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No. 88218-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

On Certification from the Western District of Washington,
United States District Court

in

LARRY C. OCKLETREE,

Plaintiff,

vs.

FRANCISCAN HEALTH SYSTEM, a Washington corporation, d/b/a
ST. JOSEPH HOSPITAL and JOHN and JANE DOEs (#1-10),

Defendants.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons, including an interest in the proper interpretation and application of the Washington Constitution and the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD).

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents questions regarding whether the WLAD exemption from employment discrimination claims for nonprofit religious organizations provided by RCW 49.60.040(11) is valid under the Washington Constitution. Larry C. Ockletree (Ockletree) filed suit against Franciscan Health System, a Washington corporation, doing business as St. Joseph Hospital, and “John Doe” defendants (FHS). He alleged several claims, including employment discrimination based on race and disability in violation of the WLAD. He originally filed suit in Pierce County Superior Court, but FHS removed the action to the U.S. District

Court for the Western District of Washington. As a result of FHS's motion to dismiss certain of Ockletree's claims based on the nonprofit religious organization exemption, the district court certified questions regarding the validity of the exemption under the state constitution to this Court.

The underlying facts are drawn from the briefing of the parties before this Court and the federal court's orders regarding the motion to dismiss and certification. See Ockletree Br. at 4-7, Appendix A-2 (Order on Defendants' Motion to Dismiss [hereafter "Order"]) & Appendix A-3 (Order Certifying Question to the Washington Supreme Court [hereafter "Certification"]); FHS Br. at 9-12.

For purposes of this amicus curiae brief, the following facts are relevant: While working for the security department of St. Joseph's Hospital, Ockletree suffered a stroke, resulting in the loss of use of his left arm. His job entailed greeting individuals entering the emergency department of the hospital, checking their identification, and issuing visitor badges. Ockletree contends that the job did not require the use of his left arm, nor did it have any other significant physical requirements. Ockletree filed suit in superior court, alleging that FHS did not allow him to return to work following the stroke and eventually terminated his employment because of his race and/or disability. He asserted race and disability discrimination claims under the WLAD, RCW 49.60.030 & .180, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

(Title VII), and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.* (ADA).

After removing the case to federal court, FHS filed a motion to dismiss the WLAD claims, as well as the Title VII and ADA claims, pursuant to Fed. R. Civ. P. 12(b)(6). Ockletree’s Title VII and ADA claims hinge in part upon the viability of his WLAD claim because the availability of state administrative procedures extends the time limit for invoking remedies under Title VII and the ADA. See Ockletree Br. at Appendix A-2 (Order at 6-10). Under both Title VII and the ADA an administrative charge must be filed with the U.S. Equal Employment Opportunity Commission within 180 days after the alleged discrimination occurred if no state agency has jurisdiction, but 300 days if a state agency has jurisdiction. See id.; see also 42 U.S.C. §2000e-5(e)(1) (stating Title VII time limit for filing charge of discrimination); 42 U.S.C. §12117(a) (incorporating Title VII time limit under the ADA). It appears that, if the WLAD applies in this case, Ockletree’s Title VII and ADA claims would be timely. See Ockletree Br. at Appendix A-2 (Order at 6-10).

FHS relied on the exemption of nonprofit religious and sectarian organizations from the WLAD definition of “employer” as the basis for its motion to dismiss. The WLAD definition of employer provides in pertinent part:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

....

(11) “Employer” includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, *and does not include any religious or sectarian organization not organized for private profit.*

RCW 49.60.040(11) (ellipses & emphasis added).¹ FHS relied solely on its status as a religious organization, and did not contend that Ockletree’s employment or his termination implicated any religious belief or conduct. See Ockletree Br. at Appendix A-2 (Order at 10, stating “FHS does not claim that it terminated Ockletree for any reason related to its religious activity”); id. at Appendix A-2 (Order at 13, recognizing “the alleged discrimination has nothing to do with any religious purpose or activity”); id. at Appendix A-3 (Certification at 4, phrasing question #2 in terms of discrimination “for reasons wholly unrelated to any religious purpose, practice, or activity”).

