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SUPREME COURT OF THE STATE OF WASHINGTON

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CERTIFICATION FROM UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA IN

LARRY C. OCKLETREE,

Plaintiff,

v.

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

Defendants.

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DEFENDANT FRANCISCAN HEALTH SYSTEM'S  
ANSWERING BRIEF

---

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## I. ISSUES PRESENTED FOR REVIEW

The United States District Court for the Western District of Washington at Tacoma has certified the following two questions for determination by this Court:

1. The Washington Law Against Discrimination excludes religious non-profit organizations from its definition of “employer” (Wash. Rev. Code § 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 Wash. Rev. Code § 49.60.040(11)’s exemption unconstitutional as applied to an employee claiming that the religious non-profit organization discriminated against him for reasons wholly unrelated to any religious purpose, practice, or activity?

## II. COUNTERSTATEMENT OF THE CASE

### A. Factual Background.

For a number of years, Larry Ockletree worked as a security guard on a contract basis performing a variety of duties at St. Joseph Medical Center, a religious nonprofit organization operated by Franciscan Health System. *Dkt. #17, p. 2*. In December 2009 St. Joseph made a decision to employ security guards directly, rather than on a contract basis, and hired Ockletree. *Id.* In March 2010, Ockletree suffered a stroke which left him without the use of his left arm. *Dkt. #17, p. 2; Dkt. #62, p. 2*. St. Joseph kept his job open for six months,<sup>1</sup> but terminated Ockletree’s employment on September 10, 2010, *Dkt. #17, p. 2; Dkt #62, p. 2*, after its Human

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<sup>1</sup> Ockletree was not yet eligible for leave under the Family & Medical Leave Act.

Resources Department met with Ockletree but was unable to identify a position for which he was able to perform the essential functions with or without reasonable accommodation, *Dkt. #25, p. 4, ¶3.14; Dkt. #62, p. 2.*

B. Procedural Background.

On April 22, 2011, more than 180 days after his employment was terminated on September 10, 2010, Ockletree submitted a Charge of Discrimination to the Equal Employment Opportunity Commission (EEOC), alleging that he had been discharged due to his race and/or disability in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e *et seq.*, and the Americans With Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*<sup>2</sup> *Dkt. # 40, p. 2; Dkt. # 41, Ex. B, p. EEOC018; Dkt. # 62, pp. 8-10.*

Ockletree sued St. Joseph in Pierce County Superior Court in August 2011, asserting federal law claims under Title VII, the ADA, and 42 U.S.C. §1981, as well as state law claims for race and disability discrimination “in violation of public policy and the common law,” hostile

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<sup>2</sup> Although Ockletree claims that he filed an Intake Questionnaire on November 5, 2010, that should be considered an earlier-filed (and, consequently, timely) Charge of Discrimination, no such document was ever received by the EEOC. *Dkt. #41, pp. 1-2; Dkt. #62, pp. 8-9.* The only Intake Questionnaire the EEOC received was filed on March 19, 2011, 189 days after Ockletree’s employment was terminated. *Dkt. #17, p. 3.; Dkt. # 62, p. 3.* Moreover, in his March 19, 2011, Intake Questionnaire, Ockletree stated that he had not previously filed a Charge of Discrimination. *Dkt. # 41, Ex. B, p. EEOC032.* The District Court has ruled that Ockletree failed to file his charge of discrimination with the EEOC within the 180-day period prescribed by federal law for pursuing claims under either Title VII or the ADA. *Dkt # 62, pp. 8-10.*

work environment, disparate treatment, disparate impact, unlawful retaliation, constructive discharge, tortious interference with business relationship or expectancy, negligence, and intentional infliction of emotional distress. *Dkt. # 1-2, pp. 9-16.* St. Joseph denied that it discriminated against Ockletree or that it was liable to him under any of his alleged theories of recovery. *Dkt. #2.*

St. Joseph removed the lawsuit to the United States District Court for the Western District of Washington. *Dkt. #1.* After removal, Ockletree amended his complaint, limiting his state law claims to “wrongful discharge in violation of public policy,” and negligent infliction of emotional distress. *Dkt. #24, pp. 6-8.* The Amended Complaint contained statutory claims of race and/or disability discrimination in violation of Title VII, the ADA, 42 U.S.C. §1981, and the Washington Law Against Discrimination (WLAD), RCW ch. 49.60. *Dkt. #24, pp. 5-7.*

St. Joseph filed a motion to dismiss Ockletree’s claims under Title VII, the ADA, and the WLAD, as well as the common law claim of wrongful discharge in violation of public policy. *Dkt. # 39.* St. Joseph argued that it was exempt from the WLAD because it is not an “employer” as that term is defined in RCW 49.60.040(11). Since 1957, the WLAD has defined “employer” as “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); *Dkt. # 39, p. 4, ¶23; Dkt. # 40, p. 2, ¶3, and pp. 5-6, 12-13; Dkt. # 42, ¶¶2-7 and 9-10.*

The District Court granted the motion to dismiss Ockletree’s state law claim for wrongful discharge in violation of public policy, finding that the such a claim is not legally viable because the public interest against discrimination is adequately protected by federal statutes. *Dkt. #62, pp. 14-16.* The District Court also ruled that Ockletree failed to file his Title VII and ADA charges with the EEOC within the 180-day time-period prescribed by federal law. *Dkt. #62, pp. 8-10.* But, because the 180-day deadline to file a Charge of Discrimination is extended under federal law to 300 days if a state agency has jurisdiction over a discrimination claim, the District Court ruled that Ockletree’s Title VII and ADA claims were subject to dismissal unless RCW 49.60.040(11)’s exemption of religious or sectarian nonprofits from the WLAD’s definition of “employer” violates either article I, section 11, or article I, section 12 of the Washington Constitution.<sup>3</sup> The District Court noted that no state appellate court has ever ruled on these precise constitutional questions, and certified them to this Court. *Dkt. #62, pp. 4, 12-14, and 16; Dkt. #63.*

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<sup>3</sup> The District Court also denied without prejudice St. Joseph’s motion to dismiss Ockletree’s WLAD claim pending this Court’s determination of the state constitutional issues. *Dkt. #62, p.14.*

### III. STANDARD OF REVIEW

This Court reviews the constitutionality of a statute *de novo*. *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). Statutes are presumed to be constitutional, and the party challenging a statute bears the burden of persuading the Court beyond a reasonable doubt that the statute is unconstitutional. *E.g., Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). As this Court has explained:

[T]he separation of powers requires a careful balance by the judiciary that respects the role and authority of the legislature, while assuring its adherence to the constitution. This court's reasoned judgment for nearly the past century has been that the "beyond a reasonable doubt" standard for reviewing the constitutionality of a statute achieves the appropriate balance.

*Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 606-07 n.1, 244 P.3d 1 (2010).

[T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.

*Island County*, 135 Wn.2d at 147 (citations omitted).

