

No. 88218-5

SUPREME COURT  
OF THE STATE OF WASHINGTON

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CERTIFICATION FROM WESTERN DISTRICT OF WASHINGTON,  
UNITED STATES DISTRICT COURT

IN

LARRY C. OCKLETREE,

Plaintiff,

v.

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

Defendants.

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PLAINTIFF LARRY C. OCKLETREE'S OPENING BRIEF

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## A. INTRODUCTION

This case concerns the constitutionality of a blanket exemption for nonprofit religious organizations from Washington's law against discrimination ("WLAD"), Chapter 49.60 RCW. Larry Ockletree, an African-American, worked for Franciscan Health System ("FHS") as a security guard at St. Joseph Hospital, where he was responsible for manning a desk in the Emergency Department, checking identification, and issuing name tags to visitors. While employed with FHS, Ockletree suffered a stroke, resulting in the impairment of his non-dominant left arm. Instead of accommodating Ockletree's disability, as required by WLAD, FHS terminated his employment.

Ockletree brought suit and FHS moved to dismiss on the ground that it was a nonprofit religious organization and, thus, exempt from WLAD under RCW 49.60.040(11). In considering FHS's motion, the United States District Court for the Western District of Washington determined that Ockletree's employment had "nothing to do with any religious purpose or activity" and that "[t]he discrimination Ockletree claims (race and disability)" was "wholly unrelated to FHS' religious purpose, practice, or activity." Dkt. 62 at 13-14. The Honorable Ronald B. Leighton observed, "I have a suspicion that most federal judges would say that WLAD, in this respect, as applied, is unconstitutional."

Verbatim Report of Proceedings (“VRP”) at 24.<sup>1</sup> Before ruling on the constitutionality of the religious nonprofit exemption under the United States Constitution, however, the District Court certified the issue to this Court for consideration under the Washington Constitution. Dkt. 63. *See* RAP 16.16(a) (Federal Court may certify question that “does not involve a question determined by reference to the United States Constitution.”).

Although this issue has come before this Court previously in *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991), and more recently in *Erdman v. Chapel Hill Presbyterian Church*, 175 Wn.2d 659, 286 P.3d 357 (2012), the Court has yet to rule on the constitutionality of the religious nonprofit exemption. In *Farnam*, this Court declined to reach the issue owing to the inadequacy of the briefing, and was able to decide *Erdman* on narrower grounds. This case, as Judge Leighton observed, is “that perfect case that decides a very serious issue,” since Ockletree’s employment “has no tie to the religious mission of the hospital.” VRP at 15.

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<sup>1</sup> The District Court’s transcript (A-1), along with its subsequent substantive orders (Order on Defendants’ Motion to Dismiss (A-2) and Order Certifying Question to the Washington Supreme Court (A-3)) and the Declaration of Larry C. Ockletree dated February 6, 2012 (A-4), are attached in the Appendix to this brief. All are included in the record as ordered by the District Court.

The Washington legislature has expressed the purpose of WLAD as follows:

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 . . . or the presence of any sensory, mental, or physical 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.

RCW 49.60.010.

Both as drafted and as applied to Ockletree, RCW 49.60.040(11)'s exemption for religious employers violates article I, sections 11 and 12 of the Washington Constitution. It classifies employers on religious grounds, and grants nonprofit religious organizations immunity from WLAD at the expense of their employees' right to work free from discrimination. The exemption cannot pass strict scrutiny, rational basis review, the *Lemon*<sup>2</sup> test, or any other test that this Court may apply to an article I, section 12 challenge. The exemption also offends the Religious Freedom clause by favoring religion over non-religion and permitting "practices

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<sup>2</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

inconsistent with the peace and safety of the state.” Const. art. 1, § 11.

**B. CERTIFIED QUESTIONS**

The United States District Court certified the following questions of state law for this Court’s consideration:

(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?

**C. STATEMENT OF THE CASE**

Larry Ockletree, worked in the security department for FHS. Dkt. 17 at 2.<sup>3</sup> On March 10, 2010, Ockletree suffered a stroke while working at St. Joseph Hospital, one of FHS’s hospitals. *Id.* At the time of his stroke, and for approximately a year and a half before that time, Ockletree’s job was to man a checkpoint station in the Emergency

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<sup>3</sup> Ockletree’s declaration is attached as A-4 in the Appendix to this brief.

Department. *Id.* Ockletree's position entailed greeting individuals entering the department, checking identification, and supplying visitor badges. *Id.* His job did not have any significant physical components. *Id.* As a result of his stroke, he lost the use of his left arm; however, he did not have any other significant physical impairment. *Id.* After recovering from his stroke, Ockletree sought to return to work at St. Joseph Hospital, as he could still perform the duties that he had performed prior to his stroke. *Id.* FHS did not allow him to work and declined to provide any accommodation. *Id.* FHS later unlawfully terminated Ockletree's employment due to his disability and race. *Id.*

Ockletree filed suit in Pierce County Superior Court. Dkt. 1. FHS removed the action to federal court. *Id.* After removal, FHS filed a motion to dismiss Ockletree's claims, citing the exemption for religious nonprofit organizations found in RCW 49.60.040(11). Dkt. 40. In this regard, WLAD defines an "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) (emphasis added). FHS argued that it was a religious nonprofit organization and, thus, not subject to WLAD, and that the 180-day (as opposed to the 300-day) Equal Employment Opportunity Commission

("EEOC") filing deadline<sup>4</sup> applied to Ockletree's case. Ockletree answered, in relevant part, that the exemption from WLAD for religious organizations was unconstitutional under both the Washington and United States Constitution. Dkt. 43.

On November 27, 2012, the District Court conducted a hearing on this issue. The District Court concluded that this Court should first consider whether the exemption violates the Washington Constitution before it considered whether the exemption violates the United States Constitution:

I am going to submit it. Because I have a suspicion that most federal judges would say that WLAD, in this respect, as applied, is unconstitutional. And there are powerful interests – and I don't mean to denigrate their interest, because these are heartfelt positions, and I have said before I don't like bullies. And I didn't like bullies who were picking on the Catholics in Plan B, and I don't like the Catholics finding a safe haven if – if, it's a big if, they discriminated against this security guard. And that's just fundamental fairness. I think it's baked into the cake. The Constitution, our founding fathers, didn't like bullies either.

VRP at 24:13-24. Shortly thereafter, the District Court entered orders certifying to this Court the question of whether the religious exemption

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<sup>4</sup> 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . , except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . , such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred"). See also 42 U.S.C. § 12117(a) (ADA utilizes Title VII procedures).

is constitutional under the Washington Constitution<sup>5</sup> and establishing the record for appeal. Dkt. 63. By letter dated December 18, 2012, this Court accepted certification.

**D. ARGUMENT**

At issue are two provisions of the state constitution, article I, section 11 and article I, section 12. Article I, section 12 is entitled “Special Privileges and Immunities Prohibited” and provides:

No 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 11, entitled “Religious Freedom,” provides in part:

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 . . . .

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<sup>5</sup> Pursuant to RAP 16.16(a), this Court will not accept certified questions regarding the interpretation of federal law. Therefore, in the event this Court holds that the religious exemption is constitutional under the Washington Constitution, the case will return to the United States District Court for consideration of Ockletree's challenges to the exemption under the United States Constitution.

Both of these provisions are interpreted independently of the United States Constitution. The religious exemption in RCW 49.60.040(11) is unconstitutional under these provisions as written and when applied to an employee whose job has no relationship to any religious purpose, practice, or activity.

Before embarking on the state constitutional analysis, it is important to note that the constitutionality of the exemption does not impact the larger statutory framework of WLAD.<sup>6</sup> The legislature originally included an express severability clause when it first enacted WLAD in 1949, including the religious exemption. The legislation specifically stated: “[i]f any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.” Laws of 1949, ch. 183, § 13. Similar severability provisions were included in updates to WLAD in 1957, 1969, and 1993.<sup>7</sup> Although these provisions were not codified in RCW 49.60.010,

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<sup>6</sup> Ockletree cites this issue at the outset as Justice Sanders’ opinion in *Griffin v. Eller*, 130 Wn.2d 58, 69-70, 922 P.2d 788 (1996), included dicta suggesting that if there was an invalidation of a portion of the definition of “Employer,” in *Griffin* the challenge was to the exemption for small employers, this could render the entire statutory scheme invalid. Aside from the non-binding nature of this discussion in *Griffin*, it also overlooks the various WLAD severability enactments Ockletree cites.

<sup>7</sup> See Laws of 1957, ch. 37, § 27 (“If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of

the severability provisions have the same force of law. RCW 1.08.017 (“The reviser may omit from the code all titles to acts, . . . severability, and validity and construction sections . . . . The omission of validity or construction sections is not intended to, nor shall it change, or be considered as changing, the effect to be given thereto in construing legislation of which such validity and construction sections were a part.”). *See also State v. Franklin*, 172 Wn.2d 831, 839 n.9, 263 P.3d 585 (2011); *State v. Anderson*, 81 Wn.2d 234, 236-37, 501 P.2d 184 (1972). Elimination of the exemption for religious employers will not defeat the purpose of the act, and there is no history to suggest that, in the absence of this exemption, the legislature would have declined to pass WLAD.

**1. Washington’s Privileges and Immunities Prohibition Clause Is Interpreted Separately from the Federal Equal Protection Clause.**

The Washington Constitution’s Privileges and Immunities Prohibition Clause, article I, section 12, provides greater protection from governmental favoritism of certain entities than the United States

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such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.”); Laws of 1969 Ex. S., ch. 167, § 10 (“If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.”); Laws of 1993, ch. 510, § 26 (“If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.”).

Constitution. This Court has repeatedly held that article I, section 12 should be interpreted independent of the Fourteenth Amendment's Equal Protection Clause. *American Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 606, 192 P.3d 306 (2008) ("The privileges and immunities clause warrants a separate constitutional analysis."). In *American Legion*, this Court reaffirmed this principle without analyzing the *Gunwall*<sup>8</sup> factors, recognizing that "[o]nce this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision, a *Gunwall* analysis is unnecessary." *Id.* (quoting *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007)).

While it is now settled that article I, section 12 requires an independent analysis, this Court has noted that "parties may consider and brief the *Gunwall* factors as interpretive devices in support of our constitutional interpretation inquiry." *Madison*, 161 Wn.2d at 93 n.5. For this reason, the *Gunwall* factors are briefly addressed.

This Court has also explained that, in determining that a state constitutional provision requires a separate and independent constitutional analysis from the United States Constitution, it will consider six nonexclusive and neutral criteria: (1) the textual language

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<sup>8</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern. *Grant Cnty. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806, 83 P.3d 419 (2004) (citing *Gunwall*, 106 Wn.2d at 58).

Considering the first and second *Gunwall* factors, the text of the federal Equal Protection Clause “varies significantly” from Washington’s article I, section 12. *Id.* The latter provides, “No 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.” Const. art. I, § 12. The Fourteenth Amendment, on the other hand, states in pertinent part, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1, cl. 2. Critical to the issues raised in this case, the *Grant County* court observed the differences in purpose between these provisions:

Analyzing the texts of the federal and state constitutions, it becomes apparent that the federal constitution is

concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens. . . .

Thus, one might expect that the state provision would have a harder “bite” where a small class is given a special benefit, with the burden spread among the majority. On the other hand, the Equal Protection Clause would bite harder where majority interests are advanced at the expense of minority interests.

*Grant County*, 150 Wn.2d at 806-07 (quoting Jonathan Thompson, *The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1251 (1996)).

Regarding the third *Gunwall* factor, constitutional history, *Grant County* noted that the Washington Constitution’s Privileges and Immunities Prohibition Clause was modeled after the Oregon Constitution, with one specific difference: “the Washington provision added a reference to corporations, which our framers perceived as manipulating the lawmaking process.” *Id.* at 808. “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.* As explained in *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J.,

concurring), “[t]he concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.”

Regarding the fourth *Gunwall* factor, preexisting state law, this Court recognized in *Grant County* that “preexisting law seems to favor a separate analysis of article I, section 12.” *Id.* at 811. The Court noted that “[t]he limitation on government to grant special privileges to certain individuals or groups was recognized prior to the adoption of the Washington Constitution in 1889.” *Grant County*, 150 Wn.2d at 809-10.

Regarding *Gunwall* Factor Five, structural differences in provisions, this Court held that these differences are “apparent” and “support an independent analysis.” *Id.* at 811.

Lastly, the sixth *Gunwall* factor favors an independent analysis when the subject is a matter of state or local concern. *Id.* Here, WLAD explains that ending discrimination is a matter of “state concern” and the legislation is enacted pursuant to the state’s police powers. RCW 49.60.010 (“The legislature hereby finds and declares that practices of discrimination against any of its inhabitants ... are a matter of state concern . . . .”). Just as the question of annexations was a matter of state concern in *Grant County*, the regulation of

employment relationships and unlawful discrimination is also a matter of state and local concern. Thus, the sixth *Gunwall* factor favors an independent analysis, just as it did in *Grant County*.

FHS will likely rely upon *Farnam*, 116 Wn.2d 659. See Dkt. 49 at 7. In *Farnam*, however, this Court expressly declined to decide the constitutionality of the religious nonprofit exemption, but went on to comment in dicta that the “Washington State Constitution (article 1, section 12) and the equal protection clause of the Fourteenth Amendment are substantially identical and have been considered by this court as one issue.” *Id.* at 681. If raised, this Court should reject FHS’s argument for a number of reasons. First, there was no *Gunwall* analysis performed by the *Farnam* Court; instead, the Court simply made a conclusory and unexplained remark about the Washington Constitution. Second, the statement from *Farnam* is explicitly dicta, as the Court expressly noted that it was not deciding the issue:

Farnam next argues that the exemption for religious organizations contained in RCW 49.60 is unconstitutional under article 1, section 11 (freedom of belief) and article 1, section 12 (privileges and immunities) of the Washington Constitution. She has expressly declined to bring any federal constitutional challenges. For the reasons discussed below, we decline to reach Farnam’s state constitutional claims.

*Id.* at 679 (emphasis added). The Court observed that the employee had failed to brief the article I, section 11 issue properly. *Id.* at 680 (“[T]his court is faced with deciding an issue under our constitution without benefit of citation to appropriate supporting authority. This we decline to do.”). The Court similarly found the briefing on article I, section 12 insufficient: “it would be inappropriate to decide this issue on the briefing before us. Therefore, we decline to reach the issue of the constitutionality of the exemption under article 1, section 12.” *Id.* at 681.

Third, the *Farnam* dicta is directly inconsistent, and thereby overruled, by this Court’s subsequent holding in *Grant County*. The Washington Constitution article I, section 12 is different in its text, purpose, and history from that of the federal Equal Protection clause. FHS’s reliance on *Farnam* where no *Gunwall* analysis was conducted, inadequate briefing was provided, and the Court admits it was declining to actually entertain the question, is misplaced. Therefore, this Court must analysis the constitutionality of this question separately under the state constitution.