In response, Ockletree argued that the WLAD nonprofit religious organization exemption is unconstitutional, under both the state and federal constitutions. Under the Washington Constitution, Ockletree contended that the exemption violates Washington Constitution Art. I § 11, regarding religious freedom, and Art. I § 12, prohibiting special privileges and immunities. Although the district court indicated that the exemption may be invalid under the *federal* constitution, to the extent that it exempts nonprofit religious organizations from liability for non-religion-based discrimination claims, it did not issue a ruling on the federal

constitutional issue, but rather certified the state constitutional issues to

¹ The full text of the current version of RCW 49.60.040 is reproduced in the Appendix to this brief.

this Court. See Ockletree Br. at Appendix A-1 (Transcript of Proceedings at 24); id. at Appendix A-2 (Order at 14).

III. ISSUES PRESENTED

The certified questions are:

1. The Washington Law Against Discrimination excludes religious nonprofit organizations from its definition of “employer” (RCW 49.60.040(11)). Such entities are therefore facially exempt from the WLAD’s prohibition of discrimination in the workplace. Does this exemption violate Wash. Const. article I, §11 or §12?
2. If not, is RCW 49.60.040(11)’s exemption unconstitutional as applied to an employee claiming that the religious nonprofit organization discriminated against him for reasons wholly unrelated to any religious purpose, practice, or activity?”

Ockletree Br. at Appendix A-3 (Certification at 4).

IV. SUMMARY OF ARGUMENT

Where alleged WLAD employment discrimination claims do not implicate religious belief or conduct, the exemption of nonprofit religious organizations in RCW 49.60.040(11) violates Washington Constitution Art. I §11. The “absolute freedom of conscience in all matters of religious sentiment” guaranteed by Art. I § 11 is qualified by additional text providing that “the liberty of conscience hereby secured shall not be so construed as to ... justify practices inconsistent with the peace and safety of the state.” This qualification represents a limitation on the general police power of the state, and constrains the Legislature from exempting a religious or sectarian organization, based on *religious status alone*, from an otherwise neutral law enacted to promote public peace and safety. The

exemption for nonprofit religious organizations must be stricken from RCW 49.60.040(11).

While in some contexts a statute adopted for the sake of public peace and safety may burden religious freedom guaranteed by Art. I §11, and require the Court to carefully balance the competing interests, that is not the case here. Given the lack of any nexus between Ockletree's employment or termination and FHS's religious beliefs or conduct, the certified questions do not involve any burden on religious freedom to balance against the "public welfare, health, and peace of the people of this state" protected by the WLAD, RCW 49.60.010.

Because the WLAD's nonprofit religious organization exemption is invalid under Art. I §11, it is not necessary to reach the question of whether the exemption also violates the prohibition regarding special privileges and immunities in Washington Constitution Art. I §12.

V. ARGUMENT

Introduction

This brief only addresses whether the WLAD exemption for nonprofit religious organizations in RCW 49.60.040(11) is invalid under Washington Constitution Art. I §11, regarding religious freedom. To bring the issues posed by the certified questions into sharper focus, it is helpful to ask: If the foregoing statutory exemption did not exist, could FHS avoid WLAD liability by invoking Art. I §11 as a defense to employment discrimination claims having nothing to do with its religious beliefs or

conduct, based solely on its status as a nonprofit religious organization? And, if not, by what authority is the Legislature entitled to grant such an exemption by statute? The answers to these questions require the exemption to be invalidated.

A. Washington Constitution Art. I §11 Prohibits The Legislature From Exercising Its General Police Power To Exempt Religious Actors, Based On Their Religious Status Alone, From Laws Protecting The Peace And Safety Of The State.