#### IV. ARGUMENT

Ockletree challenges the constitutionality of the Legislature's enactment of an antidiscrimination statute that covers many employers, but exempts "any religious or sectarian organization not organized for private profit," as well as all small employers (for profit or not for profit) that employ fewer than eight employees.<sup>4</sup> RCW 49.60.040 (11). Ockletree claims that the exemption of religious or sectarian nonprofit organizations violates Const. art. I, §12, the "privileges and immunities" clause, and Const. art. I, §11, the "religious freedom" clause. Ockletree bears the burden of presenting argument sufficiently coherent and forceful to persuade the Court beyond a reasonable doubt that the Legislature's decision to exempt religious or sectarian nonprofit organizations from the definition of "employer" in RCW 49.60.040(11) is unconstitutional.<sup>5</sup> He has not done so, and for that reason, and the reasons explained below, the Court should decline to hold the statute unconstitutional.

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<sup>4</sup> In *Griffin v. Eller*, 130 Wn.2d 58, 922 P.2d 788 (1996), this Court, applying rational basis scrutiny, held that RCW 49.60.040(11)'s exemption of small employers from the reach of the WLAD does not violate Const. art. I, §12.

<sup>5</sup> Courts "will not address constitutional issues not supported by adequate briefing." *State v. Kinzy*, 141 Wn.2d 373, 384-85 n. 33, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). "Parties raising constitutional issues must present considered arguments" to the court. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

A. RCW 49.60.040(11)'s Exemption of "Any Religious or Sectarian Organization Not Organized for Private Profit" from the WLAD's Definition of "Employer" Does Not Violate Const. art. I, §12, Washington's Privileges and Immunities Clause.

Article I, section 12 of the Washington Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Article I, section 12 was modeled after article I, section 20 of the Oregon Constitution, but differs from the Oregon provision "in that the Washington provision added a reference to corporations, which our framers perceived as manipulating the lawmaking process." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake* ("Grant County II"), 150 Wn.2d 791, 807-08, 83 P.3d 419 (2004) (citations omitted). "Washington's addition of the reference to corporations demonstrates that our framers were concerned with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority." *Id.* at 808 (citation omitted). Washington's constitutional framers' concern "with avoiding favoritism toward the wealthy clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves." *Id.* (citation omitted).

Both the “privileges and immunities” clause of the Washington Constitution and the Equal Protection Clause of the United States Constitution are aimed at securing equality of treatment of all persons.

The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution and of the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.

*Grant County II*, 150 Wn.2d at 810 (citation omitted).

Differences exist, however, between the federal equal protection clause and Washington’s privileges and immunities clause. The state privileges and immunities clause “has been historically viewed as securing equality of treatment by prohibiting undue favor, while the equal protection clause has been viewed as securing equality of treatment by prohibiting hostile discrimination.” *Andersen v. King County*, 158 Wn.2d 1, 15, 138 P.3d 963 (2006). And, the concept of “privileges and immunities” must be viewed in light of the unique historical context of Const. art. I, § 12 that “focused on the award of special privileges rather than the denial of equal protection.” *Grant County II*, 150 Wn.2d at 810.

Thus, unlike the federal equal protection clause which “shows concern with ‘majoritarian threats of invidious discrimination against nonmajorities,’” the state privileges and immunities clause “protects as

well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Andersen*, 158 Wn.2d at 14 (quoting *Grant County II*, 150 Wn.2d at 806-07). In other words, and as this Court recognized in *Andersen*, 158 Wn.2d at 15, the text of the federal equal protection clause is aimed at hostile discrimination and prohibits states from denying benefits that are generally available to others under the law. Conversely, the state’s privileges and immunities clause is aimed at undue favoritism, and prohibits the grant of special privileges and immunities that give some or a few elevated status before the law. *Id.*

1. Under this Court’s jurisprudence concerning independent constitutional analysis of the state “privileges and immunities” clause, RCW 49.60.040(11)’s exemption of any religious or sectarian nonprofit organization from the WLAD’s definition of “employer” does not violate Const. art. I, §12 because it is not a grant of positive favoritism and thus does not confer a “privilege or immunity.”

“[W]hen considering whether the state constitution provides greater protection than the federal constitution, this court engages in a two-step inquiry.” *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 605-06, 192 P.3d 306 (2008) (citing *Madison v. State*, 161 Wn.2d 85, 93, 163 P.3d 757 (2007)). The first step is to determine “whether ‘a provision of the state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision,’” which normally involves an analysis of six

nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Am. Legion*, 164 Wn.2d at 606 (quoting *Madison*, 161 Wn.2d at 93). However, “[o]nce this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision,” as it has with Const. art. I, § 12, “it is unnecessary to engage repeatedly in further *Gunwall* analysis simply to rejustify performing that separate and independent constitutional analysis.” *Madison*, 161 Wn.2d at 94-95 (citing *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)); *see also Am. Legion*, 164 Wn.2d at 606.

Thus, Ockletree’s extensive foray into a *Gunwall* analysis, *Pltf’s Br. at 9-15*, is unnecessary to determine whether the privileges and immunities clause of the Washington Constitution warrants a constitutional analysis independent from the Equal Protection Clause of the United States Constitution, because this Court, having previously engaged in a *Gunwall* analysis, has already determined that it does. *See, e.g., Am. Legion*, 164 Wn.2d at 606 (“The privileges and immunities clause warrants a separate constitutional analysis”); *Grant County II*, 150 Wn.2d at 811; *Madison*, 161 Wn.2d at 94-95.

Consequently, this Court may move on to the second step of the inquiry: “whether the provision in question extends greater protections for the citizens of this state,” than does the federal constitution. *Am. Legion*,

164 Wn.2d at 597 (internal quotation omitted). “This step focuses on the state constitutional provision as applied to the alleged right in a particular context,” with the Court looking “at the language of the constitutional provision in question and the historical context surrounding its adoption.” *Id.* at 606. With respect to the state privileges and immunities clause, this step requires the Court to first determine whether the challenged legislative provision confers a privilege or immunity that is protected by article I, section 12. *Id.*; *Madison*, 161 Wn.2d at 95.

If a privilege or immunity implicating article I, section 12 is involved, then the focus shifts to determining whether and to what extent it provides greater protection than the federal constitution in the context of the particular privilege or immunity. *Madison*, 161 Wn.2d at 95. If no privilege or immunity is involved, then there is no violation of article I, section 12, at least under an independent state constitutional analysis, leaving for consideration only the question of whether the legislation violates the Equal Protection Clause of the federal constitution.<sup>6</sup> *Am. Legion*, 164 Wn.2d at 608.

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<sup>6</sup> Whether the exemption of religious or sectarian nonprofit organizations from the WLAD’s definition of employer violates the federal equal protection clause is not a question of local law that the District Court has certified to this Court.

- a. Washington's privileges and immunities clause prohibits grants of positive favoritism that undermine fair competition among businesses.

