as

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<sup>6</sup> See Lauren LeGrand, *Proving Retaliation after Burlington v. White*, 52 St. Louis U. L.J. 1221, 1245 (2008) (noting average cost of defending against employment discrimination claim was \$250,000 as of 2006); R. James Filiault, *Enforcing Mandatory Arbitration*

“beyond dispute,” Reply Br. 12, and notes the “obvious costs and expenses attendant upon compliance with the law irrespective of the existence of a claim.” *Id.*

These costs are significant for any employer; they are potentially ruinous for many, if not most, religious nonprofits. Even for those that obtain liability insurance, there are significant costs incurred in these situations prior to a claim being filed and most policies have a substantial retention requiring religious nonprofits to expend tens of thousands of dollars before insurance coverage is triggered.

Although the expansion of the WLAD coverage would affect all amici, it would be particularly burdensome on the smaller nonprofit organizations with a handful of employees. These employers, such as amicus curiae Faith Presbyterian Church, have more than seven but fewer than fifteen employees. Under the current statutes, they are not subject to the WLAD due to their nonprofit religious status (RCW 49.60.040(11)) and are not subject to Title VII because they are below the 15 employee threshold for application of federal law (42 U.S.C. § 2000e(b)). Narrowing

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*Clauses in Employment Contracts: A Common Sense Approach to the Federal Arbitration Act's Section 1 Exclusion*, 36 Santa Clara L. Rev. 559, 589 (1996) (reporting average jury verdict for prevailing plaintiff of \$647,000); Joyce E. Taber, *An Unanswered Question about Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude the EEOC from Seeking Monetary Relief on an Employee's Behalf in a Title VII Case?*, 50 Am. U. L. Rev. 281, 313 (2000) (noting mean damage award in federal civil actions of \$530,611).

the WLAD exemption would expose these organizations to employment practices liability for the first time, affecting a majority of the 246 Catholic parishes in Washington and many of the congregations of the Pacific Northwest Presbytery, just by way of example within the amici. This burden would fall heavily on many other local congregations, and other small religious nonprofits, throughout the state, which are also likely to be within the eight-to-fourteen employee window.

Donations to cover these new expenses would necessarily divert resources from the work of these religious organizations. As charitable operations that rely mostly on donations from co-religionists, the organizations could not price these increased expenses into the cost of the “goods” they provide. For every dollar spent on compliance, defense, and judgment costs, one fewer dollar is available for services.

The state benefits directly from the exemption when its financial burden is reduced by the services amici provide. Amici such as Seattle’s Union Gospel Mission, The Rescue Mission of Pierce County, and the Catholic Charities agencies serve tens of thousands of clients and provide hundreds of thousands of shelter-nights and more than two million meals per year to vulnerable residents.<sup>7</sup> This does not include the services

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<sup>7</sup> See Seattle’s Union Gospel Mission, *Financial Accountability*, [http://www.ugm.org/site/PageServer?pagename=about\\_financials\\_accountability](http://www.ugm.org/site/PageServer?pagename=about_financials_accountability) (last visited Mar. 29, 2013); The Rescue Mission, *Annual Report 2012*, <http://www.rescue->

provided by other religious nonprofits such as Evergreen Christian Community, Northshore Christian Church, Faith Presbyterian Church, and countless other small congregations that provide food pantries and financial assistance to the needy in their local communities. Striking down the exemption will inevitably result in some of these resources being redirected towards litigation costs, leaving the state to fill the gap at a time it can least afford to do so or, even worse, resulting in more unmet needs.

The state also realizes savings in education expenses through the work done by nonprofit religious schools. There were 513 private schools in Washington in 2012, the vast majority of which were religiously-affiliated schools.<sup>8</sup> These private schools enrolled 80,914 Washington State students who would otherwise be part of the public school system.<sup>9</sup> Based on the \$9,694 average expenditure per student in 2012,<sup>10</sup> those students represent a savings of \$784 million for the state. The state benefits by not incurring expenses for these students, while simultaneously

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[mission.org/document.doc?id=123](http://mission.org/document.doc?id=123) (last visited Mar. 29, 2013); Washington State Catholic Conference, *Directory of Social Services and Housing Facilities of the Catholic Charities Network 2012*, <http://www.thewsc.org/images/stories/Resources/Directory/12ccdir.pdf> (last visited Mar. 29, 2013).

<sup>8</sup> Washington Office of the Superintendent of Public Instruction, *Approved Private Schools 2012-2013*, <http://www.k12.wa.us/PrivateEd/PrivateSchools/default.aspx> (last visited Mar. 29, 2013).