Article I §11 of the Washington Constitution provides:

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: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

(Emphasis added.) In applying the factors listed in State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), this Court has concluded that the “[a]bsolute freedom of conscience ...” clause of Art. I §11 should be given an interpretation independent of the free exercise clause of the First Amendment to the U.S. Constitution, see First Covenant Church v. Seattle, 120 Wn.2d 203, 223-26, 840 P.2d 174 (1992), and that its “[n]o

public money ...” clause should be interpreted independently from the establishment clause of the First Amendment, see Malyon v. Pierce County, 131 Wn.2d 779, 791-98, 935 P.2d 1272 (1997). However, the Court has not specifically addressed whether the “peace and safety” clause highlighted above should be interpreted independently from the First Amendment. See Farnam v. CRISTA Ministries, 116 Wn.2d 659, 679-80 & n.7, 807 P.2d 830 (1991) (declining to reach Art. I §11 challenge to WLAD nonprofit religious organization exemption).

Because analysis of the Gunwall factors focuses on the specific constitutional text, and because it provides guidance regarding how the text should be interpreted and applied, a Gunwall analysis of the peace and safety clause is warranted, if not required, here. See Malyon, 131 Wn.2d at 792 & n.10 (noting need for Gunwall analysis of “relevant portion” of Art. I §11 to determine whether independent interpretation is warranted); State v. Boland, 115 Wn.2d 571, 575, 800 P.2d 1112 (1990) (indicating Gunwall factors helpful in determining what the independent interpretation should be).

Gunwall Analysis of Peace and Safety Clause

The first Gunwall factor focuses on the text of the relevant constitutional provision:

The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the Federal Constitution. It may be more explicit or it may have no precise federal counterpart at all.

Gunwall, 106 Wn.2d at 61. In this connection, the Court has emphasized the importance of the plain meaning of the constitutional text:

Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.³¹ The text necessarily includes the words themselves, their grammatical relationship to one another, as well as their context. Our objective is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise.

³¹ Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.

Joseph Story, *Commentaries on the Constitution of the United States* § 451 (Melville M. Bigelow ed., 5th ed. 1891).

Malyon, 131 Wn.2d at 799 & n.31.

Turning to the text of Art. I §11, the peace and safety clause qualifies the freedom of conscience guarantee. These clauses are juxtaposed in the same sentence, and the reference in the peace and safety clause to “liberty of conscience hereby secured” is an explicit reference to the preceding freedom of conscience language. The word “construed” indicates that both of the clauses must be read together. See Black’s Law Dictionary, s.v. “construe” (9th ed. 2009) (defining “construe” as “[t]o

analyze and explain the meaning of (a sentence or passage)”).² Reading the two clauses together, the text of Art. I §11 plainly prohibits the Legislature from “justify[ing] practices inconsistent with the peace and safety of the state” simply because they happen to be performed by religious actors.³

The second Gunwall factor involves comparison of the parallel provision of the federal constitution. See Gunwall at 61. However, the First Amendment religion clauses contain no language comparable to the peace and safety clause of Art. I §11, supporting an independent interpretation. See Malyon v. Pierce County, 79 Wn. App 452, 468, 903 P.2d 475 (1995) (stating “[t]he language of [Art. I] section 11 alone virtually demands an interpretation different from the First Amendment”), *rev'd on other grounds*, 131 Wn.2d 779, 935 P.2d 1272 (1997); see also Malyon, 131 Wn.2d at 791 (agreeing with Court of Appeals’ Gunwall analysis).

The third Gunwall factor involves consideration of the history of adoption of a particular constitutional provision, which would seem to include the amendments to the provision. See Gunwall at 61. The peace

² In Malyon, 131 Wn.2d at 796-97, the Court stated that the “shall not be so construed” language contained in the proviso to the “[n]o public money” clause of Art. I §11 is a “rule of construction,” stating a principle going beyond the language of the constitutional text that governs the interpretation of the text. In reliance on this rule of construction, the Court held that the proviso authorized a county sheriff to use chaplains, even though such chaplain positions were not specifically mentioned in the proviso. See id., at 800-01.