A law, or its enforcement, must confer a "privilege" to a class of citizens in order to violate Const. art. I, §12. *Madison*, 161 Wn.2d at 95.<sup>7</sup> Article I, section 12 is concerned with the exercise of undue political influence by those with large concentrations of wealth and with avoiding favoritism to the wealthy. *Grant County II*, 150 Wn.2d at 808. "A 'privilege' normally relates to an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others." *Am. Legion*, 164 Wn.2d at 607. "A privilege is not necessarily created every time a statute allows a particular group to do or obtain something." *Am. Legion*, 164 Wn.2d at 606-07 (citing *Grant County II*, 150 Wn.2d at 812-13). In the specific sphere of regulatory law, a "privilege," for purposes of

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<sup>7</sup> For purposes of its independent constitutional analysis of Const. art. I, §12, this Court has not undertaken to distinguish between a "privilege" and an "immunity." Nor has Ockletree, who bears the burden of proving unconstitutionality beyond a reasonable doubt, offered any such distinction. He has not proffered any "immunity" argument separate from his assertions that RCW 49.60.040(11)'s exemption of religious or sectarian nonprofits from the definition of "employer" confers a "privilege." Citing *Madison*, he acknowledges, *Pltf's Br. at 27*, that a privilege must be conferred for a violation of art. I, §12 to occur, and then argues, *Pltf's Br. at 28*, that bestowing an "immunity" on religious organizations from the state anti-discrimination law "grants [such organizations] a 'privilege.'" Ockletree uses the terms privilege and immunity interchangeably and as synonymous at one point with "fundamental rights," *Pltf's Br. at 27*; at another point with "the right to pursue any lawful calling, business, or profession," *Pltf's Br. at 28-29*; and at yet another point with "legislative act of favoritism to a powerful minority group" and "a positive grant of favoritism," *Pltf's Br. at 29-30*. Thus, Ockletree offers the Court no conceptual basis for concluding that, even if the WLAD does not confer a "privilege," it nonetheless confers an "immunity" upon religious or sectarian nonprofit organizations that employ eight or more people.

article I, section 12 analysis, is an exemption that benefits certain businesses at the expense of others, such that the State's police power can be said to have been manipulated to serve private interests at the expense of the common good. *Am. Legion*, 164 Wn.2d at 607.<sup>8</sup>

- b. The exemption of religious or sectarian nonprofit organizations from the WLAD's definition of "employer" does not work a positive grant of favoritism within the meaning of Const. art. I, §12.

Although Ockletree, citing *Madison*, 161 Wn.2d at 95, acknowledges that "[f]or a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens," *Pltf's Br. at 27*, he fails to address what this Court has said constitutes a "privilege" for purpose of the state privileges and immunities clause – *i.e.*, "an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others." *Am. Legion*, 164 Wn.2d at 607. Instead, he proffers, *Pltf's Br. at 28, n.14*, a dictionary definition of "privilege," which would recognize a privilege every time a statute allows a particular group to do or obtain something, as support for his assertion, *Pltf's Br. at 28*, that

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<sup>8</sup> The WLAD was enacted under the legislature's police power, RCW 49.60.010, and thus is a regulatory law. See *State v. Brayman*, 110 Wn.2d 183, 192-93, 751 P.2d 294 (1988) (A statute is a valid exercise of the legislature's police power to promote the health, peace, safety, and general welfare pursuant to Const. art. I, §1 if it tends to correct some evil or promote some interest of the State and bears a reasonable and substantial relationship to the purpose it seeks to accomplish); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000) (police power extends to regulations that promote the health, peace, safety, and general welfare of the people of this state).

“the legislature has bestowed on religious organizations ‘immunity’ from the antidiscrimination laws applicable to other employers and, thus, grants them a ‘privilege’ to discriminate against employees without liability for damages under the WLAD or the costs attendant on statutory compliance.”

But such a definition of “privilege” is inconsistent with both this Court’s article I, section 12 jurisprudence and the historical context surrounding the adoption of the state privileges and immunities clause. As this Court has made clear, “[a] privilege is not necessarily created every time a statute allows a particular group to do or obtain something.” *Am. Legion*, 164 Wn.2d at 606-07 (citing *Grant County II*, 150 Wn.2d at 812-13). Moreover, contrary to Ockletree’s assertions, the WLAD’s definition of “employer” does not give religious or sectarian nonprofits a license to discriminate. *See City of Tacoma v. Franciscan Found.*, 94 Wn. App. 663, 669-70, 972 P.2d 566 (1999) (“Although the state antidiscrimination law does not ‘authorize’ religious groups to discriminate, it does ‘authorize’ their exemption from the law’s reach”).<sup>9</sup> In fact, religious or sectarian nonprofits are subject to federal anti-discrimination laws. Washington’s privileges and immunities clause does not require the

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<sup>9</sup> “The religious exemption has been part of the antidiscrimination statute since it was enacted. It has never been amended, although the section in which it is contained has been amended many times, and the Legislature twice has considered narrowing or deleting the exemption.” *City of Tacoma*, 94 Wn. App. at 669 n.9 (citation omitted).

Legislature to subject them to the burden of lawsuits seeking state statutory remedies under the WLAD.

The WLAD's exemption of religious nonprofit organizations from its definition of "employer" is not a grant of positive favoritism to religious or sectarian nonprofit organizations *at the expense of* other organizations that are subject to the WLAD, any more than the WLAD's exemption of employers of fewer than eight persons is a grant of favoritism at the expense of large employers. The WLAD's exemptions of employers of fewer than eight persons and of religious or sectarian nonprofit organizations do not offend the anti-competitive concerns of article I, section 12, because those exemptions do not benefit the exempted employers *at the expense of* the non-exempted employers. That exempted employers, such as religious or sectarian nonprofit organizations, are not subject to "liability for damages under the WLAD or the costs attendant on statutory compliance," as Ockletree complains, *Pltf's Br. at 28*, does not mean that non-exempted employers bear any greater expense because religious or sectarian nonprofits are exempted.<sup>10</sup>

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<sup>10</sup> Ockletree's bald, unsubstantiated assertion, *Pltf's Br. at 29*, that "there are privileges and immunities at issue in the case, which are granted through a legislative act of favoritism to a powerful minority group – religious nonprofit organizations" hardly establishes that the WLAD's exemption of religious or sectarian nonprofits from the definition of "employer" is unconstitutional beyond a reasonable doubt. He cites no data of record, and no authority, suggesting that religious or sectarian nonprofits constitute a powerful minority group, much less that they constitute organizations with large concentrations of wealth capable of wielding undue political influence. Yet, the

Nothing in RCW 49.60.040(11)'s exemption of religious or sectarian nonprofits from the WLAD's definition of "employer" gives exempted nonprofits a benefit at the expense of other employers subject to the WLAD. Thus, the exemption does not constitute a "privilege or immunity" within the meaning of Const. art. I, §12. Because the exemption does not confer a "privilege or immunity" within the meaning of article I, section 12, there is no violation of the privileges and immunities clause under an analysis independent of the federal equal protection clause.

2. Whether the exemption violates equal protection under the Fourteenth Amendment, and thus under Const. art. I, §12, is not an issue of local law that has been certified to this Court for determination.