**2. Legislation that Differentiates Based on Religion is Subject To Strict Scrutiny.**

When legislation differentiates between groups based on religion, the appropriate standard of review is strict scrutiny. In

*Andersen v. King Cnty.*, 158 Wn.2d 1, 18-19, 138 P.3d 963 (2006), this Court explained that “[t]he level of scrutiny to be applied under an equal protection analysis depends on whether a suspect or semisuspect classification has been drawn or a fundamental right is implicated[.]” Although no Washington case has expressly considered whether religion is a suspect classification under article I, section 12, Washington cases decided prior to *Grant County* confirm that religion is a suspect class. For instance, in *American Network, Inc. v. Washington Utils. & Transp. Comm’n*, 113 Wn.2d 59, 77-78, 776 P.2d 950 (1989), this Court explained that it would apply rational basis review unless the challenged legislation involved a “suspect criteria” such as “religion.” There, the Court stated, in relevant part, “where the classification neither involves suspect criteria (race, religion, national origin, alienage, gender) nor affects fundamental interests (e.g., free speech, privacy, voting rights), the court will engage in only minimum scrutiny of the enactment”. *Id.* (emphasis added). This holding is consistent with decisions from various Divisions of our Courts of Appeal. *See, e.g., King County Dep’t of Adult and Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 359, 254 P.3d 927 (2011) (“The challenged classification need only be rationally related to a legitimate state interest unless it violates a fundamental right or is drawn upon a suspect classification such as

race, religion, or gender.”); *Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789, 796, 973 P.2d 1081 (1999) (accord).

Again, FHS is expected to cite *Farnam*, 116 Wn.2d 659, for the proposition that the exemption of religious nonprofits from RCW 49.60.040(11)’s definition of “employer” is subject only to rational basis review. *Farnam*, however, expressly “decline[d] to reach the issue of the constitutionality of the exemption under article I, section 12.” *Id.* at 681. Declaring that “it would be inappropriate to decide this issue on the briefing before us,” the court, nonetheless, said that it was “worth noting” that the United States Supreme Court had “held that the federal counterpart to Washington’s religious exemption does not violate the Equal Protection Clause of the Fourteenth Amendment because it was rationally related to the legitimate governmental purpose of alleviating significant governmental interference with the exercise of religion.” *Id.* (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987)). *Farnam* stated that the *Amos* court had found “no merit to the argument that strict scrutiny was required because the exemption was drawn on religious grounds,” and indicated that, “[w]hile laws discriminating *among* religions are subject to strict scrutiny, laws affording a uniform benefit to *all*

religions need only satisfy the rational relationship test.” *Farnam*, 116 Wn.2d. at 681 (emphasis in original).

FHS’s expected reliance on *Farnam* is misplaced. First, *Farnam*’s, discussion of *Amos* was dicta, the court having “decline[d] to reach the issue of the constitutionality of the exemption under article I, section 12.” *Id.* Second, *Farnam* predated *Grant County*. The court said that *Amos* was “worth noting” because at that time it considered the state constitution’s Privileges and Immunities Prohibition clause (article I, section 12) and the Fourteenth Amendment’s Equal Protection Clause to be “substantially identical.” *Id.* (quoting *Am. Network, Inc.*, 113 Wn.2d at 77). As discussed above, *Grant County*, changed this interpretation, holding that article I, section 12 and the Equal Protection Clause are no longer “one issue” and must be analyzed independently. *Id.* Third, *Farnam* overlooked the crucial difference between RCW 49.60.040 and the “federal exemption” at issue in *Amos*. While RCW 49.60.040(11) completely exempts nonprofit religious organizations from the law against discrimination, 42 U.S.C. § 2000e-1, only exempts religious organizations from “Title VII’s prohibition against discrimination in

employment on the basis of religion."<sup>9</sup> *Amos*, 483 U.S. at 329 (emphasis added). Thus, what *Farnam* calls the "federal counterpart to Washington's religious exemption" is actually a much narrower exception. The District Court highlighted this fundamental difference in its ruling:

And what makes this different is their religious purpose, and it's a categorical - - the federal court looks at the verb, the religious activity. The Washington Supreme Court took the noun, religious organization, and gives them carte blanche to treat them, their employees, as ever as they wish to. That's a stark distinction between the interpretation of this provision.

VRP at 16.

Furthermore, *Farnam* misstates *Amos*. The United States Supreme Court did not say that "laws affording a uniform benefit to *all* religions need only satisfy the rational relationship test," *Farnam*, 116 Wn.2d at 681 (emphasis added). Instead, it held that, while "laws discriminating *among* religions are subject to strict scrutiny," those "affording a uniform benefit to *all* religions' should be analyzed under *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)]"

*Amos*, 483 U.S. at 339 (emphasis added) (citing *Larson v. Valente*, 456 U.S. 228, 252

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<sup>9</sup> 42 U.S.C. § 2000e-1, Title VII, provides in relevant part: "This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

(1982)). The Supreme Court observed that “[i]n cases such as these, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test.”<sup>10</sup> *Amos*, 483 U.S. at 339 (emphasis added). In *Larson*, moreover, the Supreme Court explained that the *Lemon* test “reflect[s] the same concerns” that justified the application of strict scrutiny to the statute challenged in that case. *Larson*, 456 U.S. at 252. Thus, *Farnam* overlooked the pivotal role that *Lemon* played in *Amos*. While *Amos* did state that “[t]he proper inquiry is whether Congress has chosen a rational classification to further a legitimate end,” it did so only after first determining that the federal exemption passed the *Lemon* test. *Amos*, 483 U.S. at 339.

Notably, RCW 49.60.040(11)’s sweeping exemption would not pass muster under *Lemon*. In *Amos*, the Court rejected the argument that Title VII’s exemption failed the second part of the *Lemon* test (*i.e.*, that the primary effect of the law “neither advances nor inhibits religion,” *Lemon*, 403 U.S. at 612), reasoning that the government

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<sup>10</sup> Under the *Lemon* test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive governmental entanglement with religion.’” *Lemon*, 403 U.S. at 612-613 (citing *Board of Ed. v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

acted “with the proper purpose of lifting a regulation that burdens the exercise of religion, [and therefore] we see no reason to require that the exemption come packaged with benefits to secular entities.” *Id.* (emphasis added). RCW 49.60.040(11), however, exempts religious organizations even when the alleged discrimination does not relate to the “exercise of religion.” Properly understood, *Amos* cannot be said to validate all laws enacted with the purpose of accommodating or exempting religion from general laws, as later decisions have made clear. *See, e.g., Texas Monthly Inc. v. Bullock*, 489 U.S. 1 (1989) (sales tax exemption for religious periodicals unconstitutional).

That said, *Amos* is a poor guide to the proper interpretation of article I, section 12. It has been criticized by commentators as “short on logic and reasoning” and “one of the most deferential and least logically convincing Establishment Clause analyses ever undertaken by the Court.” Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247, 292, 290-91 (1994). In other contexts, the Supreme Court has not found the distinction between laws that discriminate among religions and laws that discriminate between religion and non-religion significant. In *Bullock*, for example, the Supreme Court observed:

The core notion animating the requirement that a statute possess ‘a secular legislative purpose’ and that

'its principal or primary effect ... be one that neither advances nor inhibits religion,' ... is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general."

489 U.S. at 9 (quoting *Lemon*, 403 U.S. at 612). The application of a different level of scrutiny depending on whether a statute discriminates among religions or between religion and non-religion is inexplicable, for in both cases the distinction is still drawn on religious grounds. Furthermore, importing the *Lemon* test from the Establishment Clause context and its relationship to the "rational classification" inquiry produces a doctrinal muddle. This Court should adhere to its past pronouncements and apply strict scrutiny to a law that involves the "suspect criteria" of "religion." *E.g.*, *American Network*, 113 Wn.2d at 77-78.

**3. WLAD's Religious Exemption is Facially Unconstitutional Under Washington Constitution, Article I, Section 12.**

Because the religious exemption employs a suspect classification, this Court should apply strict scrutiny. For this reason, the statute is first analyzed under this exacting standard of review. Nevertheless, legal commentators have recognized that the standard of review that this Court will apply to an article I, section 12 challenge

after *Grant County* is not yet fully developed.<sup>11</sup> As a result of this uncertainty, the religious exemption is also analyzed under alternative tests that this Court has previously utilized for constitutional analysis.

**a) WLAD's Religious Exemption Is Not Narrowly Tailored to Meet a Compelling Interest.**

No decisions from this Court since *Grant County* have construed a legislative act that differentiates based on a suspect classification like religion. Nevertheless, the strict scrutiny test is well defined in other contexts and such laws can be sanctioned “only if they further compelling state interests, and are narrowly drawn to serve those interests.” *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993) (citing *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200, (1991)); see also *State v. McCuiston*, 174 Wn.2d 369, 401, 275 P.3d 1092, 1108 (2012) (Stephens, J. dissenting) (“Strict scrutiny requires that any deprivation of a fundamental right be narrowly tailored to the State’s compelling interests.”) When applied to the questions certified to this Court, the religious exemption falls short. Even assuming *arguendo* that there is a compelling interest in limiting governmental interference

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<sup>11</sup> “Would the court in future cases apply the privileges or immunities clause strictly, striking down any law that conferred privileges or immunities to some while denying them to others, or would the court instead defer to the legislature and uphold such laws so long as they satisfied some more lenient application of judicial scrutiny? ... In the six years and four significant privileges or immunities clause decisions since *Grant County*, we are no closer to answering that critical question. If anything, the objective has receded further into the distance.” Michael Bindas, Seth Cooper, David K. DeWolf & Michael J. Reitz, *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 46 Gonz. L. Rev. 1, 31-32 (2011).

with the practice of religion, there are narrower ways to achieve this goal. For instance, the federal statutory scheme only exempts such employers from religious discrimination. *See* 42 U.S.C. §2000e-1 (Title VII); 42 U.S.C. § 12113(d)(1) (ADA). Furthermore, and although this is addressed below in the analysis of the law “as applied” to Ockletree, WLAD’s religious employer exemption is not related to the purpose of limiting governmental interference with the practice of religion, because it applies to employees whose activities are “wholly unrelated to any religious purpose, practice, or activity.”<sup>12</sup> Dkt. 63 at 4. Under strict scrutiny, WLAD’s religious exemption fails.

**b) WLAD’s Religious Exemption Is Unconstitutional Under The Tests Applied By The Early Washington Supreme Court.**

During the early 20th Century, article I, section 12 was applied “in a manner consistent with its aim of eliminating governmental favoritism toward certain business interests.” *Bindas et al., supra* (n. 11) at 25. For instance, in *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949), the Court struck down a city ordinance requiring license fees for photographers located outside of the city, holding that the statute in question: “was passed with the primary

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<sup>12</sup> Because Ockletree’s employment is unconnected to FHS’s religious activities, the Free Exercise Clause concerns outlined recently in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. \_\_\_, 132 S.Ct. 694 (2012), are not present.

purpose of protecting local photographers from lawful competition, and was thereby designed to serve private interests in contravention of common rights, it must be condemned as an abuse of the police power, and, therefore, unreasonable and unlawful.” *Id.*

As this Court explained in *State ex rel. Bacich v. Huse*, “[t]he aim and purpose of the special privileges and immunities provision of article 1, section 12, of the state Constitution . . . is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.” 187 Wash. 75, 80, 59 P.2d 1101 (1936), overruled on other grounds, *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979). In *Bacich*, the Court provided a less deferential review of legislation holding:

A classification, to be legal and valid, must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act in respect to which the classification is made. The distinctions giving rise to the classification must be germane to the purposes contemplated by the particular law and may not rest upon a mere fortuitous characteristic or quality of persons, or upon personal designation. In short, the classification cannot be an arbitrary selection. These principles have been so frequently stated and so thoroughly recognized that it is unnecessary to cite any authority in their support.

187 Wash. at 84. (emphasis added). Similarly, in *Larson v. City of Shelton*, 37 Wn.2d 481, 490, 224 P.2d 1067 (1950), the Court struck

down a law exempting veterans from a license fee, acknowledging a sincere feeling of gratitude to veterans, but stating that “the legislature has no authority to express that gratitude in enactments which suspend the operation of criminal laws or regulations enacted under the police power for the protection of the public, or which make unreasonable and discriminatory classifications for taxation purposes.”

Under the test outlined by this Court in *Bacich*, the religious exemption does not pass constitutional muster. While there may be a reason to lift employment laws that impact the practice of religion, there is no just relationship between this purpose and allowing a religions organization to discriminate where religious exercise is not at issue. The exemption is, therefore, unconstitutional under the tests outlined in early Washington Supreme Court decisions.

**c) WLAD’s Religious Exemption Is Unconstitutional Under The Test Outlined In *Madison*.**

In *Madison*, this Court considered a challenge to the state’s felon disenfranchisement scheme requiring convicted felons to pay their legal financial obligations before their voting rights would be reinstated. This Court outlined a two step inquiry, along with other relevant considerations, in analyzing an article I, section 12 case. First, the Court considered “whether ‘a provision of the state constitution should be given an interpretation independent from that given to the

corresponding federal constitutional provision.” *Madison*, 161 Wn.2d at 93 (quoting *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). Based on *Grant County*, the Court found that independent analysis was warranted in *Madison*. For the same reasons, this first step is also satisfied here.

This Court next addressed “whether the right to vote is a privilege or immunity that is protected by article I, section 12 of the Washington Constitution,” observing 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.” *Id.* at 95 (quoting *Grant County*, 150 Wn.2d at 812). The Court explained that, “[a]lthough the precise confines of what constitutes a privilege remains unclear, this court has stated that for the purposes of article I, section 12, privileges are “those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship.” *Id.* (quoting *Grant County*, 150 Wn.2d at 813) (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902))).<sup>13</sup>

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<sup>13</sup> Notably, the “fundamental rights” identified in *Vance* are not coextensive with the small number of “fundamental rights” that have been held to justify the application of strict scrutiny under the United States Constitution. While this Court has declined to recognize a privilege or immunity when the issue involves a purely governmental function, such as annexations or garbage collection, *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 103, 178 P.3d 960 (2008), the Court has recognized the following: “the right remove to and carry on business [in a state]; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal right; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.” *Vance*, 29 Wash. at 458. Here, there is not a purely governmental function at issue, but instead

Here, 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 WLAD or the costs attendant on statutory compliance.<sup>14</sup> Moreover, RCW 49.60.010 specifically defines the right to be free from discrimination in employment, which the legislature enacted “in fulfillment of the provisions of the Constitution” and which WLAD declares to be one of the “privileges of [the state’s] inhabitants.” RCW 49.60.010 (emphasis added); *see also* RCW 49.60.030(1) (“right to obtain and hold employment without discrimination”). Finally, although this Court has not yet squarely addressed this issue, the right to pursue any lawful calling, business, or profession is one of the privileges that citizens of

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legislative special treatment for a select subset of corporations based on religion. Furthermore, other than *Vance*, early decisions of this Court did not articulate the “fundamental right” at stake before striking down statutes or ordinances conferring privileges or immunities on some businesses but not others. Whatever “fundamental right” was implicated by an exemption for farmers from a ban on fruit peddling within the fire limits of the City of Spokane, *Ex parte Camp*, 38 Wash. 393, 80 P. 547 (1905), or for businesses selling cigars by hand from the license fees imposed on those employing vending machines, *City of Seattle v. Dencker*, 58 Wash. 501, 108 P. 1086 (1910), or for cereal and flour mills from a statute regulating the sale of concentrated food stuffs, *State v. W. W. Robinson Co.*, 84 Wash. 246, 146 P. 628 (1915), is equally implicated by an exemption for religious organizations from the antidiscrimination laws applicable to other employers in the state.

