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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.

CORRECTED PLAINTIFF LARRY C. OCKLETREE'S REPLY BRIEF

James W. Beck
WSBA #34208
Stephanie Bloomfield
WSBA #24251
Gordon Thomas Honeywell LLP
1201 Pacific Ave., Suite 2100
Tacoma, WA 98402
(253) 620-6500

Dwayne L. Christopher
WSBA #28892
Dwayne L. Christopher PLLC
4008 S. Pine Street
Tacoma, WA 98409
(253) 830-5787

Attorneys for Plaintiff Ockletree

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A. INTRODUCTION

FHS attempts to distract the Court from analyzing the religious exemption in WLAD's definition of employer, suggesting it applies to all nonprofits. In its effort to avoid the inevitable strict scrutiny analysis, FHS also ignores numerous decisions from this Court recognizing that classifications based upon religion require strict scrutiny. WLAD's definition of employer, which exempts only religious nonprofits from compliance, grants a privilege favoring religion and fails to pass constitutional muster on its face, violating article I, section 12. By providing a direct benefit to religious organizations the exemption also runs afoul of article I, section 11. Moreover, as applied to Larry Ockletree, a security guard employed by FHS whose employment has no connection to any religious activity, there is no basis under any standard to uphold the constitutionality of this exemption.

B. ARGUMENT

While FHS correctly notes that this Court reviews the constitutionality of a statute *de novo*, FHS implies that the beyond a reasonable doubt standard creates an extreme evidentiary burden. However, as this Court just recently explained, the beyond a reasonable doubt standard of review applicable to a constitutional challenge is "not an evidentiary standard," but only serves as a

reminder that this Court “will not strike a duly enacted statute unless we are ‘fully convinced, after a searching legal analysis, that the statute violates the constitution.’” *Washington Off Highway Vehicle Alliance v. State*, ___ Wn.2d ___, 290 P.3d 954, 958 (2012) (citing *Sch. Dists.’ Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 606, 244 P.3d 1 (2010) (quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998))). Thus Ockletree need only prove “by argument and research that the statute does in fact violate the constitution.” *Id.* (internal quotations omitted).

1. **FHS Ignores The Exclusively Religious Aspect To Its WLAD Exemption.**

To avoid the strict scrutiny analysis this Court applies to statutory differentiation based on a suspect class, FHS works to mask the religious limitation of the exemption, leaving the impression that the exemption is for all nonprofit organizations, including secular nonprofits. This is a continuation of its efforts at the District Court where FHS argued, “the state has a right to say we are going to exempt certain organizations for whatever reason, in this case not for profits or religious organizations” and, “[i]t’s an exemption that goes to every

religious organization and to secular not for profits." VRP at 9:13-5, and 21:23-24.¹

FHS ignores the fact that secular nonprofit corporations, who also provide public hospital services to the poor and uninsured, are subject to WLAD, while FHS is granted the privilege of exemption solely because of its religious affiliation.² The irrationality of this argument was not lost on Judge Leighton, who observed, "if you walked out there in the street and tried to tell people that a security guard, if he worked at TG, would have a claim . . . but if the Franciscans in the same circumstances, identical, that person would be locked out of the courtroom . . . [h]ow many people would say that makes sense to me?" VRP at 20:4-10.³

The correct comparison here is between religious nonprofit organizations and all secular nonprofit and for profit employers, which

¹ The District Court transcript is found at Appendix A-1 to Ockletree's opening brief.

² For example, FHS quotes a law review article asserting that "nonprofit hospitals provide more charity care than do for-profit hospitals." FHS Brief at 30 (citing John V. Jacobi, *Mission and Markets in Health Care: Protecting Essential Community Providers for the Poor*, 75 Wash. U.L.Q. 1431, 1460-62 (1997)). While nonprofit hospitals may very well provide more charity care, that fact is irrelevant here, because RCW 49.60.040(11)'s exemption is solely for religious nonprofit organizations. Secular nonprofits are subject to WLAD.

³ FHS's reliance on the legislative history of the federal Volunteer Protection Act is equally unpersuasive. FHS Br. at 32. That act, unlike WLAD's definition of employer, does not create special protections for volunteers working with only religious nonprofits. 42 U.S.C. § 14503, *et seq.* Instead, it provides protections for volunteers with all nonprofit organizations and provides a reasoned basis for doing so.

must comply with WLAD.⁴ Thus, state or municipal hospital districts which are nonprofit, private nonprofit hospitals, all other nonprofit organizations, and all for profit entities are subject to WLAD.