Ockletree devotes a significant portion of his opening brief, *Pltf's Br. at 15-26*, to equal protection analysis. But, since this Court determined in *Grant County II* that the state privileges and immunities clause warranted analysis independent of the federal equal protection clause, that independent analysis has been limited to undue favoritism analysis. When the question under Const. art. I, §12 is one of unequal treatment by virtue of hostile discrimination, the Court applies federal equal protection analysis. *See, e.g., Andersen*, 158 Wn.2d at 18 (where the

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historical context surrounding article I, section 12's adoption was concern over undue political influence being exercised by those with large concentrations of wealth and avoiding favoritism to the wealthy. *Grant County II*, 150 Wn.2d at 808.

issue is whether plaintiffs are discriminated against as members of a minority class, the Court applies the same constitutional analysis that applies under federal equal protection clause); *Madison*, 161 Wn. 2d at 116 (Madsen, J., concurring) (one “would be hard pressed to find a body of cases historically applying *an independent state constitutional analysis* under article I, section 12 that is not coextensive with the equal protection clause in any circumstances other than a grant of positive favoritism to a minority class.”).

Here, however, whether the WLAD’s exemption of religious or sectarian nonprofit organizations violates the equal protection clause of the Fourteenth Amendment is not a question of local law that the District Court has certified to this court. The District Court’s certification order does not request this Court to consider the constitutionality of the WLAD definition of “employer” under the federal equal protection clause, nor could it as, under RAP 16.16(a):

The Supreme Court may entertain a petition to determine a question of law certified to it under the Federal Court Local Law Certificate Procedure Act if the question of state law is one which has not been clearly determined and does not involve a question determined by reference to the United States Constitution. Certificate procedure is the means by which a federal court submits a question of Washington law to the Supreme Court.

Thus, it is not clear that this Court can or should address federal equal protection analysis in this case. *See Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (“Where an issue is not within the certified questions, and is within the province of the federal court, this court will not reach the issue.”).

3. Even if this Court were to conclude that it can and should resort to federal equal protection analysis to decide the certified questions, the WLAD’s exemption of religious or sectarian nonprofits from its definition of “employer” does not violate equal protection.
  - a. The WLAD’s exclusion of religious or sectarian nonprofits does not create a suspect class.

Ockletree argues, *Pltf’s Br. at 15-22*, that strict scrutiny applies to this case. He is wrong. The WLAD’s differentiation between employers that are religious or sectarian nonprofit organizations and employers that are not religious or sectarian nonprofits is not based upon a suspect classification.

To qualify as a “suspect” class for purposes of equal protection analysis, a class must have suffered a history of discrimination; have as its class-defining characteristic an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society; and be a minority or politically powerless class. *Andersen*, 158 Wn.2d at 19 (citations omitted). Courts have recognized race, alienage, and national origin as examples of suspect classifications. *Id.* at 19 (citing *City of*

*Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L. Ed. 2d 313 (1985)).

Ockletree essentially argues that the mere connection of religion to a statutory exemption subjects the exemption to strict scrutiny. He is incorrect. First, he fails to identify the classification actually made by the WLAD's definition of employer. Contrary to Ockletree's assertions, the distinction drawn by the WLAD's definition is not simply between religion on the one hand, and non-religion on the other. Rather, the WLAD distinguishes between religious or sectarian nonprofit organizations that employ at least eight persons on the one hand, and other employers of at least eight persons that are not religious or sectarian nonprofit organizations on the other. Thus, Ockletree's reliance on cases that, in *dictum*, suggest that religious-based classifications are suspect is misplaced.<sup>11</sup>

Second, Ockletree has not shown, nor can he show, that secular or for-profit organizations have suffered a history of discrimination as a powerless class, or have been subject to prevailing prejudice and antipa-

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<sup>11</sup> None of the cases Ockletree cites actually involved religion and, therefore, do not provide any real support for his claim that religion, in general, is a suspect class. *Am. Network, Inc. v. Washington Utilities & Transp. Comm'n*, 113 Wn.2d 59, 776 P.2d 950 (1989) (challenge to utility commission's power to promulgate financial rules); *King County Dept. of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 254 P.3d 927 (2011) (challenge to government agency's authority to deny prisoner's record requests); *Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789, 797, 973 P.2d 1081 (1999) (challenge to statute allowing awards of attorney fees in land use cases).

thy. Nor do secular or for-profit organizations have as a defining characteristic any obvious, immutable trait unrelated to an ability to perform or contribute to society. In fact, historically, the opposite may be true.

Thus, because the distinction RCW 49.60.040(11) makes between religious or sectarian nonprofit employers of at least eight persons and all other employers of at least eight persons does not involve any “suspect” class, it is not subject to strict scrutiny.

- b. Under rational basis scrutiny, which would apply here for purposes of equal protection analysis, the Legislature had a rational basis to exempt religious or sectarian nonprofit organizations from liability under the WLAD.

Because the exemption of nonprofit religious organizations from liability under the WLAD does not involve a semi-suspect<sup>12</sup> or suspect classification, it is subject to rational basis review. *See Paulson v. County of Pierce*, 99 Wn.2d 645, 652, 664 P.2d 1202, *appeal dismissed*, 464 U.S. 957 (1983).<sup>13</sup> Legislation subjected to rational basis scrutiny will be disturbed by the judiciary only if there are no conceivable facts to support it. *Seeley v. State*, 132 Wn.2d 776, 795-96, 940 P.2d 604 (1997).

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<sup>12</sup> Ockletree makes no claim that the WLAD’s exemption of religious or sectarian organizations from its definition of “employer” involves a semi-suspect class.

<sup>13</sup> Indeed, as the Court of Appeals in *Erdman v. Chapel Hill Presbyterian Church*, 156 Wn. App. 827, 850, 234 3d 299 (2010), *reversed on other grounds*, 175 Wn.2d 659 (2012), inferred from this Court’s observations in *Farnum v. CRISTA Ministries*, 116 Wn.2d 659, 681, 807 P.2d 830 (1991), “the WLAD’s religious employer exemption would be subject to and would survive a rational basis review under the federal equal protection clause.”

Under rational basis review, plaintiffs have the burden of proving that the classification drawn by the law is not rationally related to a legitimate state interest.... The statute is presumed constitutional.... Under the rational basis standard, the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification.... Production of empirical evidence is not required to sustain the rationality of the classification.... In fact, "the rational basis standard may be satisfied where the 'legislative choice ... [is] based on rational speculation unsupported by evidence or empirical data'.... In addition, within limits, a statute generally does not fail rational-basis review on the grounds of over- or under-inclusiveness; "[a] classification does not fail rational-basis review because 'it is not made with mathematical nicety or because in practice it results in some inequality.'"

*Andersen*, 158 Wn.2d at 31-32 (citations omitted).<sup>14</sup>

Under the rational basis test the court must determine: (1) whether the legislation applies alike to all members within the designated class; (2) whether there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the proper purpose of the legislation.

*Griffin v. Eller*, 130 Wn. At 65 (quoting *Convention Ctr. Coalition v. Seattle*, 107 Wn.2d 370, 378-79, 730 P.2d 636 (1986)).

Ockletree effectively concedes that the exemption at issue here survives rational basis scrutiny because he makes no argument that the

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<sup>14</sup> This Court has previously recognized that "the Legislature may constitutionally approach the problem of employment discrimination one step at a time," and that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Griffin v. Eller*, 130 Wn.2d 58, 66, 922 P.2d 788 (1996) (quoting *O'Hartigan v. Dep't of Personnel*, 118 Wn.2d 111, 124, 821 P.2d 44 (1991)).

exemption fails any of the three prongs of the rational basis test. Lest there be any doubt, (1) the exemption applies alike to all members of the class of religious or sectarian nonprofit organizations; (2) there are reasonable grounds to distinguish between religious or sectarian nonprofit organizations on the one hand, and secular for-profit organizations on the other hand, that employ eight or more persons; and (3) the exemption bears a rational relationship to the proper purpose of the legislation.