³ There are a number of instances in the Washington Constitution where the framers used the negative phrase “shall not be construed” or similar language to limit legislative power. See e.g. Wash. Const. Art. VIII §9 (indicating legislative power to provide for a state building authority “shall not be construed as authority to provide buildings through lease or otherwise to nongovernmental entities”). A listing of constitutional provisions containing this type of language is included in the Appendix to this brief.

and safety clause was included in the original text, and it has remained unchanged despite three amendments to Art. I §11 in the intervening time. See First Covenant Church, 120 Wn.2d at 224 (in analyzing third Gunwall factor, relying on language of Art. I §11 at time of adoption and lack of change to this language despite amendment). All three of these amendments relate to the proviso allowing for the public employment of chaplains. See Laws of 1903, ch. 147 §1 (Amendment 4); Senate Joint Resolution No. 14, Laws of 1957, p. 1299 (Amendment 34); House Joint Resolution No. 4200, Laws of 1993, p. 3062 (Amendment 88).

Like the peace and safety clause in the original text of Art. I §11, these three amendments also use the “shall not be so construed” language. Amendment 4 first added the proviso: “That this article shall not be so construed as to forbid the employment by the state of [certain specified chaplain positions] as in the discretion of the legislature may seem justified.” (Brackets added.) Amendments 34 and 88 retained the “shall not be so construed language” and merely elaborated upon the list of specified chaplain positions.⁴

The contrast in how the “shall not be so construed” language is used in these amendments sheds light on the meaning of the peace and safety clause. The amendments are each in the nature of an enabling clause permitting legislative action. They preclude a construction that would “forbid” the employment of chaplains, and give the Legislature

⁴ The original and amended texts of Art. I §11 are reproduced in the Appendix to this brief.

“discretion” to determine whether or not to employ chaplains at public expense.

The peace and safety clause, on the other hand, is in the nature of a limitation upon legislative action. It precludes a construction that would “justify [i.e., permit] practices inconsistent with the peace and safety of the state.” The text does not give the Legislature any discretion to exempt religious actors from legislation adopted for the sake of promoting public peace and safety.

The fourth Gunwall factor involves consideration of preexisting state law. See Gunwall at 61-62. Preexisting state law considered under this factor is not limited to law predating the adoption of the Washington Constitution. See First Covenant Church, 120 Wn.2d at 224-25 (relying on post-constitution case law). Washington law has recognized in varying contexts that religious actors may properly be subject to neutral laws addressing public peace and safety. See Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 166-69, 995 P.2d 33 (2000) (requiring church to apply for conditional use permit for building based on the necessity and validity of zoning as an exercise of police power, and rejecting challenge based on Art. I §11); CJC v. Corporation of Catholic Bishop of Yakima, 138 Wn.2d 699, 727-28, 985 P.2d 282 (1999) (rejecting church’s argument that Art. I §11 prevented Court from imposing tort duty on religious organization, based on peace and safety clause; plurality opinion); State ex rel. Holcomb v. Armstrong, 39 Wn. 2d

860, 864, 239 P.2d 545 (1952) (denying application for mandamus to register student at public university where student refused X-ray exam for tuberculosis on religious grounds, and rejecting Art. I §11 challenge due to public interest in protecting health of students and employees of the university); State v. Verbon, 167 Wash. 140, 148-49, 8 P.2d 1083 (1932) (upholding conviction of religious healer for practicing medicine without a license based on “preservation of the public health and general welfare,” and rejecting challenge based on Art. I §11); State v. Balzer, 91 Wn.App. 44, 65-66, 954 P.2d 931 (upholding conviction for religious use of marijuana, rejecting appeal based on Art. I §11, and stating that the defendant’s “free exercise of religion must yield to the ‘peace and safety of the state’”), *review denied*, 136 Wn.2d 1022 (1998); State v. Norman, 61 Wn. App. 16, 21-24, 808 P.2d 1159 (upholding manslaughter conviction for withholding medical treatment from child on religious grounds, rejecting Art. I §11 challenge due to peace and safety of the state), *review denied*, 117 Wn.2d 1017 (1991). There appears to be no Washington authority exempting religious actors from such neutral laws involving peace and safety. See FHS Br. at 38-40.⁵