<sup>14</sup> In 1889, a “Privilege” meant “[a] right peculiar to the person on whom conferred, not to be exercised by another or others,” and a “[s]pecial or exclusive privilege” meant “any particular individual authority or *exemption* existing in a person or class of persons, and in derogation of common right; as, the grant of a monopoly.” A DICTIONARY OF THE LAW 811-12 (1889) (emphasis added). That is precisely what RCW 49.60.040(1.1) confers: an exemption existing in a class of employers in derogation of common right “to obtain and hold employment without discrimination.” RCW 49.60.030(1)(a).

this state enjoy. *See, e.g., Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (“It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition.”) Therefore, 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.

The second inquiry in *Madison* was “whether and to what extent the clause provides greater protection in the context” before the Court. *Id.* at 95. While the Court in *Madison* did not find this consideration satisfied because the right to vote was already stripped from the individual bringing the challenge, this is not the circumstance in Ockletree’s case. Here, the text of article I, section 12 is focused on grants of favoritism, which is exactly what occurred with the religious exemption. Indeed, *Madison* specifically held that there was no violation because there was no favoritism to a specific group. 161 Wn.2d at 96-97. There, the Court explained that “the respondents fail to assert a privileges and immunities clause violation because Washington’s disenfranchisement scheme does not involve a grant of

favoritism.” Unlike *Madison*, this case involves a positive grant of favoritism and, thus, represents a core article I, section 12 violation.<sup>15</sup>

**d) WLAD’s Religious Exemption Is Unconstitutional  
Under the Test Referenced in *Farnam*.**

The *Farnam* Court indicated in dicta that it might apply the same type of review to WLAD as the United Supreme Court provided Title VII in *Amos*. 116 Wn.2d at 681. Although this is not the appropriate test under article I, section 12, should the Court apply this standard, WLAD’s religious exemption still fails. In *Amos*, the Supreme Court examined the federal exemption under the *Lemon* test, observing: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive governmental entanglement with religion.’” *Lemon*, 403 U.S. at 612-13 (citing *Bd. of Ed. v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). Examining Title VII’s

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<sup>15</sup> In his concurring opinion in *Andersen v. King County*, Justice James Johnson outlined a two part test for analyzing challenges under article I, section 12. 158 Wn.2d at 58-59. There, Justice Johnson began by quoting *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997), for the proposition that constitutional analysis should, in most cases, start and end with the text of the constitution. From there, Justice Johnson explained that “[t]his text requires a two-part analysis: (1) Does a law grant a citizen, class, or corporation “privileges or immunities,” and if so, (2) Are those “privileges or immunities” equally available to all?” *Id.* If this test is applied, for similar reasons as those discussed above, the religious exemption is unconstitutional. First, there is a grant to certain corporations of a specific privilege from complying with the WLAD and immunity from the liability that would otherwise arise from a violation, all at the expense of Ockletree’s privilege and right to employment and freedom from discrimination. Second, these privileges are not applied equally, but instead only granted to a subset of religious corporations.

limited exemption for religious discrimination, *Amos* held, “[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.” *Amos*, 483 U.S. at 338 (emphasis added).

Critical to this Court’s analysis, Title VII and WLAD are fundamentally different – the statutes are not the same, as *Farnam* incorrectly states. Federal law exempts religious employers from claims of religious discrimination; in contrast WLAD exempts religious employers entirely. Here, the exemption at issue does not lift a regulation that burdens the exercise of religion, and therefore, it does not pass the test articulated in *Lemon*.

**4. When Applied to a Secular Employee, WLAD’s Religious Exemption Violates Article I, Section 12.**

The certified question to this Court and the District Court’s companion Order on FHS’s motion to dismiss make clear that Ockletree’s employment and the discrimination at issue are in no way related to any of FHS’s religious activities or purposes. The second Certified Question is whether: RCW 49.60.040(11)’s exemption is “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?” Dkt. 63 at 4

(emphasis added). The District Court's Order on FHS's motion explains, "[t]he discrimination Ockletree claims (race and disability) is wholly unrelated to FHS's religious purpose, practice, or activity." Dkt. 62 at 14. Indeed, the District Court states that it is a "verity" that Ockletree's employment is "not religious activity." VRP at 14. Assuming *arguendo* that this Court does not conclude the exemption is unconstitutional as drafted, the Court must then conduct an as-applied analysis. The appropriate standard of review for this analysis is strict scrutiny, for the reasons stated above; however, even if this Court does apply a less demanding test, the result is the same: the exemption is unconstitutional because there is no rational relationship between allowing FHS to conduct its religious activities and Ockletree's termination.

An analysis of the facts of this case, even under the least stringent of all tests, rational basis review, illustrates the unconstitutionality of the WLAD exemption. "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." *Andersen*, 158 Wn.2d at 31. Assuming the claimed state interest cited

is reducing governmental interference with the practice of religion,<sup>16</sup> under the specific facts of this case, there is no relationship between this interest and the discrimination in question. Even Counsel for FHS conceded that the exemption “makes no sense” in this context during oral argument:

The Court: How would you articulate the rational basis for the Franciscans to discriminate against an African American security guard? How would you articulate that?

Ms. Glickstein: I don't think it's giving a license to discriminate. As I mentioned before in the City of Tacoma v. Franciscan Foundation --

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The Court: . . . . And the state of Washington, I don't know what they bargained for, but it makes no sense to me. It makes no sense.

Ms. Glickstein: And Judge, I will absolutely agree with you on your comments about the importance of the laws, and to the extent that perhaps it makes no sense.

VRP 21-22.

In this “perfect case,” there is absolutely no connection between religious activity and the employment relationship with Ockletree as a hospital security officer. The application of this

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<sup>16</sup> There is little legislative history regarding this exemption. The Senate and House Journals from 1949 make no reference to the exemption. Moreover, the Washington State Archives indicates that it holds no records for legislation from this time and the legislative committee reports were not retained.

exemption deprives Ockletree of a remedy for unlawful discrimination merely because of the favoritism provided to his category of employer – a religious nonprofit – and it is unconstitutional under rational basis review or any other test this Court might apply.

**5. Washington’s Religious Freedom Clause Is Interpreted Separately from the Establishment Clause of the United States Constitution.**

The Washington Constitution’s Religious Freedom provision, article I, section 11, provides greater protection from governmental support of religion than the United States Constitution and specifically forbids government action that would “excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.” In *Malyon*, 131 Wn.2d at 791-798, this Court conducted a thorough *Gunwall* analysis determining that “an independent interpretation is warranted.” Once this Court conducts a *Gunwall* analysis and determines that the state constitutional provision is interpreted differently, no further *Gunwall* analysis is necessary. *Madison*, 161 Wn.2d at 94-95. Nevertheless, for the same reasons the *Gunwall* factors were addressed above in relation to the Privileges and Immunities Prohibition Clause, the *Gunwall* factors are also addressed for this provision.

The first and second *Gunwall* factors consider the text of the state constitution and any significant textual differences with the United States Constitution. Here, article I, section 11 provides, in relevant part, 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.” Const. art. I, § 11. In contrast, the pertinent portions of the First Amendment to the United States Constitution state: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” U.S. Const. amend. I. “The text of article I, section 11 significantly differs and is considerably more specific” than the First Amendment. *Malyon*, 131 Wn.2d at 793. For these textual reasons, this Court agreed “with the Court of Appeals that ‘[t]he language of section 11 alone virtually demands an interpretation different from the First Amendment.’” *Id.* (quoting *Malyon v. Pierce County*, 79 Wn. App. 452, 468, 903 P.2d 475 (1995)).

The third *Gunwall* factor considers state constitutional and common law history. As explained in *Malyon*, 131 Wn.2d at 794, “[t]he treatment given religion during the state constitutional convention demonstrates religious concerns and outlooks significantly differed from those motivating the First Amendment a century before.” While

the focus at the state constitutional convention was religious influence in public education, this Court noted that “the drafters could have copied the federal establishment clause yet the fact that they did not, instead using significantly different language supports the proposition that their concerns and intentions were different.” *Id.* at 795 n.15. While it is true that religious orders operated a majority of the hospitals in Washington when the constitution was drafted, *id.* at 796, such hospitals were not exempt from laws of general applicability. *See, e.g.*, Laws of 1889-90, ch. 18, §§ 1, 5 (church property not exempt from state taxes). Moreover, those were very different times: in 1889, when Washington held its Constitutional Convention, women in the Washington territory had recently lost the right to vote, and Native Americans of any gender were disenfranchised because they were deemed “not citizens” in *Elk v. Wilkins*, 112 U.S. 94 (1884). State and federal anti-discrimination laws were decades away. Things changed, and Washington was at the forefront, granting women suffrage a decade before passage of the Nineteenth Amendment in 1920. Similarly, Washington’s legislature took action to protect employees from discrimination fifteen years before passage of Title VII in 1964.

The fourth *Gunwall* factor addresses preexisting state law. The legislature did not address discrimination in employment until 1949,

when it enacted WLAD; however, the debate over the constitutional limits on property tax suggests that a blanket exemption for religious organizations from laws of general applicability would not have met with the approval of the delegates who drafted the Washington Constitution. In August 1889, the delegates defeated a motion to exempt “actual places of religious worship” from state taxes, leaving the decision to future state legislatures. *Robert F. Utter and Edward J. Larson, Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Const. L. Q. 451, 474 (1987-88) (citing *Journal of the Washington State Constitutional Convention* 1889, at 655-56 (B. Rosenow ed. 1962); Tacoma Daily News, Aug. 7, 1889, at 1, col. 4; Morning Oregonian, Aug. 8, 1889, at 2, cols. 2-3). The first state legislature did not exempt church property from taxation. See Laws of 1889-90, ch. 18, §§ 1, 5 (church property not exempt).<sup>17</sup>

The fifth and sixth *Gunwall* factors consider “the differences in structure between state and federal governments, [which] ‘always favors an independent state interpretation[,]’” *Malyon*, 131 Wn.2d at

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<sup>17</sup> There was no exemption for church property 1881. Laws of 1881 § 2829. In 1886, the legislative assembly amended the Code to provide an exemption for church property up to five thousand dollars, but this exemption came “packaged with benefits to secular entities,” *Amos*, 483 U.S. at 338, embracing “all buildings or institutions of learning, benevolent, charitable, and scientific institutions, and hospital[s] for the sick [and] infirm.” Laws of 1885-86, p. 47, § 6.

797 (quoting *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996)), and whether the issue is a matter of state and local concern. Here, in 1949, fifteen years before the federal Civil Rights Act of 1964, the Washington legislature enacted WLAD. Laws of 1949, ch. 183, § 1. The legislature made it clear that abolishing discrimination is “a matter of state concern,” which “threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” *Id.* The law’s purpose remains unchanged. RCW 49.60.010.

Local jurisdictions, moreover, such as the City of Tacoma, have also sought to prevent discrimination. For instance, the Tacoma Municipal Code (“TMC”) was drafted to mirror Title VII and the ADA more closely by regulating religious employers unless the employment practice in question related to religious practices. *See City of Tacoma v. Franciscan Foundation*, 94 Wn. App. 663, 972 P.2d 566 (1999). The TMC currently provides that “[i]t is an unlawful discriminatory practice for any employer to: [f]ail or refuse to hire or discharge an individual . . . because of race . . . [or] disability . . . provided . . . that it shall not be an unlawful practice for a nonprofit religious organization to limit the hiring of employees who will perform religious duties to those persons who are members or followers of such religious organization . . . .”

TMC 1.29.050. Because of the decision in *Franciscan Foundation*, however, the municipal code modified the definition of “Employer” as having “the same meaning as set forth in the current Revised Code of Washington Section 49.60.040(3) and as hereafter amended.”

TMC 1.29.040. Thus, because of this unconstitutional exemption for religious organizations, and the unreviewed decision of Division II of the Court of Appeals, the City of Tacoma is currently precluded from advancing its local policy against discrimination. Because the regulation of discrimination by employers and the protection of the “privileges” of this state’s “inhabitants” are issues of state and local concern, these factors also support an independent analysis of the state constitution.

**6. WLAD’s Religious Exemption Elevates Religion Over Non-Religion In Violation of Article I, Section 11.**

Article I, section 11, prohibits the legislature from “the support of any religious establishment.” RCW 49.60.040(11) favors nonprofit religious organizations by exempting them from the provisions of WLAD, and such favor constitutes “support” for “religious establishment[s].” By its text, WLAD’s religious exemption violates this prohibition. Nevertheless, should this Court find the dicta in *Farnam* persuasive, and embrace the United States Supreme Court’s approach

in *Amos*, it must necessarily take the Court's Establishment Clause jurisprudence into account.

As Justice Souter observed in *Lee v. Weisman*, 505 U.S. 577, 610 (1992), "the Establishment Clause forbids not only state practices that 'aid one religion ... or prefer one religion over another,' but also those that 'aid all religions.'" (Souter, J., concurring) (quoting *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 15 (1947)). In keeping with this principle, the Supreme Court has "consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others." *Id.* In *Texas Monthly*, 489 U.S. at 17, for example, the Court struck down a state tax exemption that benefitted only religious periodicals. Although the exemption did not discriminate between religions, a majority of the Court nonetheless found that its preference for religious publications over all other kinds of publications "effectively endorses religious belief." *Id.* at 17 (plurality opinion), 28 (Blackmun, J., concurring in judgment). Writing for the plurality, Justice Brennan articulated the following analytical framework:

Insofar as [a tax exemption or subsidy] is conferred on a wide array nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause.

However, when the government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, ... it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community."

*Id.* at 14-15 (emphasis added) (brackets in original) (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring)). *See also Epperson v. Arkansas*, 393 U.S. 97 (1969) ("The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."). Justice Brennan went on to reject the state's argument that it had a compelling interest in avoiding a violation of the Free Exercise Clause, observing that nothing in the Court's Free Exercise jurisprudence prevented the state from eliminating the exemption and that "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious beliefs."

*Id.* at 18 (emphasis added).

FHS has never espoused a religious belief that precludes employment of African-Americans or the disabled. Even before WLAD was enacted, the Roman Catholic Church was an outspoken supporter

of civil rights legislation. On November 13, 1943, in fulfillment of Pope Pius XII's wishes, the Administrative Board of the National Catholic Welfare Conference, issued a statement wherein it "stressed the necessity for extending equal justice to all groups of American citizens." Louis Coleridge Kesselman, *The Social Politics of FEPC: A Study in Reform Pressure Movements* 139 (1948). In part, this statement proclaimed: "In the Province of God there are among us millions of fellow-citizens of the Negro race. We owe to these fellow-citizens, who have contributed so largely to the development of our country, and for whose welfare history imposes on us a special obligation of justice, to see that they have in fact the rights which are given to them in our Constitution. This means not only political equality, but also fair economic and educational opportunities, a just share in public welfare projects, good housing without exploitation, and a full chance for the social development of their race . . . ." *Id.* (internal quotations omitted).

Here, as in *Texas Monthly*, "[n]o concrete need to accommodate religious activity has been shown." *Texas Monthly*, 489 U.S. at 18. FHS has no evidence to prove that liability for race or disability discrimination "would offend their religious beliefs or inhibit religious activity." Indeed, the District Court has already found that

Ockletree's claims of race and disability discrimination are "wholly unrelated to FHS' religious purpose, practice, or activity." Like the tax exemption struck down in *Texas Monthly*, WLAD's blanket exemption for nonprofit religious organizations "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion" and, therefore, "cannot but convey a message of endorsement." *Id.* at 15 (citation omitted).