A number of rational bases for the exemption challenged in this case readily can be conceived. First, both the drafters of article I, section 12, and the drafters of the exemption of religious nonprofit organizations under the WLAD knew of the important public services performed by religious nonprofit organizations for the people of Washington. At the time the state's constitution was adopted,

Religious orders operated nearly all hospitals within the State. Many religious groups received state funding through public service contracts. For example in 1877 the Sisters of Providence favorably responded to a bid proposal by King County by establishing the first hospital in Seattle. Other religious groups were particularly active in providing other public services such as orphanages and poor houses. The drafters were aware of this practice.

*Malyon v. Pierce County*, 131 Wn.2d 779, 796, 935 P.2d 1272 (1997) (citations omitted). It continues to be true that "nonprofit hospitals provide more charity care than do for-profit hospitals." John V. Jacobi,

*Mission and Markets in Health Care: Protecting Essential Community Providers for the Poor*, 75 Wash. U. L. Q. 1431, 1460-62 (1997). Nonprofit facilities shift the costs away from public coffers to provide care to the uninsured because such activity is within their explicit religious mission. *Id.* In exempting religious nonprofit organizations from the WLAD's definition of "employer," the legislature could have reasoned that the State has a substantial interest in the well-being of religious nonprofit organizations that provide such important public services and wanted to make sure that these organizations could continue to do so without the burden of potential liability for the enhanced remedies under, or of the increased costs of compliance with, the WLAD.

Indeed, as this Court recognized when it upheld RCW 49.60.040(11)'s exemption of employers employing less than eight persons from an equal protection challenge in *Griffin*, exemption of small employers are common and have a rational basis, and the Legislature could well have been advancing legitimate state purposes simply "by conserving limited state resources and protecting small business from private litigation expense, in addition to avoiding the regulatory burden inherent in regulation by the Human Rights Commission, per se." *Griffin*, 130 Wn.2d at 66-67. And, as this Court also recognized in *Griffin*, among the many reasons the Legislature could have had when adopting the

WLAD's small employer exemption, "[c]ertainly the State has a substantial interest in the well-being of small business with regard to the state economy, tax base, and opportunities for employment." *Id.* at 68. Similar considerations – protecting the well-being of religious or sectarian nonprofit organizations, which provide important public services to the people of the State of Washington – provide a rational basis for the Legislature to exempt such organizations from the burdens of private litigation expense and regulatory burdens they would face under the WLAD.

The WLAD's religious nonprofit exemption is just one example of a law that reflects the policy decision to foster the good works of religious nonprofit organizations. Another reasonably conceivable rationale for exempting religious nonprofits from litigation expense and potential liability under the WLAD is similar to the reasons justifying the federal law limiting liability for nonprofit volunteers:

the willingness of such organizations to offer their services may be deterred by the potential for liability actions against them ... high liability costs and unwarranted litigation costs ... and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities[.]

Enr. Sen. Bill 543 §2, Pub. L. 105-19 (findings and purpose of the federal Volunteer Protection Act of 1997, 42 U.S.C. §14503, *et seq.*). Other

Washington laws also reflect similar policy. *See, e.g.*, RCW 4.24.264 (officers and those who serve on the board of directors of a nonprofit corporation are granted a qualified immunity); *see also* RCW 70.200.020 (charitable organizations that distribute donated goods are entitled to qualified immunity).

Ultimately, it is the legislature, not the Court that is charged with establishing statutory causes of action. *Griffin*, 130 Wn.2d at 72 (Madsen, J., concurring) (recognizing that the WLAD's exemption of employers with fewer than eight employees reflects the legislature's policy determination to relieve small employers from the greater burden of a lawsuit seeking enhanced statutory remedies). The legislature's actions in enacting the WLAD's religious nonprofit exemption reflect the same rational basis in lifting the burden of enhanced statutory remedies. There is no constitutional requirement that the legislature create a statutory cause of action against religious nonprofit organizations. *See Andersen*, 158 Wn.2d 1, 39 ("there is no constitutional requirement that states must make special accommodations for the disabled so long as their actions toward such individuals are rational.") (internal quotation omitted).

There are many examples of laws upheld on rational basis grounds where strong policy arguments opposing such laws have been advanced. But legislative bodies, not courts, hold the power to make public policy determinations, and

where no suspect classification or fundamental right is at stake, that power is nearly limitless.

*Id.*<sup>15</sup>

Ockletree has not overcome his heavy burden of establishing that the Legislature lacked any rational basis for the WLAD's religious nonprofit exemption and, therefore, even if this Court were required to decide the equal protection question, it should find that the exemption has a rational basis, does not violate the federal equal protection clause, and survives Ockletree's article I, section 12 challenge.<sup>16</sup>

B. RCW 49.60.040(11)'s Exemption of "Any Religious or Sectarian Organization Not Organized for Private Profit" from the WLAD's Definition of "Employer" Does Not Violate Const. art. I, §11, Washington's "Religious Freedom" Clause.

Article I, section 11 of the Washington Constitution provides in pertinent part that:

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<sup>15</sup> Ockletree notes, *Pltf's Br. at 18-19, 24*, that the federal anti-discrimination statutory scheme only exempts religious organizations from the prohibition of discrimination on the basis of religion, and suggests that RCW 49.60.040(11) must therefore be constitutionally infirm because its exemption for religious or sectarian nonprofits is not so limited. But, Ockletree cites no authority (nor could he) suggesting that a state law must mirror a federal law in all respects in order to pass constitutional muster, or that the only permissible justification for exempting religious or sectarian nonprofits from a state anti-discrimination statute is to allow them the freedom to discriminate on the basis of religion. The notion that state legislatures must march in step with Congress is radical enough to require more than bald assertions to support it.

<sup>16</sup> Ockletree's reliance on *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) in his article I, section 12 argument, *Pltf's Br. at 20-21, 30-31*, is misplaced because *Lemon* is a federal First Amendment decision, not an Equal Protection decision. Thus, to the extent that federal Equal Protection decisions might, theoretically, provide persuasive guidance to this Court in interpreting article I, section 12 or in fashioning analytical tools for article I, section 12 jurisprudence, *Lemon* is inapposite.

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 ....

Ockletree argues that the Legislature's exemption of religious or sectarian nonprofit organizations from the WLAD's definition of "employer" impermissibly, in violation of Const. art. I, §11, (a) justifies practices inconsistent with the peace and safety of the state, and/or (b) provides public support to religious establishments. He is wrong on both counts.

1. Unless the exemption of religious or sectarian nonprofits from the WLAD's definition of "employer" can be said to molest or disturb someone in person or property on account of religion, or to appropriate or apply public money or property for "religious worship, exercise or instruction, or the support of any religious establishment," the exemption does not violate Const. art. I, §11.