<sup>9</sup> Washington Office of the Superintendent of Public Instruction, *2012-2013 Enrollment Count for Approved Private Schools*, <http://www.k12.wa.us/DataAdmin/default.aspx> (last visited Mar. 29, 2013).

<sup>10</sup> Washington Office of the Superintendent of Public Instruction, *Education Quick Facts*, <http://data.k12.wa.us:9990/PublicDWP/Web/WashingtonWeb/Home.aspx> (last visited Mar. 29, 2013).

collecting revenue from their parents through the general taxes that support Washington's schools.

In light of these realities, it is reasonable for the Legislature to conclude that the current WLAD exemption provides a greater benefit to society than exposing these organizations to increased employment practices liability. The Legislature has determined to encourage these activities by enacting and maintaining the exemption.

**3. The religious nonprofit exemption is consistent with the policy behind other exemptions that shield the majority of Washington employers from the burdens of state and federal anti-discrimination laws.**

The small business exemptions to the WLAD and Title VII both exhibit similar policy choices in a secular context, providing relief from those statutes for organizations that provide a valuable social benefit but are the least likely to be able to bear the costs of compliance. The WLAD exempts all employers with seven or fewer employees. RCW 49.60.040(11). Title VII exempts all employers with fourteen or fewer employees. 42 U.S.C. § 2000e(b).

The exemptions from the WLAD and Title VII for businesses based on the number of employees reflect legislative judgments that the employment opportunities provided by smaller businesses outweigh the benefits of imposing compliance on these employers. The majority of

businesses in both Washington State and the nation are exempted by these provisions. As of 2008 – the latest year employment figures are available from the U.S. Census Bureau – at least 59 percent of Washington employers are completely exempted from the WLAD<sup>11</sup> and at least 78 percent of employers nationwide are completely exempted from Title VII.<sup>12</sup> The exemption of religious nonprofits without regard to their size is no less rational than the exemption of smaller, for-profit businesses regardless of their revenue. In each case, the organizations provide benefits to society that the legislatures considered important enough to refrain from interfering with their hiring practices.

#### IV. CONCLUSION

The WLAD exemption for religious nonprofits does not constitute state interference with the plaintiff's private employment. And even if it did, private employment is not a fundamental right under the State Constitution, so the exemption is subject to rational basis review. It was rational for the Legislature to conclude that, without the exemption, applying the State's police power to the hiring practices of religious nonprofits would interfere with their religious freedom protected by article

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<sup>11</sup> 90,291 out of 150,991 employers in Washington had four employees or fewer. United States Census Bureau, *Statistics of U.S. Businesses: 2008: Washington*, <http://www.census.gov/epcd/susb/2008/wa/WA--.HTM#> (last visited Mar. 25, 2013).

<sup>12</sup> 4,661,829 out of 5,930,132 employers in the U.S. had nine employees or fewer. United States Census Bureau, *Statistics of U.S. Businesses: 2008: United States*, <http://www.census.gov/epcd/susb/2008/us/US--.HTM> (last visited Mar. 25, 2013).

1, section 11. Because of the high constitutional regard for religious freedom, as well as the significant societal benefits provided by religious charities, the exemption is rationally related to a legitimate state interest and is not unconstitutional.

RESPECTFULLY SUBMITTED this 9th day of April, 2013.

ELLIS, LI & McKINSTRY PLLC

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CERTIFICATE OF SERVICE

1. I am a legal assistant with the law firm Ellis, Li & McKinstry PLLC. I am over the age of 18, am competent to make this declaration, and have personal knowledge of the facts herein.

2. On April 9, 2013, I certify that I emailed, and mailed via Regular U.S. Mail, with postage prepaid thereon, a copy of the foregoing Brief of Amici Curiae by Religious Organizations to the following:

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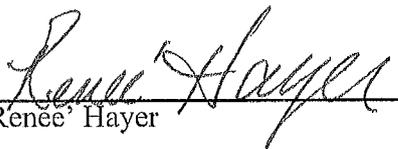
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I declare under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

Executed this 9th day of April, 2013, at Seattle, Washington.

  
Renee Hayer

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Case Name: Larry C. Ockletree v. Franciscan Health System, et. al.  
Case Number: 88218-5

For filing with the Court, please find attached:

- 1) Motion to file Amicus Curiae Brief by Religious Organizations; and
- 2) Brief of Amici Curiae by Religious Organizations.

These documents are being filed by:

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