Again, the federal exemption upheld in *Amos* offers a useful comparison. As the Supreme Court pointed out, it provided an exception only to "Title VII's prohibition against discrimination in employment on the basis of religion." *Amos*, 483 U.S. at 330. The Court found that it was "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious," and declared that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 336. RCW 49.60.040(11), on the other hand, exempts nonprofit religious organizations from liability under WLAD for every manner of discrimination, whether it relates to religious activity or not. Because RCW 49.60.040(11) lifts regulations that do not significantly burden

the exercise of religion, the fact that the exemption is directed exclusively to religious organizations, rather than being “packaged with benefits to secular entities,” renders it an unconstitutional endorsement of religion. In sum, if this Court follows the text of article I, section 11 or follows *Amos*, the religious nonprofit exemption does not pass muster.

In the event this Court limits article I, section 11 to circumstances where public money or property is provided to a religious organization, the WLAD religious nonprofit exemption is still unconstitutional because the exemption hinges on the organization’s nonprofit status and the exemption provides a financial benefit. Indirect financial support of a religious organization violates the state Constitution just as much as a direct payment of funds. For instance, in *Visser v. Nooksack Valley School Dist.*, 33 Wn.2d 699, 708, 207 P.2d 198 (1949), this Court determined article I, section 11 was violated by the government providing bus transportation for religious schools.

There, the Court reasoned:

In both inception and operation of schools, transportation thereto and therefrom is a vital and continuous financial consideration. Any private, religious, or sectarian schools which are founded upon, or fostered by, assurances that free public transportation facilities will be made available to the prospective pupils thereof, occupy the position of receiving, or expecting to receive, a direct,

substantial, and continuing public subsidy to the schools, *as such*, thus encouraging their construction and maintenance, and enhancing their attendance, at public expense.

*Id.* See also, *Mitchell v. Consol. School Dist. No. 201*, 17 Wn.2d 61, 68, 135 P.2d 79 (1943) (holding in similar school transportation case that government action violated article I, section 11 and reasoning that “[w]e think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself.”).

Exemptions such as those in RCW 49.60.040(11) are of enhanced concern and merit greater scrutiny, because they are coupled with state subsidies in the form of preferential tax treatment.

As one legal commentator recently highlighted:

When it comes to tax-exempt status, the organization may claim to be acting as a purely private party, but many others would view the tax exemption as a subsidy, and surely it has the same cash value as a subsidy. If the tax exemption is a subsidy, then it too should warrant a higher level of concern about exemptions from civil rights laws.

Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. Rev. 781, 821 (2007). Indeed, providing a tax exemption to religious nonprofit organizations is the same thing as financial support. For instance, FHS, as a religious nonprofit under RCW 49.60.040(11) is exempt from having to pay business and occupation tax on amounts received from fundraising,

RCW 82.04.3651, and exempt from substantial property taxes. RCW 84.36.040. These tax subsidies represent a direct financial benefit to FHS, as well as a benefit to the donors who also receive a tax exemption for their donations. Recognizing the direct benefit of such an “exemption”, the United States Supreme Court denied a tax exemption to a religious university when it chose to discriminate based on race. *Bob Jones University*, 461 U.S. at 593 (1983).

Here, religious nonprofit organizations are provided financial support in the form of tax-exemptions. Additionally, releasing religious nonprofit organizations from the necessary financial costs of compliance with WLAD and potential damages for violation is unconstitutional financial support. For these reasons, the exemption for religious nonprofit organizations under RCW 49.60.040(11) violates the Washington Constitution.

**7. WLAD’s Religious Exemption Is Unconstitutional Under Article I, Section 11, Because It Excuses Acts of Licentiousness and Practices Inconsistent with the Peace and Safety of the State.**

Under the constitutional plain text, the state “shall not” interpret the free exercise of religion “as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.” Const. art. I, § 11. This text alone should end the analysis of the issue. As explained by the Washington Constitution:

“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.” Const. art. I, § 29.

While the precise question presented has not yet arisen, Washington Courts have held that the state, through its police power, certainly has the ability to regulate conduct even if it should burden the free exercise of religion. There are a number of Washington decisions that illustrate the line between free exercise and breach of the peace. In *Backlund v. Bd. of Comm'rs of King Cnty. Hosp. Dist. 2*, 106 Wn.2d 632, 642, 724 P.2d 981 (1986), the Court upheld a requirement that hospital staff purchase professional liability insurance even though this was contrary to a physician's religious beliefs. Likewise, in *State v. Norman*, 61 Wn. App. 16, 808 P.2d 1159 (1991), the court determined that a parent must provide medical treatment to his child, contrary to his religious beliefs, because the beliefs were incompatible with the peace and safety of the state. In *State v. Meacham*, 93 Wn.2d 735, 612 P.2d 795 (1980), the Court approved mandatory blood tests for putative fathers despite religious objection. Finally, in *State ex rel. Holcomb*, 39 Wn.2d 860, 239 P.2d 545 (1952), the Court upheld the University of Washington's requirement that students submit to tuberculosis testing before registration despite their religious objections.

While the cases outlined above are examples of when a governmental regulation will be approved, the same rational applies where the state has specifically declined to regulate under the police power only because of a concern about religious freedom. Under the plain text of the Religious Freedom's provision, 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. "Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon*, 131 Wn.2d at 799.

Here, WLAD was enacted to protect the peace and safety. RCW 49.60.010 explains the law's purpose, in relevant part, as "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 . . . ." Allowing FHS to breach this peace only because of its corporate religious affiliation, violates the Constitution.

Assuming *arguendo* that RCW 49.60.040(11)'s exemption is constitutional as drafted, at a minimum, when applied to Ockletree, whose employment has no legitimate relationship to any religious purpose or belief, the state has excused a breach of the peace in

violation of the command imposed by article I, section 11. Therefore, the exemption is unconstitutional as applied to Ockletree.

**E. CONCLUSION**

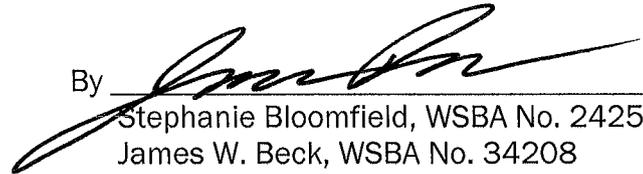
For the reasons outlined above, Plaintiff respectfully requests that this Court answer the questions posed by the District Court, "Yes", and conclude that RCW 49.60.040(11)'s exemption is unconstitutional under the Washington Constitution.

Dated this 18<sup>th</sup> day of January, 2013.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By



Stephanie Bloomfield, WSBA No. 24251  
James W. Beck, WSBA No. 34208  
Attorneys for Plaintiff

DECLARATION OF SERVICE

I, Jennifer Milsten-Holder, declare that on this 18<sup>th</sup> day of January, 2013, I placed in the mails of the United States of Postal Service an original and one copy of Plaintiff Larry C. Ockletree's Opening Brief addressed to the Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929, and served upon the parties indicated below:

Copy to:

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

Dated this 18<sup>th</sup> day of January, 2013 at Tacoma, Washington.

  
Jennifer Milsten-Holder  
Legal Secretary

# APPENDIX A-1

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF WASHINGTON  
3 AT TACOMA

4	LARRY C. OCKLETREE,	)	Docket No. CV11-5836RBL
5	Plaintiff,	)	Tacoma, Washington
6	vs.	)	November 27, 2012
7	FRANCISCAN HEALTH SYSTEM, a	)	
8	Washington Corporation,	)	
9	D/B/A/ ST. JOSEPH HOSPITAL,	)	
	And JOHN and JANE DOE(s)	)	
	1-10,	)	
10	Defendants.	)	

11  
12 TRANSCRIPT OF PROCEEDINGS  
13 BEFORE THE HONORABLE RONALD B. LEIGHTON  
14 UNITED STATES DISTRICT COURT JUDGE

14 APPEARANCES:  
 15 For the Plaintiff: JAMES WALTER BECK  
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Court Reporter: Teri Hendrix  
 Union Station Courthouse, Rm 3130  
 1717 Pacific Avenue  
 Tacoma, Washington 98402  
 (253) 882-3831

25 Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

1                   Tuesday, November 27, 2012 - 1:30 p.m.

2   \* \* \*

3                   THE COURT: Please be seated. Good afternoon.

4                   THE CLERK: This is in the matter of Ockletree versus  
5 Franciscan Health System, Cause No. CV11-5836RBL.

6                   Counsel, please make their appearances.

7                   MR. BECK: James Beck for the plaintiff, Your Honor.  
8 With me at counsel table is Stephanie Bloomfield and Dwayne  
9 Christopher, also.

10                  THE COURT: Good afternoon, all.

11                  MS. GLICKSTEIN: On behalf of the defendants, Karen  
12 Glickstein and Sheryl Willert.

13                  THE COURT: Good afternoon. All right. I have  
14 requested argument on the defendant Franciscan Health System's  
15 motion to dismiss Counts I, II, IV and V of plaintiff's  
16 amended complaint.

17                  I have reviewed the briefs. I have reviewed the following  
18 cases: *Farnam v. CRISTA Ministries*, *Erdman v. Chapel Hill*  
19 *Presbyterian Church*, *French v. Providence Everett Medical*  
20 *Center*, *Halle v. Providence Health & Services*, *Lim v.*  
21 *Franciscan Health Services*, *MacDonald v. Grace Church*, *Salina*  
22 *v. Providence Hospice of Seattle*, *Hazen v. Catholic Credit*  
23 *Union*, and *CJC v. Corp. of Catholic Bishop of Yakima*, *Donelson*  
24 *v. Providence Health & Services*, and a few others.

25                  Let's see, Ms. Glickstein, are you up first?

1 MS. GLICKSTEIN: I believe I am, Your Honor.

2 THE COURT: All right.

3 MS. GLICKSTEIN: Judge, as you indicated, we are here  
4 today with regard to a motion to dismiss four counts of  
5 plaintiff's amended complaint. Of those four counts, there's  
6 really three counts that we're dealing with substantively.  
7 Counts I and II are federal law claims under the ADA and Title  
8 VII; Count IV is wrongful discharge in violation of public  
9 policy count; and Count V is a claim under the Washington Law  
10 Against Discrimination.

11 It's defendants' position that all four of these counts  
12 should be dismissed from the lawsuit because they have no  
13 legal basis.

14 If it's okay with the Court, I am going to take the first  
15 two counts together first, and then move on into the second  
16 two counts.

17 The argument with regard to Counts I and II is essentially  
18 a failure to timely file claim. As the Court is aware from  
19 reviewing the briefs, Mr. Ockletree was dismissed from his job  
20 on September 10th of 2010. And under the Washington law --  
21 because the Washington Law Against Discrimination, as there is  
22 obviously overlap between that claim and the arguments we are  
23 making in the first claim, the referral provisions of the  
24 federal law don't apply, and his charge of discrimination  
25 needed to be filed within 180 days, because as the Ninth

1 Circuit made clear in *MacDonald*, when there's no claim under  
2 state law, there's no extra 120 days to file the lawsuit.

3 And the argument plaintiff has made is that, well, he says  
4 he filed an intake questionnaire in November of 2010 that  
5 should operate as a charge of discrimination. And for  
6 purposes of this motion only, as we noted in our brief, even  
7 assuming that's true, that still doesn't save his claim in  
8 this case for a couple of different reasons.

9 The most important of those reasons is that a pro se  
10 plaintiff, even when he was acting pro se initially, is not  
11 exempt from the statute of limitations that are imposed in  
12 timely filing a charge of discrimination.

13 The intake questionnaire itself, even if you consider it  
14 to be a charge of discrimination, it was never received by the  
15 EEOC. As the Court may be aware from reviewing the docket, we  
16 initially filed this motion. Mr. Ockletree made that  
17 argument. It was the first my client knew he ever had filed  
18 anything with the agency.

19 THE COURT: Right.

20 MS. GLICKSTEIN: We then withdrew, got the agency  
21 file. And that November 2010th questionnaire is nowhere in  
22 the EEOC file.

23 Importantly -- and I think this is very important -- the  
24 EEOC file does have a copy of the intake questionnaire that he  
25 filed in March of 2011. On that intake questionnaire there's

1 a specific question that says "have you ever filed a charge  
2 before?" And by that point in time Mr. Ockletree was  
3 represented by counsel. In fact, the briefing in this case  
4 indicates specifically he was assisted by counsel. Yet he  
5 still indicated he had never filed a charge of discrimination  
6 previously.

7 There's simply no reason not to impose that 180-day timely  
8 filing statute, that even if the initial intake questionnaire  
9 was filed, that's inconsistent with the arguments that  
10 Mr. Ockletree made in a document to a federal agency, that he  
11 signed, saying he had never filed anything before. And if  
12 that 180-day period has not been met, the case must be  
13 dismissed.

14 Moving on to Count IV, which is the wrongful discharge in  
15 violation of public policy claim, the law in Washington is  
16 very clear. The exception to the at-will doctrine is very  
17 narrow. And unless there's a specific reason to find a  
18 wrongful discharge claim, courts won't infer one, and courts  
19 have been very steady in their rulings, that if there is an  
20 adequate remedy available -- and in this case there is an  
21 adequate remedy --

22 THE COURT: Federal law.

23 MS. GLICKSTEIN: -- then you don't have that common  
24 law claim. And that is, in essence, our argument under that  
25 count.

1       The Washington Law Against Discrimination claim, as the  
2 Court is well aware from the cases that you indicated you  
3 reviewed, that law specifically exempts religious  
4 organizations from its reach. And I know that plaintiff's  
5 counsel has made a number of constitutional arguments, that I  
6 am happy to address for the Court, but I think most  
7 importantly -- the three important facts with regard to this  
8 constitutional argument, the first is, if the Washington  
9 legislature wanted to change that law, it's had since the  
10 *Farnam* case was decided back in 1991 to do something, and no  
11 change has been made to that law, despite the fact that the  
12 legislature has amended the statute on numerous occasions.

13       To the extent that plaintiff is making an argument with  
14 regard to constitutional issues, there are a couple of points:  
15 One, is this Court is aware federal courts in general should  
16 abstain from ruling on constitutional issues, especially in a  
17 case like this one where it's a state law constitutional  
18 issue.

19       The Supreme Court pointed out in the *Pennzoil v. Texaco*  
20 case, it would essentially be an advisory ruling for this  
21 court to make a ruling on how Washington law -- how a  
22 Washington statute, whether it was constitutional or not --

23               THE COURT: How do I resolve this conundrum? Because  
24 your arguments are persuasive on public policy, statute of  
25 limitations. And you tee up the issue, the very issue that

1 the state has been dodging for 21 years: Is it  
2 constitutional? And in *Farnam*, the Supreme Court says that  
3 the Washington constitution's privileges and immunities clause  
4 and the federal Constitutions's equal protection clause are  
5 one; they are the same question.

6 I have got a case -- I didn't go look for it, it's mine  
7 now -- and I have got to decide whether his time period for  
8 filing is 300 days or 180 days. And that begs the question of  
9 whether this WLAD is constitutional in its categorical blanket  
10 exemption, and can the Franciscans, or other religious  
11 organizations not for profit, discriminate against anyone on  
12 any basis, freely with impunity?