This Court decided in 1997 that Const. art. I, §11 warrants analysis independent of the First Amendment. *Malyon*, 131 Wn.2d at 798. As previously noted, "[o]nce this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision, it is unnecessary to engage repeatedly in further *Gunwall* analysis simply to rejustify performing that separate and independent constitutional analysis." *Madison*, 161 Wn.2d at 94. Thus,

Ockletree's *Gunwall* analysis of Const. art. I, §11, *Pltf's Br. at 34-39*, is neither necessary nor useful. As this Court explained in *Malyon*, 131 Wn.2d at 798, "article I, section 11 should be read independently from the establishment clause of the Federal Constitution ... [but] where that independence leads is a different question."

[T]he level of protection of rights under the state constitutions can be the same as, higher than, or lower than that provided by the federal constitution. The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.

*Id.* at 798 n.30 (quoting Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 St. Thomas L. Rev. 49, 50 (1992)).

Thus, what Const. art. I, §11 guarantees or prohibits depends upon what the provision means, which in turn depends upon the words of its text. As this Court has made clear:

Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well. 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.

*Malyon*, 131 Wn.2d. at 799.

According to its plain text, Const. art. I, §11 serves two key purposes: (1) it guarantees to every individual “[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship” and specifies that “no one shall be molested or disturbed in person or property on account of religion,” subject only to the legislature’s power to regulate against “acts of licentiousness” or “practices inconsistent with the peace and safety of the state;” and (2) it prohibits “public money or property” from being “appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” Because the exemption of religious or sectarian nonprofits from the WLAD’s definition of employer does not molest or disturb anyone’s person or property on account of religion, or appropriate or apply any public money or property for any purpose, much less for any religious worship, exercise or instruction, or the support of any religious establishment, the exemption does not violate Const. art I, §11.

2. The WLAD’s exemption of religious or sectarian nonprofits from the definition of “employer” does not molest or disturb anyone’s person or property on account of religion.

Const. art. I, §11 guarantees every individual “absolute freedom of conscience in all matters of religious sentiment, belief and worship” and specifies that “no one [*i.e.*, no individual] shall be molested or disturbed in person or property on account of religion.” By its plain text, there can be

no violation of the “freedom of conscience” guarantee of Const. art. I, §11 unless the legislative enactment at issue “molest[s] or disturb[s]” an individual “in person or property on account of religion.” Nothing in RCW 49.60.040(11)’s exemption of religious or sectarian nonprofit organizations (or its exemption of all employers who employ fewer than eight persons) from the WLAD’s definition of “employer” “molest[s] or disturb[s]” anyone “in person or property on account of religion.” Indeed, Ockletree does not even contend that the exemption “molests” or “disturbs” anyone’s person or property on account of religion. Rather, he argues that the exemption somehow violates the proviso to the “freedom of conscience” guarantee of article I, section 11, which states that “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.”

Ockletree’s argument, *Pltf’s Br. at 46*, that the WLAD’s exemption of religious or sectarian nonprofits excuses “acts of licentiousness and practices inconsistent with the peace and safety of the state” ignores the text, grammar, and context of the proviso to the “freedom of conscience” guarantee. *See Malyon*, 131 Wn.2d at 799. Ockletree cites decisions, *Pltf’s Br. at 47-48*, holding that it is permissible for the Legislature to enact certain health regulations that people must obey notwithstanding

religious objections and argues, *Pltf's Br. at 48*, that this Court should apply the rationale of those decisions "where the state [meaning the Legislature] has specifically declined to regulate under the police power only because of a concern about religious freedom." He then asserts, *Pltf's Br. at 48*, that under the "plain text" of Const. art. I, §11, "the State 'shall not' excuse licentiousness or acts inconsistent with the peace and safety of the state, here discrimination, simply because of unrelated religious beliefs." But that is not what Const. art. I, §11 actually says nor what its plain language implies.

While article I, section 11 *permits* the Legislature to enact statutes that may suppress religious acts or practices that the Legislature considers inconsistent with "the peace or safety of the state,"<sup>17</sup> it does not *require* the Legislature to do so, much less make it a constitutional responsibility for the Legislature to regulate anything that someone might ultimately consider to be inconsistent with the peace or safety of the state. Just because Const. art. I, §11's religious freedom provision is not violated if the State enacts or enforces, despite religious objections, legislative regulations designed to protect the peace or safety of the state, that does not mean a constitutional violation occurs when the Legislature chooses to

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<sup>17</sup>Article I, section 11 mandates absolute freedom of religion as the rule, and allows for infringement only to prevent "acts of licentiousness" or "practices inconsistent with the peace and safety of the state." *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 176-77, 995 P.2d 33 (2000).

exempt religious or sectarian nonprofit organizations from a different kind of regulatory statute. Const. art. I, § 11 is a not constitutional mandate to police the practices of religious organizations.<sup>18</sup>

Because RCW 49.60.040(11)'s exemption of religious or sectarian nonprofits from the definition of "employer" does not disturb or molest anyone in person or property on account of religion, it does not violate the "freedom of conscience" guarantee of Const. art. I, §11.

3. The exemption of religious or sectarian nonprofits from the WLAD's definition of "employer" does not appropriate or apply public money or property in aid of any religious purpose.

In addition to guaranteeing "freedom of conscience," Const. art. I, §11 provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment ...." Ockletree never argues, however, that the WLAD's exemption of religious or sectarian nonprofits

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<sup>18</sup> Although, as Ockletree points out, the Legislature uses the phrase "public welfare, health, and peace of the people of this state" in RCW 49.60.010, the WLAD's statement of purpose, he cites no constitutional drafting history or authority to support his argument that discrimination in employment is "inconsistent with the peace and safety of the state" within the meaning, specifically, of Const. art. I, §11. Ockletree does not explain why discrimination in employment is not better characterized as something that is inconsistent with values and principles of human decency that our civil society has come, albeit much too belatedly, to embrace. In view of the fact that racial and other types of discrimination in employment were not made unlawful until decades after Const. art. I, §11 was enacted in 1889, Ockletree owes this Court at least some authority for the proposition that the drafters of the constitution had in mind discrimination in employment – not only by private employers of fewer than eight employees, but also by religious and sectarian organizations – when it used the phrase "inconsistent with the peace and safety of the state," and was not more narrowly concerned with polygamy, or other practices associated with particular religious sects that were controversial at the time.

“appropriate[s] or applies[s]” public money or property directly to religious worship, religious exercise, religious instruction or the support of a religious establishment. Instead, he argues, *Pltf’s Br. at 44-45*, that the WLAD exemption works an indirect subsidy of the kind that *Visser v. Nooksack Valley Sch. Dist.*, 33 Wn.2d 699, 207 P.2d 198 (1949), and *Mitchell v. Consol. Sch. Dist. No 201*, 17 Wn.2d 61, 135 P.2d 79 (1943), held violated Const. art. I, §11. Again, Ockletree is wrong, and *Visser* and *Mitchell* are inapposite.

As decisions more recent than *Visser* and *Mitchell* emphasize, “[t]he terms ‘appropriated’ and ‘applied’ modify religious worship, exercise or instruction, and the support of any religious establishment.” *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 466, 48 P.3d 274 (2002).