Finally, FHS suggests that the legislature chose to exempt all employers with fewer than eight employees from WLAD and had a rational basis for doing so; therefore, its religious exemption also has a rational basis. FHS Br. at 27. However, nothing about WLAD's exemption for small employers is based on any religious affiliation or other suspect classification. The only issue before this Court is the religious exemption – there is no challenge to the legislature's religion-neutral decision to exempt all small employers from WLAD. Contrary to FHS's assertion, Ockletree does not concede that rational basis review is appropriate in the religious exemption context; strict scrutiny is required when a classification is based on a suspect class, like religion.

2. The Religious Exemption Is Subject To Strict Scrutiny.

FHS claims, without citing any authority to support its position, that the decisions of this Court stating that religion is a suspect class,

⁴ While FHS continually refers to the exemption as one for “religious and sectarian” nonprofit organizations, RCW 49.60.040(11) does not provide any exemption for “religious and secular” nonprofit organizations. A sect is nothing more than a fringe or dissenting religious group. Webster's Third New International Dictionary 2052 (1981), defines “sect” as “1 a: a dissenting religious body; *esp.* one that is heretical in the eyes of other members within the same communion b: a group within an organized religion whose adherents recognize a special set of teachings or practices c: an organized ecclesiastical body; *specific.* one outside one's own communion d: a comparatively small recently organized exclusive religious body *esp.* one that has parted ways with a longer-established communion.”

provide no “real support” because the cases did not specifically involve the analysis of a religious classification. FHS Br. at 27, n. 11. However, this Court’s decision in *American Network Inc. v. Washington Utilities & Transp. Comm’n*, 113 Wn.2d 59, 77-78, 776 P.2d 950 (1989), states “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,” and this is “real” authority. (Emphasis added). While in *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), this Court determined that an independent state analysis applies under article I, section 12, this Court has never changed its position that religion is a suspect class subject to strict scrutiny. As recent as 2010, this Court affirmed that suspect classifications receive strict scrutiny review under article I, section 12. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010).

Equal protection under the law is guaranteed by both the Fourteenth Amendment to the United States Constitution and article I, section 12, of the Washington Constitution. ‘The appropriate level of scrutiny in equal protection claims depends upon the nature of the classification or rights involved.’ 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.

King County Dept. of Adult & Juvenile Servs. v. Parmalee, 162 Wn. App. 337, 359, 254 P.3d 927 (2011) (footnotes omitted).

What FHS insinuates, without overtly arguing, is that because the religious exemption is benign favoritism, it should not receive strict scrutiny review. However, this is completely inconsistent with the history behind the enactment of article I, section 12, which was targeted directly at corporate favoritism. While most favoritism, by definition, is helpful to its recipient, courts have never recognized that a benign purpose in a legislative enactment is sufficient to render a discriminatory policy favoring a particular suspect class constitutional. *Regents of University of California v. Bakke*, 438 U.S. 265, 308-09 (1978) (holding "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."); *Maehren v. City of Seattle*, 92 Wn.2d 480, 491, 599 P.2d 1255 (1979) (City must demonstrate that its affirmative action procedures "necessary to the accomplishment of a compelling governmental interest.") (1979); *DeFunis v. Odegaard*, 82 Wn.2d 11, 32, 507 P.2d 1169 (1973) (University of Washington Law School had burden to show "consideration of race in admitting students is necessary to the accomplishment of a compelling state interest").

Moreover, FHS tacitly concedes that strict scrutiny should apply by changing its position between the District Court and this Court and now largely abandoning its reliance on *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 681, 807 P.2d 830 (1991), which in turn relied upon the analysis in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). *Amos*, which FHS does not cite to this Court, substituted a two-pronged Establishment Clause test for the traditional strict scrutiny framework in its analysis of the religious exemption under Title VII. Specifically, *Amos* changed the strict scrutiny approach to this question by substituting the *Lemon* test for traditional strict scrutiny. *Amos*, 483 U.S. at 339; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *Amos* held that if the law passes the *Lemon* test, it is only subject to a rational basis review. *Amos*, 483 U.S. at 339. If the law fails the *Lemon* test, it is unconstitutional. By abandoning its earlier argument, FHS now concedes *Amos* is not the correct path for this Court to follow and recognizes that RCW 49.60.010(11) could not pass the second element of the *Lemon* test – because unlike Title VII WLAD's exemption is not limited to religious discrimination.⁵ Again, there is no

⁵ Title VII's parallel exemption states that the provisions of that act do not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." 42 U.S.C. § 2000e-1 (emphasis added).

precedent for simply applying rational basis review to a statute of this nature. Either the Court applies strict scrutiny review or the Court follows the alternative (and criticized) path of *Amos/Lemon*.