13 MS. GLICKSTEIN: I will answer that question in two  
14 ways, Your Honor, if I might. Through the latter part of your  
15 statement, I think the law is very clear from Washington state  
16 courts, as well as federal courts, that it's not a license to  
17 discriminate. It's not an authorization to discriminate. As  
18 the Court noted in *City of Tacoma v. Franciscan Foundation*,  
19 what the legislature has done is not authorized  
20 discrimination, but authorized an exemption from the law. And  
21 that case law has been repeated.

22 THE COURT: Is that a difference without meaning?  
23 There you allow a religious organization to skirt the law.  
24 They can violate it and thumb their nose if they want. And a  
25 similarly situated organization or employer would fall prey to

1 the law, and all its state powers. What's fair about that?

2 MS. GLICKSTEIN: Two answers to that: A legal answer  
3 and a practical answer, if I may. From a legal perspective, I  
4 think it is very important to heed the words of the Court in  
5 the *Erdman* case. In *Erdman*, the Court specifically said that  
6 the Washington Law Against Discrimination passes  
7 constitutional muster under the Fourteenth Amendment.

8 So to the extent that plaintiff's counsel has argued it's  
9 an open question, (a), it is not, and (b), plaintiff's counsel  
10 knew it wasn't because plaintiff's law firm represented --

11 THE COURT: *Erdman's* facts are instructive because  
12 they are dealing with an ecclesiastical issue: The  
13 supervising, the keeping, the hiring of a minister, my  
14 minister. And that is at the heart of the religious function  
15 of people of faith. What does that have to do with a security  
16 guard who had a stroke and asked for an accommodation?

17 MS. GLICKSTEIN: Well, I think to answer the question  
18 with regard to -- and that was my second point, the kind of  
19 practical point of all of this: No. 1, the point the Court  
20 made in the *City of Tacoma*, that the legislature, for whatever  
21 reasons, made a distinction. And I think one of the reasons  
22 is a practical reason. It's not as though there's a license  
23 to discriminate. In fact, federal law, in a case like this  
24 one where there's more than 15 employees, absolutely applies.  
25 And so there is a cause of action with regard to disability

1 discrimination under federal law. It's absolute. There's no  
2 exemption under federal law.

3 So unless you are talking about a very small group of  
4 employers, who are somewhere between eight employees and  
5 fifteen employees, there's no -- it's a distinction without a  
6 difference, because that federal law exists. And I am  
7 confident that the Washington legislature is aware that those  
8 federal laws exist without that exemption.

9 THE COURT: So under the umbrella of Title VII, the  
10 statute that the states can pick and choose winners and losers  
11 under their state regime, right?

12 MS. GLICKSTEIN: I think the state has a right to say  
13 we are going to exempt certain organizations for whatever  
14 reason, in this case not for profits or religious  
15 organizations, from the statute, knowing that there is another  
16 remedy out there.

17 THE COURT: What does that square with the privileges  
18 and immunities clause in the constitution -- in the Washington  
19 state constitution?

20 MS. GLICKSTEIN: It squares with the privileges and  
21 immunities clause because, for the most part, an employer can  
22 hire or fire who they want. There's not a class of people who  
23 are shielded from protection of the law.

24 THE COURT: Ms. Willert knows that better than I do.  
25 It's honored in the breach. The reality is, if an employer is

1 accused of doing something, anything, under a list of  
2 violations or public policy statements, the at-will is a  
3 nullity; it's practically dead.

4       Everybody -- I mean anybody and everybody can sue for  
5 their grievance under their race, gender, sexual preference,  
6 and a whole class of people, who are people of faith, are  
7 exempt from those obligations in their enterprises that are  
8 religious and nonprofit. And that just seems to be setting up  
9 two classes of people.

10           MS. GLICKSTEIN: No. 1, I think it's a very small  
11 class because of the federal law piece that I mentioned a  
12 moment ago.

13       In addition, as the Court pointed out, in *Erdman* the court  
14 considers the privileges and immunities and the equal  
15 protection claims the same. And I understand the Court's  
16 point about the ministerial exception being a little bit  
17 different in *Farnam* --

18           THE COURT: *Erdman*.

19           MS. GLICKSTEIN: In *Erdman*. But we are really  
20 dealing with a very narrow class. And you know, for whatever  
21 reason, the Washington legislature has said it's not just a  
22 religious institution, it's a not-for-profit institution as  
23 well. But there is a remedy that exists, and in this case I  
24 think very importantly to bring it back to the facts of this  
25 case, it's not as though Mr. Ockletree does not have a remedy.

1 He does have a remedy. And I believe the Washington  
2 legislature, they could have amended the statute numerous  
3 times with regard to that particular exemption, and they chose  
4 not to. By the same token, the Washington legislature, when  
5 it enacted a separate law against age discrimination, did not  
6 exempt religious organizations.

7 So there you have a protected clause that is treated  
8 differently depending on which provision of the Washington Law  
9 Against Discrimination you are looking at.

10 THE COURT: Okay, I will get you back up. Nobody  
11 gets to leave until they have had their say.

12 Interesting question.

13 MS. GLICKSTEIN: Thank you.

14 THE COURT: Mr. Beck.

15 MR. BECK: Good afternoon, Your Honor.

16 I am going to address a couple of points with the  
17 constitutional claim.

18 THE COURT: Why doesn't the state just butt out? Why  
19 do they concern themselves with discrimination anyway? Leave  
20 it to the feds. Why do they do that?

21 MR. BECK: They have the authority and the police  
22 powers to do such, and so they have chosen to act in that  
23 regard.

24 If we are looking at when they do act -- and that would be  
25 a whole different scenario, Your Honor, if they had chosen not

1 to act, we wouldn't have any concern about different classes  
2 of citizens --

3 THE COURT: I know.

4 MR. BECK: Or under the state constitution class of  
5 corporations.

6 THE COURT: Right.

7 MR. BECK: But they did act. So that's the case we  
8 have, that we're representing --

9 THE COURT: And everybody has been pedaling backwards  
10 as far as they can back up without having to deal with this  
11 issue.

12 MR. BECK: This is true.

13 THE COURT: The constitutionality of the issue.

14 MR. BECK: Correct. There's a couple things, dealing  
15 with that at the outset, I think, that are important.

16 First, in *Farnam* they make the claim -- the statement that  
17 the state constitution's privilege and immunities clause is  
18 interpreted the same way as the federal equal protection  
19 clause. In our brief, at page 10, we cited the *Grant County*  
20 case from 2004. And it's a case where it dealt with state  
21 annexing of jurisdictions. It's *Grant County v. City of Moses*  
22 *Lake*. In that case they went through an in-depth analysis,  
23 unlike *Farnam* where they just conclusory kind of made this  
24 statement. They looked through all six *Gunwall* factors, and  
25 they said look, the state constitution is in fact different

1 than the equal protection clause, and concluded the holding of  
2 that decision from the State Supreme Court, is that it  
3 requires a separate and distinct analysis from the equal  
4 protection clause.

5 One of the key points that was in that analysis, that I  
6 think is important for the Court to understand, is that the  
7 state's privilege and immunities clause, or constitutional  
8 provision, it's set up kind of totally distinctly; it's kind  
9 of a ying and a yang from the federal Constitution in one  
10 respect. The federal Constitution equal protection is aimed  
11 at making sure there's not overreaching by a majority to  
12 impress minority groups.

13 Compare that to the state constitution, which particularly  
14 references corporations, but the concern there has expressly a  
15 concern about favoritism being applied to certain groups; not  
16 that certain small groups are going to get overridden and have  
17 vicious laws apply to them, but they might get some type of  
18 favoritism.

19 So there is a separate analysis that would be necessary to  
20 undertake in this question.

21 THE COURT: Inherent in your statement about a  
22 difference between the privileges and immunities clause and  
23 equal protection under the federal Constitution, presupposes  
24 that I should certify a question to the Supreme Court, rather  
25 than decide the case in the first instance.

1 MR. BECK: This is my suggestion, Your Honor, is we  
2 are presenting you -- and I don't see any way to get out of it  
3 in the end, unless the way the case kind of proceeds such that  
4 it doesn't become important any more, with the constitutional  
5 challenge both on its face and as applied to this unique  
6 situation with the security guard. However, the Court would  
7 be in a much better position to analyze this question post a  
8 trial once the facts are being able to be established and you  
9 could have the information on whether it makes sense --

10 THE COURT: What facts are going to make it any  
11 different? It's not religious activity. I mean, it could be  
12 a security guard at a pawn shop, and the same thing happened,  
13 there's no difference; the only difference is that the  
14 Franciscans are a religious organization not for profit.

15 MR. BECK: Understood.

16 THE COURT: And that's a verity. So why would we go  
17 to trial and dispense with the Supreme Court or my decision on  
18 whether the constitutionality is decided?

19 MR. BECK: Well, with your comments about the fact  
20 that this is purely a secular position that he has, being  
21 understood, that minimizes my comment.

22 One practical point would be if -- and this presupposes  
23 that the federal claims were to go forward based on our  
24 arguments about his filing of the first intake  
25 questionnaire --

1 THE COURT: Why build a house of cards, only to find  
2 out it falls later?

3 MR. BECK: Because practically, if that's true, just  
4 that first point, if we were to go to a trial, and you had  
5 both the federal claims and the state claims involved, the  
6 only remedy that's available under the state law, that's not  
7 available under the federal law, is the amount of emotional  
8 distress damages. So if we went to a trial and we lost, the  
9 issue is not -- it's gone. If we went to a trial and there  
10 were damages for emotional distress --

11 THE COURT: Don't you think 21 years is enough for a  
12 court to decide an issue of importance to the people of the  
13 state of Washington?

14 MR. BECK: It's hard for me to disagree with that,  
15 because I am articulating in a way, in my client's interest,  
16 to get justice quickly.

17 THE COURT: But the reality is, the statute of  
18 limitations, if this is constitutional, and the state does not  
19 have a dog in this fight, the statute of limitations is not  
20 tolled. There's no public policy argument that can be  
21 sustained here. And I am not trying to find the perfect case  
22 that decides a very serious issue. But this is that perfect  
23 case, totally. Totally. He has no tie to the religious  
24 mission of this hospital. It doesn't deal with their core  
25 beliefs. And the federal government says you have to have a

1 narrowly tailored solution. You deal with their religious  
2 issues, and you otherwise treat them as citizens equal.

3 I mean, those are powerful principles that I believe in.  
4 The question is: Should the Supreme Court get the first  
5 crack, or should this Court, because I have got the case, and  
6 I have to decide whether it is constitutional, not dealing  
7 with the ministers, not dealing with contraception, not with  
8 anything about their beliefs and their ceremonies and so  
9 forth. This is just business. It's a pedestrian issue. It  
10 recurs all the time in courtrooms around the country and  
11 around this state. And what makes this different is their  
12 religious purpose, and it's a categorical -- the federal court  
13 looks at the verb, the religious activity.

14 The Washington Supreme Court took the noun, religious  
15 organization, and gives them carte blanche to treat them,  
16 their employees, as ever as they wish to. That's a stark  
17 distinction between the interpretation of this provision. And  
18 I think I thought that the statute is susceptible to both the  
19 state constitution and the federal Constitution, because equal  
20 protection applies to the states under the Fourteenth  
21 Amendment.

22 MR. BECK: Agreed. And it is unconstitutional, both  
23 under the federal Constitution and the state constitution.  
24 There's a different analysis that is necessary to undertake if  
25 you had to go through a state constitutional analysis, but

1 either way, if the Court, assuming for the sake of argument,  
2 does determine that the ADA claims are barred, this case has  
3 to be decided on the constitutional questions. And it's both  
4 the equal protection clause, the establishment clause in the  
5 federal Constitution, the Article I, Section 11 of the state  
6 constitution that talks about understanding the importance of  
7 religious freedoms for individuals, but also saying that's  
8 only going to go so far and we're not going to sanction the  
9 activities that are in essence thumbing their nose at the law.

10 And then also Article I, Section 12, privileges or  
11 immunity under the state constitution.

12 So on all four of these grounds it's unconstitutional.

13 THE COURT: I bumped into this issue in *Stormans*, in  
14 Plan B. The state says that the Franciscans, their  
15 pharmacies, are not exempt. They have to meet the  
16 regulations, the rules. In other contexts they say no, they  
17 are a religious organization for nonprofit and they are exempt  
18 from discrimination. Isn't it time to get it once and for all  
19 decided?

20 MR. BECK: It's hard for me to argue that, Your  
21 Honor. I do think this is something -- from *Farnam* they say  
22 this is an issue, they say they are not deciding it, they go  
23 on to give a couple paragraphs of dicta --

24 THE COURT: Judge Lasnik said he found another  
25 answer; it was equitable estoppel.

1 MR. BECK: Correct.

2 THE COURT: You've got the language in your policies  
3 that applicable laws -- which makes a big difference for a  
4 promise that Mr. Ockletree can rely on.

5 Judge Pechman dodged it with the fact that it was not  
6 fully briefed in a timely fashion.

7 Judge Shea said you've got to certify this question to the  
8 Supreme Court; and then they settled.

9 It could happen here. But I just want to know whether a  
10 certification is the proper issue, or have you looked at  
11 Federal Rules of Civil Procedure 5.1(a)?

12 MR. BECK: I did, and I apologize for not looking at  
13 it earlier. Part of it was this is not the first argument  
14 that we would necessarily have to reach, the constitutional  
15 argument; we have the estoppel.

16 THE COURT: I know. We were at the front end of the  
17 train; we are at the early stages.

18 MR. BECK: So, agreed, with defense counsels'  
19 recognition that this is something that if the  
20 constitutionality is going to be decided, notice to the  
21 Attorney General has to be provided. Obviously there's the  
22 last provision in that rule that says it's not a waiver of  
23 anything. And I understand that's not the conversation right  
24 now, but that's the next step.

25 THE COURT: Does the state have a right to intervene?

1           MR. BECK: I don't know the answer to that question.  
2 I guess they would have to decide whether or not they want to  
3 attempt to. And then the Court, on proper briefing, would  
4 have to decide whether it's an intervention of right or  
5 whether it's a permissive intervention, whether or not they  
6 think counsel's interest and capability and briefing materials  
7 in making the argument are sufficient. I think the concept of  
8 the rule is simply that the state should have an ability to  
9 weigh in before something is decided. I think that is fair  
10 and makes sense.

11           THE COURT: All right. Let's hear from  
12 Ms. Glickstein. You will get another chance, Mr. Beck.

13           MR. BECK: Thank you.

14           MS. GLICKSTEIN: Judge, a couple of points based on  
15 the dialogue that you and Mr. Beck were just having.

16           The first is: To the extent that plaintiff relies on that  
17 *Grays County* case, I point out it was decided in 2004. *Erdman*  
18 was decided six years later, in 2010. And I think *Erdman* is  
19 instructive, and I think *Erdman* provides the Court with the  
20 language it needs to establish that this is a question that  
21 has been decided before.

22           THE COURT: But it doesn't decide the case outside  
23 the context of a religious function. I mean, it was precisely  
24 the purpose that religious nonprofits were exempted if -- it  
25 was logical if the people of faith can call a minister,

1 supervise a minister, keep a minister; all those arguments on  
2 both sides of that case fell squarely in the heartland of  
3 WLAD, the exemption.

4 This is so far out of it. I mean, if you walked out there  
5 in the street and tried to tell people that a security guard,  
6 if he worked at TG, would have a claim, then he'd have a  
7 300-day statute of limitations; but if the Franciscans, in the  
8 same circumstance, identical, that person would be locked out  
9 of the courtroom because he got his answer in -- his charge in  
10 189 days. How many people would say that makes sense to me?