⁵ Notably, under the WLAD, religious actors are generally subject to the prohibition against discrimination in non-employment settings such as public accommodations and real estate transfers. See RCW 49.60.030 (declaring right to be free from discrimination and providing remedy for discrimination, without regard for religious status of actor); RCW 49.60.215 (prohibiting discrimination in public accommodations); RCW 49.60.224 (prohibiting real estate transfer restrictions based on “creed,” among other things). The WLAD does exclude from the definition of “public accommodation” a limited category of religious facilities, i.e., “any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.” See RCW 49.60.040(2).

The fifth Gunwall factor involves recognition of the differences in structure between the federal and state constitutions. See Gunwall at 62. “[T]he United States Constitution is a *grant* of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law.” Id. at 66 (emphasis in original). This factor always favors an independent state interpretation. See State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994).

The sixth and final Gunwall factor involves consideration of whether the subject matter is of particular state interest or local concern. See Gunwall at 62. Although the Court has stated in First Covenant Church, 120 Wn.2d at 225, that “[f]ree exercise of religion is not a local concern,” the exercise of police power to promote public peace and safety within the boundaries of the state is of particular state interest and local concern. See CLEAN v. State, 130 Wn.2d 782, 804-05, 928 P.2d 1054 (1996) (indicating “public peace, health or safety” are synonymous with police power, and that “[t]he police power of the State is an attribute of sovereignty”).

Meaning of Peace and Safety Clause

Based on the foregoing Gunwall analysis, an independent interpretation of the peace and safety clause of Art. I §11 is required.

Properly understood, the peace and safety clause imposes a limitation on the police power of the Legislature. The Legislature cannot “justify practices inconsistent with the peace and safety of the state” based on *religious status alone*. See CLEAN, 130 Wn.2d at 805 (stating exercise of police power must not violate any constitutional mandate).

Undoubtedly, there are instances when religious belief or conduct is actually burdened by legislation adopted for the sake of public peace and safety, and, in these instances, the Court may need to balance the competing interests involved. See Open Door Baptist, 140 Wn.2d at 166-71 & n.16; Munns v. Martin, 131 Wn.2d 192, 200, 930 P.2d 318 (1997) (stating “if an enactment does create a burden, the courts must analyze if the burden is offset by a compelling state interest” under Art. I §11). However, in the absence of an actual burden on religious belief or conduct, religious status alone is insufficient, and the interest in public peace and safety takes precedence. See City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 642 n.3, 211 P.3d 406 (2009) (recognizing the government may require compliance with reasonable police power regulation under the peace and safety clause of Art. I §11 in the absence of a substantial burden on religious belief or conduct). Otherwise, a religious organization “would be totally free from government regulations[,]” even though “[o]ur Constitution expressly provides to the contrary.” Id., 166 Wn.2d at 643.

FHS construes the peace and safety clause of Art. I §11 as permissive, allowing the Legislature to *choose* whether or not to exempt religious organizations from legislation adopted for the sake of public peace and safety. See FHS Br. at 39-40. At one level, this analysis renders the peace and safety clause meaningless because the Legislature already has discretion to exercise its general police power in any manner it sees fit, subject to constitutional limitations. In order to have meaning, the peace and safety clause must be construed as a limit on the Legislature's general police power, rendering it incapable of extending the scope of religious freedom beyond that provided in Art. I §11.