Ultimately, this Court faces several alternate approaches under the Washington Constitution's privileges and immunities clause for evaluating a statute that exempts certain nonprofit corporations from WLAD, based solely upon their affiliation with a religion. The most straightforward approach, consistent with this Court's previous holdings, is to apply traditional strict scrutiny analysis, because religion has long been identified by this Court as a suspect class and the statute clearly provides a religion-based privilege and immunity to certain nonprofit corporations.

Another approach, followed by the Supreme Court interpreting the federal Equal Protection Clause, is the *Lemon* test. In *Amos*, where the statutory exemption provides "benevolent neutrality" (granting religious nonprofits an exemption from Title VII's prohibition of religious discrimination), the Supreme Court bypassed strict scrutiny and applied the three part *Lemon* test. It did so because of the concerns about impairing a religious order's ability to hire people of its own faith to carry out its mission and this implicates the First Amendment and its Establishment and Free Exercise Clauses, which are not the same as

Washington's Religious Freedom provision in article I, section 11. Under federal jurisprudence, when the issue primarily relates to Establishment/Free Exercise concerns, equal protection analysis takes a back seat and the Court evaluates the issue under the Establishment and Free Exercise Clauses of the First Amendment, finding that if the statute comports with related federal First Amendment jurisprudence, any equal protection analysis done is after-the-fact and rational basis scrutiny applies. *Locke v. Davey*, 540 U.S. 712, 721 n. 3 (2004).

However, this Court should not follow the *Amos* approach, because it does not fit in the context presented by these facts and the text of the Washington Constitution.⁶ Washington's constitution does not have the equivalent to the federal interrelated Establishment and Free Exercise Clauses with their attendant jurisprudence.⁷ Here, for the same reasons this Court has determined that the Washington Constitution merits an independent analysis from the federal Equal Protection Clause in this type of case, the Court should also be mindful of these other substantial textual and doctrinal differences and maintain the strict scrutiny approach, which provides the proper level

⁶ As explained in Ockletree's opening brief at 30-31, WLAD's religious exemption does not pass the three-part *Lemon* test should this Court follow that approach.

⁷ "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

of review for a statute which contravenes the privileges and immunities clause as plainly as RCW 49.60.040(11)'s religious exemption does.

3. WLAD Grants A Privilege To Religious Nonprofits That It Does Not Equally Provide To Secular Nonprofits, In Violation Of Article I, Section 12.

Contrary to FHS'S contention, exempting religious nonprofit organizations from WLAD constitutes a privilege and immunity, "which upon the same terms [does] not equally belong to all . . . corporations." Wash. Const. art. I, § 12. FHS faults Ockletree for not distinguishing between the terms "privileges" and "immunities," but, as FHS concedes, this Court makes no real distinction between these terms. FHS Br. at 20, n. 7. This is not an oversight, but reflects the fact that the terms "privilege" and "immunity" are used interchangeably.⁸ Current definitions are consistent with this view. *See, e.g.*, Webster's Third New International Dictionary 1805 (1981) (defining privilege as "a right or *immunity* granted as a peculiar benefit, advantage, or favor."); Black's Law Dictionary 1316 (9th ed. 2009) (defining privilege as a "special legal right, exemption, or *immunity* granted to a person or

⁸ That is how the framers would have understood the terms: the first edition of Black's Law Dictionary, 941 (1st ed. 1891), defined "privilege" as follows:

A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption. A right, power, franchise, or *immunity* held by a person or class, against or beyond the course of the law.

(Emphasis added.)

class of persons”) (emphases added); The exemption granted to religious nonprofit organizations from liability under WLAD completely fits the foregoing definitions of “privilege.”⁹ This is in accord with how other states with similar constitutional language, interpret the terms immunity and privilege.¹⁰

FHS asserts that this Court has limited the term “privilege” to “an exemption from a regulatory law that has the effect of benefitting certain businesses at the expense of others,” FHS Br. at 21 (quoting *Am. Legion Post No. 149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008)). However, in *American Legion*, this Court actually said, “Our jurisprudence indicates that a ‘privilege’ normally relates to an exception from a regulatory law that has the effect of benefitting certain businesses at the expense of others.” *Am. Legion*, 164 Wn.2d at 607 (emphasis added). It did not suggest that a “privilege” cannot take a different form. It clearly can. *See, e.g., City of Seattle v. Dencker*, 58 Wash. 501, 504, 108 P. 1086 (1910)

⁹ Words used in the constitution “will be given their common and ordinary meaning, as determined at the time they were drafted.” *Wash. Water Jet Workers Ass’n v. Yarbough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004).