11 MS. GLICKSTEIN: Well, Judge, I think that the  
12 language in *Erdman* still is instructive on the point. At page  
13 849 and 850 of the opinion, starting on 849, the Court --  
14 Washington Court of Appeals is discussing *Farnam*, and it notes  
15 that the *Farnam* court "observed that the United States Supreme  
16 Court reviewed and upheld the federal counterpart to  
17 Washington's religious employer exemption under a rational  
18 basis standard because the exemption created employer classes  
19 based on religion and provided a uniform benefit to all  
20 religions," and so --

21 THE COURT: Was that *Amos*?

22 MS. GLICKSTEIN: Pardon?

23 THE COURT: Was that the *Amos* case, the Supreme  
24 Court?

25 MS. GLICKSTEIN: Yes, sorry, the *Farnam* court citing

1 the *Amos* case.

2 THE COURT: How would you articulate the rational  
3 basis for the Franciscans to discriminate against an African  
4 American security guard? How would you articulate that?

5 MS. GLICKSTEIN: I don't think it's giving a license  
6 to discriminate. As I mentioned before, in the *City of Tacoma*  
7 *v. Franciscan Foundation* --

8 THE COURT: It's a "get out of jail free."

9 MS. GLICKSTEIN: That's exactly what it is. It's  
10 saying it's okay in some situations to provide an exemption if  
11 you are a secular or religious --

12 THE COURT: Judges used to let anybody who got a DWI,  
13 who was a lawyer, get a "get out of jail free."

14 MS. GLICKSTEIN: I think there's a lot of examples of  
15 that.

16 THE COURT: It was wrong.

17 MS. GLICKSTEIN: Another example might be in some  
18 states lawyers are exempt from jury service. That's not a  
19 legal issue as much, but certainly an important public right,  
20 and some say lawyers should be serving on juries.

21 But we have lots of laws, and I didn't come prepared with  
22 a list of them that provide exemptions on certain bases. And  
23 it's an exemption that goes to every religious organization  
24 and to secular not for profits.

25 THE COURT: The reality is, I have come to the

1 conclusion that our antidiscrimination laws around the country  
2 are the most important laws in the federal system and in the  
3 state. They are prized by the citizens. They are ill  
4 defined, perhaps. They result in emotional issues. I hate  
5 them. I hate employment law, Sheryl, because they go -- they  
6 go straight down to the drain, deal with the worst issues and  
7 the deepest pain caused to both sides. And I freely tell  
8 people I don't like them. I don't like those cases. And I  
9 keep my fingerprints off the case. I let them tell their  
10 story and let the jury decide.

11 But it is a body of law that -- and I would say this  
12 election, the presidential election, reflects so many people  
13 who believe that they have to have an opportunity to redress  
14 their grievances. And the state of Washington, I don't know  
15 what they bargained for, but it makes no sense to me. It  
16 makes no sense.

17 MS. GLICKSTEIN: And Judge, I will absolutely agree  
18 with you on your comments about the importance of the laws,  
19 and to an extent that perhaps it makes no sense. But even if  
20 it makes no sense to this Court, I would submit that, No. 1,  
21 there is sense that can be made due to *Erdman*; and No. 2, even  
22 if it makes no sense to this Court, we are in federal court in  
23 this case, and this is not a decision, it would merely be an  
24 advisory opinion for you to rule on it. And I think there is  
25 a way for you to rule on it and find that the statute is

1 constitutional. But if not, I don't believe this Court should  
2 be making that decision.

3 THE COURT: I should certify it.

4 MS. GLICKSTEIN: It should be certified.

5 THE COURT: Okay, Mr. Beck, any final words?

6 MR. BECK: Your Honor, just quickly.

7 One point, this *Erdman* case we are talking about, this is  
8 a Court of Appeals decision.

9 THE COURT: I know, Judge Houghton.

10 MR. BECK: Also, one point that's kind of subtle,  
11 when it was accepted for review at the State Supreme Court,  
12 the answers to the petition for review included this precise  
13 question, the constitutionality of the exemption. The Court  
14 didn't make a distinction, they took the whole thing up, and  
15 they never reached it.

16 THE COURT: Right.

17 MR. BECK: So what we are talking about, about  
18 *Erdman*, it doesn't matter. It's dicta; it wasn't part of the  
19 affirming court.

20 THE COURT: The federal court has all -- we've all  
21 decided this is an open question that hasn't been decided by  
22 the state.

23 MR. BECK: I guess the last parting thing, Your  
24 Honor, is that if counsel agrees that it doesn't make sense,  
25 how can it be rational?

1 THE COURT: You guys are all together too polite to  
2 me.

3 If I don't make sense, you can say I don't make sense, and  
4 you would be doing a favor for me. She's from -- Missouri?

5 MS. GLICKSTEIN: Yes.

6 THE COURT: Kansas City. She's just nice.

7 MS. GLICKSTEIN: Thank you, Your Honor.

8 THE COURT: And as soon as I leave, she'll tell you  
9 what I think. But I want to give you guys a chance, if you  
10 can get it done, competing submittals, in a letter or -- the  
11 question that you want me to submit to the Supreme Court.

12 MR. BECK: Thank you, Your Honor.

13 THE COURT: And I am going to submit it. Because I  
14 have a suspicion that most federal judges would say that WLAD,  
15 in this respect, as applied, is unconstitutional.

16 And there are powerful interests -- and I don't mean to  
17 denigrate their interest, because these are heartfelt  
18 positions, and I have said before I don't like bullies. And I  
19 didn't like bullies who were picking on the Catholics in Plan  
20 B, and I don't like the Catholics finding a safe haven if --  
21 if, it's a big if, they discriminated against this security  
22 guard. And that's just fundamental fairness. I think it's  
23 baked into the cake. The Constitution, our founding fathers,  
24 didn't like bullies either.

25 Okay, so if you guys can, by Friday, send me a

1 two-paragraph letter, the question, and then I will review  
2 them and I will get this decision out early next week.

3 MR. BECK: Thank you, Your Honor.

4 THE COURT: All right. Thank you.

5 (Proceedings adjourned.)  
6  
7

8 \* \* \* \* \*

9 C E R T I F I C A T E  
10

11 I certify that the foregoing is a correct transcript from  
12 the record of proceedings in the above-entitled matter.  
13

14 /S/ Teri Hendrix \_\_\_\_\_

November 29, 2012

15 Teri Hendrix, Court Reporter

Date  
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# APPENDIX A-2

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LARRY C. OCKLETREE,

Plaintiff,

v.

FRANCISCAN HEALTH SYSTEM, et  
al.,

Defendants.

CASE NO. 11-cv-05836 RBL

ORDER ON DEFENDANTS'  
MOTION TO DISMISS

THIS MATTER is before the Court on Defendant Franciscan Health System ("FHS")'s Motion to Dismiss. (Dkt. #40). Plaintiff Larry Ockletree was terminated from his job as a security guard at FHS in September, 2010. Ockletree sued, alleging that his termination reflected discrimination based on his disability or his race.

FHS moves to dismiss counts I, II, IV, and V of Ockletree's Second Amended Complaint. Ockletree's first and second causes of action allege that FHS unlawfully terminated his employment in violation of the Americans with Disabilities Act ("ADA") and the Civil Rights Act of 1964 ("Title VII"). His fourth cause of action asserts a wrongful discharge in violation of public policy, and the fifth alleges a violation of the Washington Law Against Discrimination ("WLAD").

1 FHS contends that Ockletree's failure to file a timely administrative charge with the  
2 Equal Employment Opportunity Commission forecloses both federal claims. It argues that  
3 Ockletree's public policy claim fails because a statutory remedy exists which supplants the  
4 equitable claim. FHS seeks dismissal of Ockletree's WLAD claim, claiming that as a religious  
5 organization it is broadly exempt from that statute.

6 Ockletree argues that he timely submitted an intake questionnaire to the EEOC (despite  
7 the absence of any such record in the EEOC file) and that as a result his Title VII and ADA  
8 claims are timely. Ockletree also argues the WLAD's blanket exemption of religious non-profits  
9 is unconstitutional.

### 9 I. FACTUAL BACKGROUND

10 FHS employed Ockletree as a Security Officer at St. Joseph's Hospital when he suffered  
11 a stroke on March 10, 2010. Pl.'s Opp. at 2 (Dkt. # 43). The stroke impaired Ockletree's use of  
12 his left arm. FHS determined that he could not perform the essential functions of his job, with or  
13 without accommodation, and it terminated Ockletree's employment on September 10, 2010.  
14 Defs.' Memo in Support at 2 (Dkt. # 40). On August 25, 2011, Ockletree sued, claiming that his  
15 termination was the result of discrimination based on race or disability. He claims he should  
16 have been re-employed in his prior position, or provided reasonable accommodations. Pl.'s Opp.  
17 at 2.

18 It is undisputed that Ockletree initially contacted the EEOC in mid-October, 2010. Defs.'  
19 Memo in Support at 7; Pl.'s Opp. at 2. The EEOC file notes reflect that it sent Ockletree an  
20 intake questionnaire and referred him to the Department of Labor. Decl. of Sirinek, Ex. B,  
21 EEOC 010 (Dkt. # 41). Ockletree claims that he mailed the EEOC a signed intake questionnaire  
22 around November 5, 2010, although there is no record that the EEOC received a completed  
23 intake questionnaire in that time frame. Decl. of Ockletree at Ex. A (Dkt. # 17). The EEOC  
24 closed Ockletree's file in January, 2011. Decl. of Sirinek at Ex. B, EEOC 010.

1 On March 19, 2011 Ockletree's attorney submitted a completed intake questionnaire to  
2 the EEOC. Decl. of Ockletree. It reflected Ockletree's intention to file a charge of  
3 discrimination, and authorized the EEOC to investigate. Decl. of Sirinek at Ex. B, EEOC 028.  
4 Ockletree submitted a formal Charge of Discrimination on April 22, 2011. *Id.* at EEOC 018.  
5 Ockletree filed a similar charge with the Tacoma Human Rights and Human Services  
6 Department the same day. Defs.' Memo in Support at 5, n. 5. On June 3, 2011, the EEOC issued  
7 Ockletree a "Notice of Right to Sue." Decl. of Sirinek at Ex. B, EEOC 006. Ockletree filed his  
8 complaint in state court on August 25, 2011. The case was timely removed to this Court. (Dkts.  
9 # 1, 1-2).

10 FHS now moves to dismiss four of Ockletree's claims: (1) discrimination in violation of  
11 the American with Disabilities Act; (2) discrimination in violation of Title VII of the Civil  
12 Rights Act of 1964; (3) wrongful discharge in violation of public policy; and (4) violation of  
13 Washington's Law Against Discrimination. Defs.' Memo in Support. at 1.

14 FHS argues that Ockletree did not properly file anything with the EEOC until March 19,  
15 2011—189 days after his termination. It claims that Ockletree's failure to file an intake  
16 questionnaire or charge of discrimination within the 180 day statutory timeframe deprives this  
17 Court of subject matter jurisdiction over Ockletree's ADA and Title VII claims. *Id.* FHS further  
18 contends that Ockletree's wrongful discharge in violation of public policy claim should be  
19 dismissed because a statutory remedy was available, thereby foreclosing this common law claim  
20 for relief. *Id.* at 10. Finally, FHS asserts that as a non-profit religious hospital, it is facially  
21 exempt from WLAD. *Id.* at 5.

22 Ockletree maintains that this Court has subject matter jurisdiction because he timely filed  
23 his intake questionnaire in November, 2010, and that that document is a sufficient charge of  
24

1 discrimination under Title VII. Pl.'s Opp. at 1. He also suggests that if the Court determines that  
2 his filing was untimely, equitable tolling should apply. *Id.* at 15.

3 Ockletree also argues that because a state agency has jurisdiction over his claim, the  
4 filing deadline for his federal claims is 300 days, not 180. He can succeed on this argument only  
5 if WLAD applies to FHS, despite the statute's broad exemption for religious non-profits like  
6 FHS. Ockletree asks the Court to subject FHS to WLAD in two ways. First, he contends that  
7 FHS is estopped from asserting the WLAD exemption because its EEO policy guarantees and  
8 assures employees that it will comply with applicable anti-discrimination laws. *Id.* at 4.

9 Ockletree's second argument is better but more complicated: he claims that WLAD's  
10 blanket religious exemption is unconstitutional, under both the Washington and the United States  
11 Constitutions. *Id.* at 6. Because WLAD's viability under the Washington Constitution is best  
12 answered by the Washington Supreme Court, and because that Court has not done so in the  
13 context of this case, the issue is certified to the Washington Supreme Court. Because the  
14 outcome of Defendants' Motion with respect to Ockletree's federal and state law discrimination  
15 claims depends on the answer, the Motion to Dismiss those claims is DENIED without prejudice,  
16 and the case is STAYED pending the Washington Supreme Court's input.

## 17 II. DISCUSSION

18 FHS moves to dismiss for failure to state a claim for which relief may be granted under  
19 Fed. R. Civ. P. 12(b)(6), and for lack of subject matter jurisdiction under Fed. R. Civ. P.  
20 12(b)(1).

21 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
22 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
23 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege  
24 facts to state a claim for relief that is plausible on its face. *See Aschcroft v. Iqbal*, 129 S. Ct.  
1937, 1949 (2009). A claim has "facial plausibility" when the party seeking relief "pleads

1 factual content that allows the court to draw the reasonable inference that the defendant is liable  
2 for the misconduct alleged.” *Id.* Although the Court must accept as true the Complaint’s well-  
3 pled facts, conclusory allegations of law and unwarranted inferences will not defeat a Rule 12(c)  
4 motion. *Vazquez v. L. A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State*  
5 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to provide the ‘grounds’  
6 of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic  
7 recitation of the elements of a cause of action will not do. Factual allegations must be enough to  
8 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
9 (2007) (citations and footnotes omitted). This requires a plaintiff to plead “more than an  
unadorned, the-defendant-unlawfully-harmed-me-accusation.” *Iqbal*, 129 S. Ct. at 1949 (citing  
*Twombly*).

10 A complaint must be dismissed under Rule 12(b)(1) if, considering the factual allegations  
11 in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution,  
12 laws, or treaties of the United States, or does not fall within one of the other enumerated  
13 categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the  
14 meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v.*  
15 *Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F.Supp. 1062, 1063  
16 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1346 (United  
17 States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the  
18 court is not restricted to the face of the pleadings, but may review any evidence to resolve factual  
19 disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560  
20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d  
21 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack subject matter jurisdiction until  
22 plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375  
23 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore,  
24 plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West*, 873  
F.2d at 1225; *Thornhill Publishing Co., Inc. v. Gen’l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th  
Cir. 1979).

1     **A. Title VII and ADA Claims.**

2             FHS argues that this Court lacks subject matter jurisdiction over Ockletree's Title VII  
3 and ADA claims, because the EEOC file demonstrates that Ockletree's intake questionnaire was  
4 not filed until March 19, 2011—189 days after his termination, and nine days too late. Defs.'  
5 Memo in Support at 4. Ockletree argues that a charge was timely filed. Pl.'s Opp. at 14. He  
6 asserts that he submitted a timely intake questionnaire on November 5, 2010, indicating that he  
7 intended file a charge of discrimination, and that he understood the EEOC must give FHS  
8 information about his charge. Decl. of Ockletree at Ex. A.