At another level, FHS's analysis would essentially allow the Legislature to establish the contours of the peace and safety clause by means of its own legislation. This exceeds the proper bounds of legislative authority. See Washington State Hwy. Comm'n v. Pacific Nw. Bell Tel. Co., 59 Wn.2d 216, 222-23, 367 P.2d 605 (1961) (noting "[t]he constitution does not grant to the legislature the power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision"). Construction of a constitutional provision is "exclusively a judicial function." Id., 59 Wn.2d at 222.

Reading the peace and safety clause of Art. I §11 as a limitation on the general police power of the Legislature is required by this Court's teachings. As noted in Weiss v. Bruno, 82 Wn.2d 199, 210, 509 P.2d 973

(1973), *overruled on other grounds*, State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 48 P.3d 274 (2002):

“[T]he police power—broad and comprehensive as it is—may not be exercised in contravention of plain and unambiguous constitutional inhibitions.” *Mitchell v. Consolidated School Dist. 201*, [17 Wn.2d 61, 64, 135 P.2d 79 (1943)] The legislature cannot violate specific constitutional requirements simply by declaring the statute in question to be within the scope of the police power. “Otherwise, the result would be a police state, and the legislative branch of the government would be omnipotent.” *Peterson v. Hagan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960).

(Brackets & ellipses added); cf. Open Door Baptist, 140 Wn.2d at 168-70 (rejecting argument for unconditional religious freedom regarding zoning laws based on Art. I §11).

With this understanding of the peace and safety clause, it is possible to address the certified questions posed by the federal court as they relate to Art. I §11, and the validity of the WLAD’s exemption for nonprofit religious organizations.

B. The WLAD Exemption In RCW 49.60.040(11) For Nonprofit Religious Organizations, Based On Their Religious Status Alone, Is Beyond The Police Power Of The State, And Should Be Invalidated.

In answer to the certified questions, the Court should hold that the WLAD’s nonprofit religious organization exemption violates Art. I §11. Unquestionably, the WLAD is designed to promote public peace and safety. Discrimination, including discrimination based on race and disability, is “a matter of state concern” that “threatens the rights and proper privileges” of the state’s inhabitants and “menaces the institutions

and foundation of a free democratic state.” RCW 49.60.010.⁶ The WLAD “is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights.” Id.; see also RCW 49.60.020 (mandating liberal construction to accomplish purposes of WLAD); RCW 49.60.030(1) (declaring freedom from discrimination, to be a civil right). This Court has repeatedly stated that the WLAD expresses a public policy of the highest priority. See e.g. International Union of Operating Engineers v. Port of Seattle, — Wn.2d —, 295 P.3d 736, 740 (2013).

RCW 49.60.040(11) exceeds the limitation on the Legislature’s police power stated in the peace and safety clause of Art. I §11 because it exempts nonprofit religious organizations from liability for employment discrimination claims based on their *religious status alone*, without requiring any nexus between the employment decision in question and any religious belief or conduct. See §A, supra.⁷

The exemption should be declared unconstitutional on its face because under Art. I §11 there are no circumstances where religious status alone can justify practices inconsistent with public peace and safety. See McDevitt v. Harborview Med. Ctr., — Wn.2d —, 291 P.3d 876, 882

⁶ The full text of the current version of RCW 49.60.010 is reproduced in the Appendix to this brief.

⁷ Of course, this does not mean that an employer is foreclosed from raising a defense to a discrimination claim based upon a showing that the claim actually burdens its religious freedom protected by Art. I §11. Cf. Open Door Baptist, 140 Wn.2d at 171 n.3 (stating “[r]eligious free exercise remains an area around which the government must tread very lightly”; involving zoning regulation challenge). However, this is a question for another day, as it is beyond the scope of the certified questions.