The verb “appropriated” means “[t]o prescribe a particular use for particular moneys; to designate or destine a fund or property for a distinct use ....” Similarly, “applied” generally means “to use or employ for a particular purpose; to appropriate and devote to a particular use, object, demand, or subject matter.”

*Malyon*, 131 Wn.2d at 799 (internal citations omitted). The exemption of religious or sectarian nonprofits from the WLAD’s definition of “employer” (and, thus, from liability for the remedies provided by the WLAD) does not, under any interpretation of the statutory language, constitute the appropriation or application of public money or property for

any purpose, nor does it constitute the appropriation or application of public money or property for any of the particular religious purposes listed in Const. art. I, §11.

In this text [*i.e.*, Const. art. I, §11] the terms require one to determine whether our government has purposefully transferred, or made available, money or property for the defined objective. Ultimate utilization of the money or property is a necessary but insufficient part of the constitutional test; a religious purpose is the key.

*Malyon*, 131 Wn.2d at 799.<sup>19</sup>

Ockletree not only has failed to show how RCW 49.60.040(11)'s definition of employer appropriates or applies public money or property (which it does not), but he has also failed even to attempt to identify a "religious purpose" for which he claims the WLAD's definition of

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<sup>19</sup> Ockletree's reliance on *Visser, Pltf's Br. at 44*, and *Mitchell, Pltf's Br. at 45*, for his "appropriation by subsidy" argument fails because the statutes held unconstitutional in those cases provided direct and certain financial benefits to religious schools, defraying the costs they would otherwise have incurred for student transportation. Here, the WLAD exemption provides no "direct" financial benefit, or any subsidy, to religious or sectarian nonprofit organizations. Thus, the exemption simply does not do what the statutes at issue in *Visser* and *Mitchell* did. As explained in 1998 Attorney General Opinion No. 8, at 11-14:

Our courts have interpreted article I, section 11 very strictly to prohibit the use of public funds to support sectarian schools [citing *Mitchell* among other decisions] [but, i]n each of these cases ... the public funds in question would have directly supported sectarian education and training. . . .

The recent case of *Malyon v. Pierce County*, 131 Wn.2d 779, 935 P.2d 1272 (1997) supports our analysis that an incidental benefit to a religious institution, in and of itself, does not render a state program unconstitutional.

And, if a given religious nonprofit is never the subject of a discrimination charge or complaint, there may never be any "benefit," even indirect or incidental, at all. Because the WLAD definition of "employer" does not confer a direct and certain financial benefit on any religious nonprofit(s), Ockletree's reliance on *Visser* and *Mitchell* is misplaced.

“employer” somehow appropriates or applies public money or property. In *Visser* and *Mitchell*, public money was applied for the purpose of busing children to religious schools. Causing students to be bused to a parochial school is quite different from exempting religious nonprofits from the possibility of facing a potential charge or lawsuit seeking relief under the WLAD. Ockletree’s attempt to equate the two, without explanation or citation to supporting authority, is simply wrong and is insufficient to meet his burden of establishing that the exemption is unconstitutional beyond a reasonable doubt.

Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.”

*State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (quoting *In re Rosier*, 105 Wn.2d at 616) (citation omitted)).

Even if RCW 49.60.040(11)’s definition of “employer” could somehow be interpreted to involve the appropriation or application of public money or property, which it cannot, any such appropriation or application of public money or property must be for specific types of religious purposes in order to be found unconstitutional under Const. art. I, §11. *Malyon*, 131 Wn.2d at 799. On its face, Const. art. I, §11, prohibits the appropriation or application of public money or property for “religious

worship, exercise or instruction, or the support of any religious establishment,” terms which this Court has narrowly construed. *See State ex rel. Gallwey v. Grimm*, 146 Wn.2d at 467-68 (quoting *Calvary Bible Presbyterian Church v. Bd. of Regents*, 72 Wn.2d 912, 919, 436 P.2d 189 (1967)) (construing “religious ... instruction” and “religious establishment” narrowly). For example, the Court in *Grimm* construed “religious establishment” as follows:

The phrase “religious establishment” is a term of art in constitutional jurisprudence. *See* U.S. Const. amend I (“Congress shall make no law respecting an *establishment of religion* ....” (emphasis added [in original])). In its most general sense, “religious establishment” refers to the prohibition against governmental creation of a state religion. The corollary to this principle is that the state should not support those institutions that indoctrinate others into a religious faith, and thus place the imprimatur of the state on a particular religious doctrine, or the preference of religion over no religion. *See Visser v. Nooksack Valley Sch. Dist. [No.] 506*, 33 Wn.2d 699, 708, 207 P.2d 198 (1949) (holding that Christian school that teaches the tenets of a religion to induce faith, and inculcate youth into its religious beliefs, is a religious establishment).

*Grimm*, 146 Wn.2d at 468.

Nothing within RCW 49.60.040(11)’s definition of “employer” appropriates or applies public money for “religious worship, exercise or instruction, or the support of any religious establishment.” Nor does it place the State’s imprimatur on any particular religious doctrine, or prefer religion over “no religion,” especially when secular employers of fewer

than eight persons are likewise exempt from the WLAD.<sup>20</sup> In fact, the exemption applies to all religious nonprofits, essentially insuring that there will be no state establishment of religion.

Ockletree cannot establish that the religious exemption is unconstitutional under Const. art. I, §11 simply because he can posit some contingent, potential, indirect benefit to church-affiliated entities. Moreover, and perhaps more importantly, in arguing that the WLAD definition of employer “constitutes ‘support’ for ‘religious establishment[s],’” Ockletree glosses over an indispensable part of the section’s text. What the section prohibits is not “support” of religious establishments, but rather the *appropriation* or *application of public money or property* to support any religious establishment. *Grimm*, 146 Wn.2d at 466 (“The terms ‘appropriated’ and ‘applied’ modify ... the support of any religious establishment”).<sup>21</sup>

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<sup>20</sup> Ockletree’s assertion that the WLAD’s definition of “employer” “elevates religion over non-religion,” *Pltf’s Br. at 39*, is both incoherent and ungrounded in the text and context of Const. art. I, §11, which never uses the term “non-religion.”

<sup>21</sup> Ockletree digresses into an argument, *Pltf’s Br. at 45-46*, that the WLAD exemption should be constitutionally more vulnerable than it might otherwise be because St. Joseph not only is exempt (as a non-“employer”) from the WLAD but also is exempt from having to pay business-and-occupation and property taxes. Mr. Ockletree neither acknowledges nor accounts for the fact that the B&O tax exemption statute he cites, RCW 82.04.3651, applies to nonprofits generally, not just to religious nonprofits, and provides an exemption limited to fund-raising receipts, and that the property tax exemption applies to St. Joseph because it is a hospital, not because it is nonprofit, RCW 84.36.040(1)(e), and applies only to the extent property is used as a hospital, RCW 84.36.040(3). Thus, while St. Joseph is exempt from the WLAD because it is a religious or sectarian nonprofit, it is exempt from B&O taxation because of its nonprofit status

4. Whether the WLAD's definition of "employer" passes muster under the First Amendment is not an issue of local law that has been certified to this Court for determination and, even if the Court were to reach that issue, there is no First Amendment violation because RCW 49.60.040(11)'s definition of "employer" passes the federal "Lemon test".