9             A federal court obtains subject matter jurisdiction over discrimination claims under Title  
10 VII when the plaintiff exhausts all administrative remedies. 42 U.S.C. § 2000e-5; *Sommatino v.*  
11 *United States*, 255 F.3d 704, 707 (9th Cir. 2001); *Greenlaw v. Garrett*, 59 F.3d 994, 997 (9th  
12 Cir.1995). A plaintiff exhausts her administrative remedies by timely filing an administrative  
13 charge with the EEOC or the appropriate state agency. 42 U.S.C. § 2000e-5(b). The  
14 administrative charge must be filed within 180 days after the alleged unlawful employment  
15 practice occurred. 42 U.S.C. § 2000e-5. This time period may be extended to 300 days in  
16 jurisdictions where the state agency has subject matter jurisdiction over the charge and the  
17 aggrieved files a claim with such agency. *Id.* The ADA's requirements for filing an  
18 administrative charge with the EEOC are identical to those for Title VII. 42 U.S.C. §1201-  
19 12203; 42 U.S.C. § 2000e; *Sumner v. Sacred Heart Med. Ctr.*, 2005 W.L. 2415969 (2005).

20             There are exceptions, and the court may maintain subject matter jurisdiction over a claim  
21 even though the administrative charge was not timely. The failure to file a timely EEOC  
22 administrative complaint is "not a jurisdictional prerequisite to suit in federal court, but a  
23 requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling."  
24 *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *See Sommatino*, 255 F.3d at 708;

1 *but see Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (“experience teaches that strict  
2 adherence to the procedural requirements specified by the legislature is the best guarantee of  
3 evenhanded administration of the law.”). The Ninth Circuit requires “substantial compliance  
4 with the presentment of discrimination complaints to an appropriate administrative agency” as a  
5 jurisdictional prerequisite. *Sommatino*, 255 F.3d at 708.

6 Although equitable estoppel and equitable tolling can extend the deadline for filing a  
7 charge, “equitable remedies are unavailable in federal court when the record shows that no  
8 administrative filing was ever made.” *Sommatino*, 255 F.3d at 711 (citing *Ross v. United States*  
9 *Postal Serv.*, 696 F.2d 720, 722 (9th Cir. 1983)). Equitable tolling is generally applied “to excuse  
10 a claimant's failure to comply with the time limitations where she had neither actual nor  
11 constructive notice of the filing period.” *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir.2002)  
12 (citation omitted). Thus, the focus in equitable tolling is on the reasonableness of a plaintiff's  
13 delay: “If a reasonable plaintiff would not have known of the existence of a possible claim within  
14 the limitations period, then equitable tolling will serve to extend the statute of limitations for  
15 filing suit until the plaintiff can gather what information [she] needs.” *Id.* (citing *Santa Maria v.*  
16 *Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir.2000)). The filing deadline may be equitably tolled  
17 when a claimant actively pursued his remedies, but filed a defective pleading during the statutory  
18 period. *Irwin v. Dep't. of Veteran Affairs*, 498 U.S. 89, 96 (1990).

19 The court construes employment discrimination charges liberally. *Id.* Forms such as an  
20 intake questionnaire may be construed as a discrimination charge. “Since laypersons initiate the  
21 administrative process for resolving employment discrimination complaints, the procedural  
22 requirements for Title VII actions are “neither interpreted too technically nor applied too  
23 mechanically.” *Greenlaw*, 59 F.3d at 999 (citing *Ong v. Cleland*, 642 F.2d 316, 319 (9th Cir.

1 1981). The charge must at least notify the agency that employment discrimination is claimed.  
2 *Sommatino*, 255 F.3d at 708.

3 A charge of discrimination is sufficient when the EEOC “receives from the person  
4 making the charge a written statement sufficiently precise to identify the parties, and to describe  
5 generally the action or practices complained of.” 16 CFR 1601.12(b). Yet “regulations do not  
6 identify all necessary components of a charge...” *Federal Exp. Corp. v. Holowecki*, 552 U.S.  
7 389, 397 (2008). “In addition to the information required by the regulations, *i.e.*, an allegation  
8 and the name of the charged party, if a filing is to be deemed a charge it must be reasonably  
9 construed as a request for the agency to take remedial action to protect the employee’s rights or  
10 otherwise settle a dispute between the employer and employee.” *Id.* at 402. The intake  
11 questionnaire, accompanied by the employee’s request of the EEOC to take action, was  
12 sufficient for the Commission to determine that the employee’s submissions constituted a charge.  
13 *Id.* at 407.

14 Equitable tolling is reserved for circumstances where the delay in filing was due to  
15 circumstances beyond the Plaintiff’s control, and it does not apply in this case. Ockletree filed a  
16 second intake questionnaire, demonstrating that he had the ability to timely file a charge of  
17 discrimination. There is nothing in the record to support the claim that Ockletree could not have  
18 contacted counsel sooner and/or submitted an intake questionnaire or a charge of discrimination  
19 before the 180 day deadline.

20 While the filing deadline is not equitably tolled, a question of fact remains regarding  
21 Ockletree’s first intake questionnaire. If Ockletree did file the initial intake questionnaire, it was  
22 timely filed and sufficient to constitute a charge of discrimination. Ockletree claims that he  
23  
24

1 submitted his intake questionnaire in November 2010, but the EEOC has no record<sup>1</sup> of any such  
2 filing. Whether he submitted an intake questionnaire remains a disputed question of fact.

3 The intake questionnaire is a sufficient charge of discrimination under 16 CFR  
4 1601.12(b). It provides FHS ample information to identify the parties and generally the action  
5 complained of which plaintiff complains. *See Federal Exp. Corp.*, 552 U.S. at 402. Ockletree  
6 indicated that he sought to file a charge of discrimination, and that he understood that the EEOC  
7 must contact the employer to investigate. Decl. of Ockletree at Ex. A.

8 Viewed in the light most favorable to Ockletree, the evidence supports a finding that he  
9 timely filed this intake questionnaire in November 2010. The Court cannot determine as a matter  
10 of law that he did not do so.

11 Furthermore, and in any event, it is not clear that the filing deadline applicable to  
12 Ockletree's EEOC filing is 180 days. When a local or state agency also has jurisdiction over the  
13 plaintiff's claims, plaintiff has 300 days to file a charge of discrimination. 42 U.S.C. § 2000e-  
14 5(e). FHS argues that no local agency has jurisdiction, because FHS is exempt from the WLAD.  
15 Therefore, it claims, the applicable deadline is 180 days, not 300.

16 If FHS is not exempt from the WLAD, a local agency—the Tacoma Human Rights and  
17 Human Services Department—appears to have jurisdiction and the 300 day filing deadline would  
18 apply. Ockletree's March 2011 intake questionnaire and the charge of discrimination were filed  
19 189 days and 225 days, respectively, after the alleged discrimination. *See* Defs.' Memo in Supp.  
20 at 6.

21 \_\_\_\_\_  
22 <sup>1</sup> Ockletree's position is undermined by the fact that, when he completed an intake  
23 questionnaire in March, 2011, he marked the box indicating he had not yet submitted a charge of  
24 discrimination. However, some ambiguity remains because the form he claimed to have  
submitted was labeled an intake questionnaire, and not a charge of discrimination. *See* Decl.  
Ockletree at Ex. A-B.

1 Therefore, even if Ockletree did not file an intake questionnaire in November, this  
2 Court's jurisdiction over Ockletree's Title VII and ADA claims depends (oddly enough) on  
3 whether the WLAD applies, making the filing deadline 300 days.

4 Because the Court is certifying the previously unanswered question of WLAD's  
5 constitutionality under the Washington State Constitution to the Washington Supreme Court, the  
6 Defendants' motion to dismiss with respect to these claims is denied without prejudice. This  
7 issue is discussed below.

8 **B. Washington Law Against Discrimination Claim.**

9 FHS claims that as a religious non-profit entity, it is exempt from WLAD, and that  
10 Ockletree's WLAD claim should be dismissed. Defs.' Memo in Supp. at 5. The WLAD  
11 exempts religious non-profit organizations from its reach by expressly excluding them from its  
12 definition of "employer": "Employer includes any person acting in the interest of an employer,  
13 directly or indirectly, who employs eight or more persons, and *does not include any religious or*  
14 *sectarian organization not organized for private profit.*" Wash. Rev. Code 49.60.040(11)  
15 (emphasis added). This exception is much broader than the parallel federal exemption contained  
16 in 42 U.S.C. §2000e-1(a):

17 This subchapter shall not apply to an employer with respect to ... a religious corporation,  
18 association, educational institution, or society with respect to the employment of  
19 individuals of a particular religion to perform work connected with the carrying on by  
such corporation, association, educational institution, or society of its activities.

20 FHS does not claim that it terminated Ockletree for any reason related to its religious  
21 activity; it simply claims that its status as religious non-profit organization exempts it from  
22 WLAD. Ockletree opposes this position in two ways.

23 First, Ockletree argues that FHS is estopped from asserting the exemption. Pl.'s Opp. at  
24 4. Ockletree cites *French v. Providence Everett Med. Ctr.*, No. C07-0217 RSL, 2008 WL

1 4186538, 7 (W.D. Wash. 2008) for the proposition that FHS should be estopped because its  
2 written EEO policy guaranteed Ockletree an expectation of equal opportunity and non-  
3 discrimination.

4 “Equitable estoppel has three elements: (1) an admission, statement, or act inconsistent  
5 with the claim afterwards asserted, (2) action by the other party on the faith of such admission,  
6 statement, or act, and (3) injury to such other party resulting from allowing the first party to  
7 contradict or repudiate such admission, statement, or act.” *Farnam v. CRISTA Ministries*, 116  
8 Wash.2d 659, 678-79 (1991) (internal citations omitted).<sup>2</sup> “Estoppel focuses on the justified  
9 reliance of a person asserting it.” *Id.*

10 In *French*, Providence Everett Medical Center (PEMC) had an EEO policy which  
11 specifically stated that PEMC would not discriminate on any basis prohibited by state law. 2008  
12 WL 4186538 at 8. Judge Lasnik found that “[t]he statement is not qualified by ‘as applicable.’”  
13 *Id.* The absence of this statement contributed to the reasonableness of the plaintiff’s reliance on  
14 the statement that PEMC would comply with local and state laws. *Id.* Therefore, PEMC was  
15 estopped from asserting WLAD’s religious exemption. *Id.*

16 FHS’ EEO policy is not as broad as the one at issue in *French*. It requires compliance  
17 with the Americans With Disabilities Act, but with limitation: “Other applicable law may  
18 supersede this policy in some instances.” Defs.’ Reply at 4. Unlike PEMC, FHS is not estopped  
19 from asserting the religious exemption because its written policy cannot be construed as a  
20 promise that that it would not assert the exemption.

---

21  
22 <sup>2</sup> The *French* court articulated a slightly different test for when a party is subject to  
23 estoppel: “(1) the party to be estopped knows the facts; (2) he intends that his conduct shall be  
24 acted on or so acts that the party asserting the estoppel has a right to believe it is so intended; (3)  
the latter is ignorant of the true facts; and (4) he relies on the former's conduct to his injury.”  
*French*, 2008 WL 4186538 at 7.

1 Ockletree's second argument about WLAD's applicability is more difficult. He argues  
2 WLAD religious exemption is unconstitutional under both state and federal Constitutions. Pl.'s  
3 Opp. at 6. Ockletree argues that the exemption is unconstitutional under the state Constitutions'  
4 privileges and immunities clause (Wash. Const. art. 1, sec. 12) and its religious freedom clause,  
5 (Wash. Const. art. 1, sec. 11). He also challenges the exemption under the United States  
6 Constitution's equal protection and the establishment clauses. FHS asks the Court to abstain  
7 from rendering an opinion on this issue, and, if it will not, to determine that the exemption is  
8 constitutional.

9 Several courts have discussed the constitutionality of WLAD's exemption for religious  
10 non-profits, but none has specifically addressed the issue presented here. The statute's  
11 constitutionality remains an open question. *See French*, 2008 WL 4186538 at 7 ("The issue is an  
12 open one in Washington."). At least one court avoided the question by determining that the  
13 entity at issue was not really a religious one. *Hazen v. Catholic Credit Union*, 37 Wash.App.  
14 502, 507 (Div. 3 1984). In *Erdman v. Chapel Hill Presbyterian Church*, 156 Wash. App. 827,  
15 850 (Div. 2 2010); *rev'd* \_ Wash.2d \_, 286 P.3d 357 (2012), the constitutional question was  
16 avoided because alleged discrimination related directly to the church's religious activities.  
17 Another case questioned the exemption's constitutionality but declined to reach the issue because  
18 of inadequate briefing. *Halle v. Providence Health & Servs.-Wash.*, NO. C10-354 MJP, 2010  
19 WL 3259699 at \*2 (W.D. Wash. 2010).

20 Washington courts have cited *Farnam* for the proposition that the exemption is  
21 constitutional, *See Erdman v. Chapel Hill Presbyterian Church*, 156 Wash. App. 827, 849 (Div.  
22 2 2010), but the Supreme Court expressly declined to reach the exemption's constitutionality  
23 under the privileges and immunities clause. 116 Wash.2d at 681.

24

1 Furthermore, there are no cases construing the religious exemption in the context of this  
2 case, where the alleged discrimination has nothing to do with any religious purpose or activity.  
3 For example, the plaintiff in a suit against a religious hospital for discrimination raised the  
4 constitutionality of the religious exemption under the establishment clause and the equal  
5 protection clause for the first time on appeal. *Harris v. Providence Everett Med. Ctr.*, No.  
6 65167-6-I, 161 Wash. App. 1039, \*2 (Div. 1 2011) (unreported). The court of appeals declined  
7 to address the constitutionality because the issue was not raised below. *Id.* at \*5.

8 In *Donelson v. Providence Health & Servs.-Wash.*, 823 F.Supp.2d 1179, 1187 (E.D.  
9 Wash 2011), the Eastern District recognized that several Washington opinions either do not  
10 reach the religious freedom argument at all, or address the constitutionality of the exemption  
11 under a provision other than article 1 section 11 of the Washington State Constitution. 823  
12 F.Supp.2d at 1187. Indeed, the *Donelson* Court intended to certify the question to the  
13 Washington Supreme Court to decide the matter, but the case settled before it could do so. *Id.*  
14 It is not clear that the privileges and immunities argument (article 1, section 12) was even raised  
15 in that case.

16 In *Hazen*, a Washington Court of Appeals recognized that the exemption might have  
17 federal constitutional problems if it was used to excuse discrimination on a basis other than  
18 religion: “[P]ermitting a religious organization to discriminate on any basis, other than religion,  
19 may violate the equal protection and establishment clauses of the United States Constitution.”  
20 37 Wash. App. at 507. *See also Hosana-Tabor v. EEOC et. al.*, 132 S.Ct. 694 (2012) (the federal  
21 ministerial exemption upheld when the church terminated a minister for conduct related to the  
22 ministerial function of the church.)

1 The discrimination Ockletree claims (race and disability) is wholly unrelated to FHS'  
2 religious purpose, practice, or activity. It is not clear to this Court that WLAD's broad  
3 exemption is constitutional, at least in this context. Accordingly, this Court has certified this  
4 question to the Washington Supreme Court under Wash. Rev. Code 2.60.020, in a separate  
5 Order. Defendants' Motion to Dismiss Ockletree's federal discrimination claims and his state  
6 law WLAD claim are DENIED WITHOUT PREJUDICE pending the Supreme Court's  
7 response.