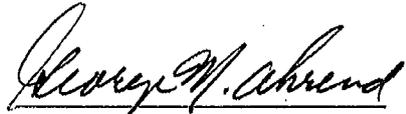
(2012) (explaining facial unconstitutionality declared when “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied”), *reconsideration pending*. Nor can the Court rewrite the exemption so that it would be limited to discrimination claims that impose an undue burden on religious belief or conduct. See Hale v. Wellpinit Sch. Dist., 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (indicating, as a matter of separation of powers, that a court may only interpret and strike down legislation). In accordance with the WLAD’s uncodified severance provision, Laws of 1949, ch. 183 §13, the last clause of RCW 49.60.040(11) should be stricken. See State v. Abrams, 163 Wn.2d 277, 287, 178 P.3d 1021 (2008) (indicating a statutory provision is severable if “it is separate and distinct and can be easily removed without affecting the other statutory provisions”).⁸

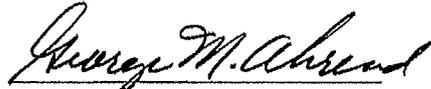
VI. CONCLUSION

The Court should adopt the analysis of Washington Constitution Art. I §11 proposed in this brief, and answer the certified questions accordingly.

⁸ If the nonprofit religious organization exemption provided by RCW 49.60.040(11) is invalidated under Art. I §11, it is unnecessary for the Court to address whether the exemption also violates Art. I §12, prohibiting special privileges and immunities. Such a result would be wholly consistent with Griffin v. Eller, 130 Wn.2d 58, 922 P.2d 788 (1996), upholding the exemption in RCW 49.60.040(11) for employers having less than eight employees. The unsuccessful constitutional challenge in Griffin was based upon a privileges and immunities analysis (predating Grant County Fire Prot. Dist. v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004)), and the exemption for small employers does not implicate Art. I §11 in any respect. See Griffin, 130 Wn.2d at 61, 65-70 (rejecting Art. I §12 challenge under rational basis test). Dicta in Griffin questioning the severability of the small employer exemption, appears to have overlooked the uncodified WLAD severability provision. See id. at 69-70.

DATED this 9th day of April, 2013..


GEORGE M. AHREND


~~For~~ BRYAN P. HARNETIAUX, *with authority*

On Behalf of WSAJ Foundation

Appendix

Original and Amended Text of Washington Constitution Art. I §11*

SECTION 11 RELIGIOUS FREEDOM. 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: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [AMENDMENT 88, 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993.]

Amendment 34 (1957) -- Art. 1 Section 11 RELIGIOUS FREEDOM --
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: Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [AMENDMENT 34, 1957 Senate Joint Resolution No. 14, p 1299. Approved November 4, 1958.]

Amendment 4 (1904) -- Art. 1 Section 11 RELIGIOUS FREEDOM --
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

* Available at www.leg.wa.gov/LAWSANDAGENCYRULES/Pages/constitution.aspx.

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. Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [AMENDMENT 4, 1903 p 283 Section 1. Approved November, 1904.]

Original text -- Art. 1 Section 11 RELIGIOUS FREEDOM -- *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. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.*

Washington Constitutional Provisions Containing The Phrase “Shall Not Be So Construed” Or Similar Language

- Art. I §11 Peace and safety clause and proviso indicating “[n]o public funding” clause “shall not be so construed as to forbid the employment of [certain specified chaplain positions.]”
- Art. I §34 Indicating legislative authority regarding recall of elective officers “shall not be construed to grant the legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people.”
- Art. II §1 Indicating reservation of initiative and referendum power to the people “shall not be construed to deprive any member of the legislature of the right to introduce any measure.”
- Art. II §28 Indicating prohibition of legislative authority to change county lines and county seats “shall not be construed to apply to the creation of new counties.”
- Art. I §24 Indicating that “nothing in [section pertaining to right to bear arms] shall be construed as authorizing” employment of an armed body of men.
- Art. II §40 Indicating limitation on use of funds collected for highway purposes “shall not be construed to include revenue from [other specified sources.]”
- Art. VIII §9 Indicating legislative authority to provide for a state building authority “shall not be construed as authority to provide buildings through lease or otherwise to nongovernmental entities.”
- Art. XI §3 Indicating legislative authority to apportion debts to newly created counties “shall not be construed to affect the rights of creditors.”
- Art. XII §10 Indicating that power of eminent domain “shall never be ... construed as to prevent the legislature from taking the property of incorporated companies.”
- Art. XVI §3 With reference to limits of sale of land granted for educational purposes, indicating “that nothing herein shall be so construed as to prevent the state from selling