The District Court's certification order does not request this Court to consider the constitutionality of the WLAD definition of "employer" under the First Amendment. Nor could it, because, under RAP 16.16(a), a question certified by a federal court to this Court must be a "question of state law . . . which has not been clearly determined and does not involve a question determined by reference to the United States Constitution." *See also Broad*, 141 Wn.2d at 676 ("Where an issue is not within the certified questions, and is within the province of the federal court, this court will not reach the issue").

If the Court nonetheless concludes that it must refer to federal First Amendment jurisprudence to determine the state law questions concerning Const. art. I, §11 that have been certified, and proceeds to do so, the only federal constitutional test to which Ockletree alludes and that could apply is the one adopted in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). *See Malyon*, 131 Wn.2d at 807 ("until the [U.S.] Supreme Court abandons the *Lemon* test, it shall apply to

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alone and is exempt from property tax neither because it is religious or sectarian nor because it is nonprofit. Ockletree's argument is without merit.

establishment clause issues under the First Amendment”). To survive a First Amendment constitutional attack under *Lemon*, a statute must have a secular purpose; may not have as its primary effect the advancement of religion; and must not create an excessive entanglement between church and state. *Lemon*, 403 U.S. at 612-13. RCW 49.60.040(11) passes all three prongs of the *Lemon* test.

RCW 49.60.040(11)'s exclusion of religious or sectarian nonprofits from the definition of “employer” does not seek to “advance” religion, any more than its exclusion of small employers seeks to “advance” the hiring of fewer than eight employees. Indeed, it treats all religious or sectarian nonprofits the same, excluding all from the definition of “employer.” The statutory exclusion of religious or sectarian nonprofits serves at least two secular purposes: to keep state courts and juries from inquiring into and passing judgment on the motivation(s) behind employment decisions made by religious or sectarian nonprofits, and to enable such entities, including charity hospitals and religiously affiliated service organizations, to provide free and/or lower-cost services without potential liability for the enhanced remedies available under the WLAD, even if they may have exposure to potential liability under federal anti-discrimination statutes because the federal statutes do not have exemptions identical to those in RCW 49.60.040(11).

- C. RCW 49.60.040(11)'s exemption of "any religious or sectarian organization not organized for private profit" from the WLAD's definition of "employer" is not unconstitutional as applied to an employee claiming that the religious non-profit organization discriminated against him for reasons wholly unrelated to any religious purpose, practice, or activity.

Ockletree argues, *Pltf's Br. at 31-34*, that, even if this Court determines that RCW 49.60.040(11) is not facially invalid under Const. art. I, §12, it should find it invalid as applied to him because the alleged discrimination of which he complains was unrelated to religion. But, Ockletree offers no analytical legal framework, based on "as applied" case law, for reaching an "as applied" holding in this case.<sup>22</sup> Ockletree simply restates his arguments for strict scrutiny, and then asserts, *Pltf's Br. at 32*, that, even under rational basis review, "the exemption is unconstitutional because there is no rational relationship between allowing [St. Joseph] to conduct its religious activities and Ockletree's termination." In so arguing he erroneously assumes, *Pltf's Br. at 32-33*, that any state interest in exempting religious or sectarian nonprofits from the WLAD's provisions must relate to the reasons for his termination (or provide a legitimate basis for a religious or sectarian nonprofit to discriminate), and that the only

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<sup>22</sup> "An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). When a statute is held unconstitutional as-applied, it "prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *Id.* at 669.

viable state interest in exempting religious or sectarian nonprofits from the WLAD's provisions is in "reducing governmental interference with the practice of religion."

Again, Ockletree is wrong. For the reasons previously discussed, which will not be repeated here, the WLAD's exemption of religious or sectarian non-profit organizations is not subject to strict scrutiny, and passes rational basis review. Ockletree's assumption, *Pltf's Br. at 32-33*, that the claimed state interest is "reducing governmental interference with the practice of religion" is admittedly unsubstantiated by any supporting authority. *See Pltf's Br. at 33, n.16*. As previously discussed, there are a number of other conceivable rational bases for the exemption at issue, and neither the exemption for religious or sectarian nonprofits, nor the exemption of small employers, must be rationally related to the reason for a given employment decision.<sup>23</sup>

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<sup>23</sup> Ockletree erroneously claims, *Pltf's Br. at 33*, that St. Joseph's counsel somehow conceded that exemption "makes no sense" during oral argument in the District Court. St. Joseph's counsel made no such concession. In context, she stated, RP at 22-23:

Ms. Glickstein: And Judge, I will absolutely agree with you on your comments about the importance of the laws, and to an extent that perhaps it makes no sense. **But even if it makes no sense to this Court, I would submit that, No. 1, there is sense that can be made due to *Erdman*; and No. 2, even if it makes no sense to this Court, we are in federal court in this case, and this is not a decision, it would merely be an advisory opinion for you to rule on it. And I think there is a way for you to rule on it and find that the statute is constitutional. But if not, I don't believe this Court should be making that decision.** (emphasis added).

Ockletree's perfunctory two-sentence argument, *Pltf's Br. at 48-49*, that RCW 49.60.040(11)'s exemption is also unconstitutional as applied to him under Const. art. I, §11, is equally devoid of any analytical framework for finding the exemption unconstitutional "as applied" if it is not facially unconstitutional. Whether under Const. art. I, §12, or under Const. art. I, §11, Ockletree has not even attempted to explain how a statutory definition that excludes certain *entities* from the definition of employer, and thus determines whether an entity can be a defendant under the WLAD, can be held unconstitutional "as applied" *to a particular individual plaintiff*.

Ockletree has not established that the WLAD's exemption of religious or sectarian nonprofit organizations either confers a privilege or immunity within the meaning of article I, section 12, or violates the plain language of article I, section 11. Therefore, this Court should hold that the exemption does not, on its face or as applied to Ockletree, violated either the state "privileges and immunities" clause or the state "religious freedom" clause.

#### V. CONCLUSION

For the foregoing reasons, this Court should answer both certified questions "No." RCW 49.60.040(11)'s exemption of "religious or sectarian organizations not organized for private profit" from the WLAD's

definition of "employer" does not violate either the "privileges and immunities" clause or the "religious freedom" clause of the Washington Constitution facially or as applied to Ockletree.

RESPECTFULLY SUBMITTED this 25th day of February, 2013.

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<sub>per auth.</sub>

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 25th day of February, 2013, I caused a true and correct copy of the foregoing document, "Defendant Franciscan Health System's Answering Brief," to be delivered in the manner indicated below to the following counsel of record:

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Attached for filing in .pdf format is Defendant Franciscan Health System's Answering Brief in *Ockletree v. Franciscan Health System*, Supreme Court Cause No. 88218-5. The attorneys filing this brief are Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: [mspillane@williamskastner.com](mailto:mspillane@williamskastner.com) and Sheryl Willert, WSBA No. 08617, (206) 628-2408, [swillert@williamskastner.com](mailto:swillert@williamskastner.com).

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