8 **C. Wrongful Termination in Violation of Public Policy Claim.**

9 FHS seeks dismissal of Ockletree's wrongful discharge in violation of public policy  
10 claim, arguing that it fails as a matter of law because there is a statutory remedy for the actions  
11 which Ockletree asserts offended public policy. Defs.' Memo in Supp. at 10. Under Washington  
12 law, the tort of wrongful discharge in violation of public policy is a narrow exception to the  
13 employment at-will doctrine. *Sedlacek v. Hillis*, 145 Wash.2d 379, 385 (2001) (citing *Thompson*  
14 *v. St. Regis Paper Co.*, 101 Wash.2d 219, 232 (1984)). To succeed, plaintiffs must prove: "(1)  
15 the existence of a clear public policy (the *clarity* element); (2) that discouraging the conduct in  
16 which [the plaintiff] engaged would jeopardize the public policy (the *jeopardy* element); (3) that  
17 the public-policy-linked conduct caused the dismissal (the *causation* element); and finally (4)  
18 that the defendant has not offered an overriding justification for the dismissal (the *absence of*  
19 *justification* element)." *Chudney v. AlSCO, Inc.*, 172 Wash.2d 524, 529 (2011) (internal citations  
20 omitted). This exception is "utilized in instances where application of the terminable at will  
21 doctrine would have lead to a result clearly inconsistent with a stated public policy and the  
22 community interest it advances." *Thompson*, 101 Wash.2d at 231.

1 A plaintiff cannot maintain such a claim if “current laws and regulations provide an  
2 adequate means of promoting public policies...” *Id.* at 530. *See Hubbard v. Spokane Cnty.*, 146  
3 Wash.2d 699, 713 (2002). “The other means of promoting the public policy need not be  
4 available to a particular individual so long as the other means are adequate to safeguard the  
5 public policy.” *Hubbard*, 146 Wash.2d at 717. *See Jones v. Rabanco, Ltd.*, 439 F. Supp. 2d  
6 1149, 1166 (2006) (plaintiff’s public policy tort claim was dismissed because the WLAD,  
7 although making a strong public policy statement against racial discrimination, provides an  
8 adequate avenue for recovery); *Armijo v. Yakima HMA, LLC.*, \_ F. Supp. 2d \_, No. 11-CV-  
9 03114-TOR, 2012 WL 1205867, at \*2 (E.D. Wash. April 11, 2012) (dismissing a claim for  
10 wrongful termination in violation of public policy when the WLAD protected the public policy  
11 being violated and no additional jeopardy not protected by the statutes allegedly violated).  
12 “Protecting the public is the policy that must be promoted, not the employee’s individual  
13 interests.” *Rose v. Anderson Hay & Grain Co.*, 168 Wash. App. 474, 478 (2012).

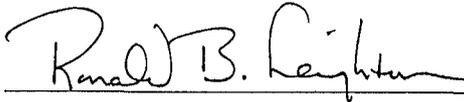
14 Ockletree cannot demonstrate the violation of a public policy which has not already been  
15 protected by statute. Title VII and the ADA are designed specifically to protect the public policy  
16 against discrimination. *Rose* emphasizes that the issue is not whether a remedy is available to  
17 the individual, but whether the statute adequately protects a public interest. The public policy  
18 against discrimination remains protected by statute even when a plaintiff fails to timely preserve  
19 his claim. Because this public interest against discrimination is adequately protected by federal  
20 statutes, FHS’ Motion to Dismiss Ockletree’s termination in violation of public policy claim is  
21 GRANTED and that claim is DISMISSED.

1 **III. CONCLUSION**

2 FHS' Motion to Dismiss (Dkt. # 39) is DENIED in part and GRANTED in part. FHS'  
3 Motion to Dismiss Ockletree's federal claims is DENIED. The Motion to Dismiss Ockletree's  
4 wrongful termination in violation of public policy claim is GRANTED and that claim is  
5 DISMISSED with prejudice. FHS' Motion to Dismiss Ockletree's WLAD claims is DENIED  
6 without prejudice, and the constitutionality of that statute is certified to the Washington Supreme  
7 Court in a separate Order.

8 IT IS SO ORDERED.

9 DATED this 11th day of December, 2012

10 

11 Ronald B. Leighton  
12 United States District Judge

# APPENDIX A-3

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LARRY C. OCKLETREE,

Plaintiff,

v.

FRANCISCAN HEALTH SYSTEM, et  
al.,

Defendants.

CASE NO. 11-cv-05836-RBL

ORDER CERTIFYING QUESTION  
TO THE WASHINGTON SUPREME  
COURT

**I. BACKGROUND**

Plaintiff Larry Ockletree was a security guard for Franciscan Health Systems (“FHS”). Generally, Plaintiff greeted people entering the emergency room of Tacoma’s St. Joseph’s hospital, checked identification, and issued visitor badges. On March 10, 2010, Ockletree suffered a stroke, which diminished the use of his left arm. FHS determined that Ockletree could no longer perform the essential elements of his job, regardless of accommodation, and on September 10, 2010, terminated his employment.

Ockletree sued FHS for employment discrimination under the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act (“ADA”), and under the Washington Law Against Discrimination (“WLAD”).

1 A federal court does not have subject matter jurisdiction over discrimination claims under  
2 Title VII unless the plaintiff exhausts all administrative remedies. 42 U.S.C. § 2000e-5;  
3 *Sommatino v. United States*, 255 F.3d 704, 707 (9th Cir. 2001); *Greenlaw v. Garrett*, 59 F.3d  
4 994, 997 (9th Cir.1995). A plaintiff exhausts his administrative remedies by timely filing an  
5 administrative charge with the EEOC or the appropriate state agency. 42 U.S.C. § 2000e-5(b).  
6 The administrative charge must be filed within 180 days after the alleged unlawful employment  
7 practice occurred. 42 U.S.C. § 2000e-5. But, this period may be extended to 300 days in  
8 jurisdictions where a state agency<sup>1</sup> has subject matter jurisdiction over the charge, and the  
9 aggrieved files with the state agency. *Id.*

10 Ockletree claims he submitted an intake questionnaire to the EEOC in November 2010,  
11 but the EEOC file contains only evidence of a second questionnaire he filed on March 19,  
12 2011—189 days after he was terminated, or nine days too late. Leaving aside his factual  
13 argument<sup>2</sup> that he did timely file an administrative charge, Ockletree can only take advantage of  
14 the longer, 300-day filing period, if there is a state agency with subject matter jurisdiction over  
15 the charge. In other words, the viability of his federal claims depends on his ability to assert a  
16 state law WLAD claim against FHS. If FHS is exempt from WLAD as a religious non-profit  
17 organization, then Ockletree's WLAD claim fails, and his federal claims may be time barred.

18 FHS seeks dismissal of Ockletree's WLAD claim, arguing that the statute specifically  
19 exempts religious non-profits: "'Employer' includes any person acting in the interest of an  
20 \_\_\_\_\_

21 <sup>1</sup> The Tacoma Human Rights and Human Services Department is the local agency  
22 responsible for investigating Ockletree's discrimination allegations. FHS argues that this agency  
23 did not have jurisdiction to seek or grant relief under WLAD because FHS is exempt from  
24 WLAD.

<sup>2</sup> Ockletree also claims that the 180 period should be equitably tolled, thus making his  
later filing timely. Both arguments are addressed in the Court's separate Order on Defendants'  
Motion to Dismiss.

1 employer, directly or indirectly, who employs eight or more persons, and *does not include any*  
2 *religious or sectarian organization not organized for private profit.*” Wash. Rev. Code  
3 § 49.60.040(11) (emphasis added). On its face, the exemption applies even when the  
4 discrimination alleged does not relate to an entity’s religious purpose, practice, or activity.

5 Ockletree argues that WLAD’s religious exemption is unconstitutional under the  
6 Washington State Constitution and the United States Constitution. Ockletree contends that  
7 WLAD violates the Washington State Constitution’s privileges and immunities clause (Article 1,  
8 Section 12) and its religious freedom clause (Article 1, Section 11) because the discrimination he  
9 alleges is unrelated to FHS’s religious purposes, practices, or activities. (*See Hosanna-Tabor*  
10 *Evangelical Lutheran Church and School v. E.E.O.C.*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 694 (2012)).

11 The Washington Supreme Court has not determined whether WLAD’s definition of  
12 “employer” is permissible under the Washington State Constitution. This Court’s resolution of  
13 FHS’ pending Motion to Dismiss depends on the answer to that question. Accordingly, the issue  
14 is certified to the Washington Supreme Court.

## 15 II. CERTIFICATION

16 Washington Revised Code section 2.60.020 is the vehicle through which federal courts  
17 may ask the Washington Supreme Court to rule upon unanswered questions of local law:

18 When in the opinion of any federal court before whom a proceeding is pending, it  
19 is necessary to ascertain the local law of this state in order to dispose of such  
20 proceeding and the local law has not been clearly determined, such federal court  
may certify to the supreme court for answer the question of local law involved  
and the supreme court shall render its opinion in answer thereto.

21 Certification preserves important judicial interests of efficiency and comity. The certification  
22 process saves “time, energy, and resources and helps build a cooperative judicial federalism.”  
23 *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

1 The constitutionality of WLAD's religious organization exemption remains an open question  
2 under Washington law. It has never been addressed in these circumstances: where the  
3 discrimination alleged (race and disability) is wholly unrelated to the religious non-profit  
4 organization's religious purpose or activity. Therefore, the following questions are certified to  
5 the Washington Supreme Court:

- 6 1. The Washington Law Against Discrimination excludes religious non-profit organizations  
7 from its definition of "employer" (Wash. Rev. Code § 49.60.040(11)). Such entities are  
8 therefore facially exempt from the WLAD's prohibition of discrimination in the  
9 workplace. Does this exemption violate Wash. Const. Article I, §11 or §12?
- 10 2. If not, is Wash. Rev. Code § 49.60.040(11)'s exemption unconstitutional as applied to an  
11 employee claiming that the religious non-profit organization discriminated against him  
12 for reasons wholly unrelated to any religious purpose, practice, or activity?

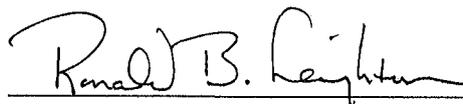
13 The questions are not intended to restrict the Washington Supreme Court's consideration  
14 of any issues it deems relevant. If the Washington Supreme Court considers the certified  
15 questions, it may reformulate the questions as it sees fit. *See Affiliated FM Ins. Co. v. LTK*  
16 *Consulting Servs. Inc.*, 556 F.3d 920, 922 (9th Cir. 2009).

17 The Clerk of Court is directed to submit to the Washington Supreme Court certified  
18 copies of this Order, and Docket numbers 1, 1-2, 2, 11, 12, 15, 15-1, 15-2, 17, 18, 24, 25, 39, 40,  
19 41, 42, 43, 44, 45, 49, 59, and 62 in the above-captioned matter.

20 This matter is STAYED until the Washington Supreme Court answers the certified  
21 questions.

22 IT IS SO ORDERED.

23 DATED this 11th day of December, 2012

24 

Ronald B. Leighton  
United States District Judge

# APPENDIX A-4

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LARRY C. OCKLETREE

Plaintiff,

v.

FRANCISCAN HEALTH SYSTEM, et al.,

Defendant.

NO. 3:11-CV-05836 RBL

DECLARATION OF LARRY C.  
OCKLETREE

I, LARRY C. OCKLETREE, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am over the age of eighteen and am competent to make this Declaration based upon personal knowledge.

2. In 1974, I graduated from high school in Austin, Texas. Thereafter, I attended the Texas Department of Public Safety Law Enforcement Academy and graduated in 1977. After completing my officer training, I served as a Texas State Trooper. In 1979, I moved in professions away from law enforcement and was hired at IBM where I worked for approximately 20 years doing starting out as a General Process Operator and working my way up to Lead Technician. In 1999, IBM underwent significant layoffs including my position.

DECLARATION OF LARRY C. OCKLETREE - 1 of 3  
(3:11-CV-05836 RBL)  
[Ockletree Decl]

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ATTORNEY AT LAW  
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TACOMA, WA 98409  
PHONE-(253) 830-5787  
FAX- (253) 566-0129

1           3.     In 2002, I relocated to the State of Washington. In Washington, I worked for a  
2 number of different companies, initially, including various security firms and Alaska Airlines.  
3 In 2005, I was hired by a company that performed the security services for Franciscan Health  
4 System. Later, there was a reorganization of the way Franciscan Health System did security  
5 and I was hired on as a Franciscan Health System employee.  
6

7           4.     On March 10, 2010, while working at St. Joseph's Hospital, I suffered a stroke.  
8 At the time of the stroke and for approximately a year and a half before that time, my job  
9 responsibilities and duties in security were to man a checkpoint station at the threshold of the  
10 ER Department. In this location, my job duties were to greet individuals entering the ER,  
11 check identification, and supply visitor badges to those entering the ER. My job did not have  
12 any significant physical components.  
13

14           5.     As a result of the stroke that I suffered, I lost the use of my left arm. My  
15 mental faculties were not impaired and aside from my left arm, I did not have any other  
16 significant physical impairments as a result of this stroke.

17           6.     After recovering from my stroke, I sought to return to work at St. Joseph's  
18 Hospital. Despite my left arm limitations, I could perform the job that I was performing  
19 before my stroke. Despite the fact that I could perform the functions of this job, Franciscan  
20 Health System did not allow me to work. I requested a reasonable accommodation from  
21 Franciscan Health System; however, Franciscan Health System declined to provide any  
22 accommodation. On September 10, 2010, I was formally terminated from employment at  
23 Franciscan Health System because of my disability.  
24

25           7.     On or about October 14, 2010, I called the Equal Opportunity Employment  
26 Commission ("EEOC") indicating that I wished to file a charge against Franciscan Health

1 System. The EEOC responded by providing me with a questionnaire to fill out regarding my  
2 situation. On or about November 5, 2010, I responded to the EEOC with a signed copy of the  
3 Intake Questionnaire, which included all the relevant information about my claim and also  
4 included my indication, on the fourth page of the questionnaire in box 2, of my intent of filing  
5 a charge with the EEOC over the situation. Attached as Exhibit A to this declaration is a true  
6 and accurate copy of the EEOC Intake Questionnaire that I personally filled out and signed on  
7 November 5, 2010 and sent back to the EEOC.  
8

9 8. It was both my understanding and intent that by contacting the EEOC in  
10 October 2010 and following up within a matter of weeks with the Intake Questionnaire that I  
11 had in fact filed a Charge of Discrimination with the EEOC at that point in time. Any delays  
12 in the EEOC's processing of my claim from that point forward were out of my control.  
13

14 9. After not hearing anything from the EEOC regarding an investigation of my  
15 complaints, I sought the assistance of legal counsel in March of 2011. Attached as Exhibit B  
16 to this declaration is a true and accurate copy of the supplemental EEOC Intake Questionnaire  
17 that I signed on March 19, 2011 and was filed by my attorney.  
18

19 I declare under penalty of perjury under the laws of the State of Washington that the  
20 foregoing is true and correct to the best of my knowledge.  
21

22 Dated at Tacoma, Washington this 6 day of February, 2012.

23   
24 LARRY C. OCKLETREE  
25  
26