the timber or stone off of any of the state lands.”

Art. XXVII Indicating legislative authority to alter or repeal laws in force in the Territory of Washington “shall not be so construed as to validate any act ... granting shore or tide lands to any person, company or any municipal or private corporation.”

Art. XXXII §1 Indicating specified constitutional provisions “shall not be construed as a limitation of authority granted by [special revenue financing section,]” and that special revenue financing section “shall not be construed as a repeal of or limitation of any other authority lawfully exercisable under the Constitution and laws of this state.”

Note: There are also several instances where the framers used the positive phrase “shall be construed” to define terms. See Art. II §40 (indicating definition of “highway purposes” for use of highway funds “shall be construed to include [certain specified purposes]”); Art. VIII §1 (indicating definition of state debt “shall be construed to mean [certain specified items]”); Art. XII §5 (indicating definition of “corporations ... shall be construed to include [certain specified entities]”).

RCW 49.60.010. Purpose of chapter

This chapter shall be known as the “law against discrimination.” It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

[2007 c 187 § 1, eff. July 22, 2007; 2006 c 4 § 1, eff. June 8, 2006; 1997 c 271 § 1; 1995 c 259 § 1; 1993 c 510 § 1; 1985 c 185 § 1; 1973 1st ex.s. c 214 § 1; 1973 c 141 § 1; 1969 ex.s. c 167 § 1; 1957 c 37 § 1; 1949 c 183 § 1; Rem. Supp. 1949 § 7614-20.]

RCW 49.60.040. Definitions

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a

person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) “Honorably discharged veteran or military status” means a person who is:

(a) A veteran, as defined in RCW 41.04.007; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) “Labor organization” includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) “Marital status” means the legal status of being married, single, separated, divorced, or widowed.

(18) “National origin” includes “ancestry.”

(19) “Person” includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) “Premises” means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) “Real estate transaction” includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) “Real property” includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) “Respondent” means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) “Service animal” means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

(25) “Sex” means gender.

(26) “Sexual orientation” means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, “gender expression or identity” means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

[2009 c 187 § 3, eff. July 26, 2009. Prior: 2007 c 317 § 2, eff. July 22, 2007; 2007 c 187 § 4, eff. July 22, 2007; 2006 c 4 § 4, eff. June 8, 2006; 1997 c 271 § 3; 1995 c 259 § 2; prior: 1993 c 510 § 4; 1993 c 69 § 3; prior: 1985 c 203 § 2; 1985 c 185 § 2; 1979 c 127 § 3; 1973 c 141 § 4; 1969 ex.s. c 167 § 3; 1961 c 103 § 1; 1957 c 37 § 4; 1949 c 183 § 3; Rem. Supp. 1949 § 7614-22.]

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Subject: Re: Ockletree v. FHS (S.C. #88218-5)

Dear Mr. Carpenter:

I inadvertently sent the email appended below without the attachment.

On Tue, Apr 9, 2013 at 4:27 PM, George Ahrend <gahrend@trialappeallaw.com> wrote:
Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is submitted for filing in the above-reference case. A letter application on behalf of the Foundation to appear as amicus curiae was submitted yesterday. Counsel for the parties are being served simultaneously by copy of this email, in accordance with a prior agreement among counsel.

Respectfully submitted,

--

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AHREND ALBRECHT PLLC

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