¹⁰ Notably, Washington’s article I, section 12 was based on a similar provision in Oregon’s 1857 Constitution, which in turn was based on Indiana’s 1851 Constitution. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 26 (2002). In *Hammer v. State*, 173 Ind. 199, 89 N.E. 850, 851 (1909), the Supreme Court of Indiana said, “Immunity’ and ‘privilege’ are synonymous terms; a right conferred peculiar to some individual or body; a favor granted; a special privilege; in short, an affirmative act of selection of special subjects of favors not enjoyed by citizens in general under the federal Constitution or laws.”

(unconstitutional city ordinance was a revenue measure; no police power or regulation was involved).

Here, the exemption of religious nonprofit organizations from WLAD under RCW 49.60.040(11) fits this Court's description of a "privilege" in *American Legion* perfectly. As FHS notes, WLAD is "a regulatory law," FHS Br. at 21 n. 8, and, contrary to FHS's contention, it has the effect "of benefitting certain businesses at the expense of others." *Am. Legion*, 164 Wn.2d at 607. It is beyond dispute that WLAD imposes costs on employers who must comply, costs that exempt employers do not incur. FHS objects that nonexempt employers do not "bear any greater expense because religious or sectarian nonprofits are exempted," FHS Br. at 23, but the same could be said of many, if not all, of the exemptions that this Court has declared unconstitutional. In *City of Seattle v. Dencker*, 58 Wash. 501, 108 P. 1086 (1910), for example, an ordinance imposed a license fee on businesses that used vending machines to sell goods, but not on businesses selling exactly the same goods by other means. The cigar merchants with the vending machines did not bear a greater expense *because* the over-the-counter merchants were exempt; they paid more because the ordinance imposed a license fee on vending machine operators. That was enough to invalidate the ordinance.

Similarly, in *City of Seattle v. Rogers*, 6 Wn.2d 31, 106 P.2d 598 (1940), a city ordinance made charitable solicitation without a license illegal, but exempted the Seattle Community Fund. Again, The Elks club did not bear a greater expense because the Seattle Community Club was exempt, but that fact was immaterial. The ordinance was unconstitutional because it granted a privilege to the Seattle Community Fund that did not belong equally to other charities. The only situation that would satisfy FHS's criterion is a law requiring one class of persons or corporations to contribute a specific sum, in which case the exemption of others would require the nonexempt class members to contribute proportionally more. In light of *Dencker* and *Rogers* and countless other cases, that is clearly not what this Court meant by "benefitting certain businesses at the expense of others." It is enough that certain businesses have to comply while others do not, there being no valid basis for the different treatment.

Even if FHS were correct in its assertion that WLAD's exemption does not benefit religious nonprofit organizations at the expense of other employers, article I, section 12 is not limited to cases in which a law confers a competitive advantage. FHS confuses one of the concerns that prompted the adoption of article I, section 12 with its scope. By comparison, the Fourteenth Amendment was prompted by a

concern for the rights of recently emancipated slaves, but it addresses other forms of inequality as well. As this Court observed in *Grant County*, 150 Wn.2d at 806, 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.” In other words, article I, section 12 differs in its approach to combating inequality, but “in substance” it “secures the same equal rights” as the Fourteenth Amendment. *McKnight v. Hodge*, 55 Wash. 289, 292, 104 P. 504 (1909).

FHS relies heavily on *American Legion*, where this Court upheld a law that banned smoking in buildings but exempted hotel rooms, on the ground that “[s]moking inside a place of employment is not a fundamental right of citizenship and, therefore, is not a privilege.” *Am. Legion*, 164 Wn.2d at 608. The legislature, however, has declared that the right to work free from discrimination is a privilege of citizenship. RCW 49.60.010, RCW 49.60.030(1)(a) (“right to obtain and hold employment without discrimination”). Unfortunately, the law grants this privilege on unequal terms, with the result that employees of religious nonprofit organizations are denied privileges enjoyed by other employees. *See Andersen v. King Cnty.*, 158 Wn.2d 1, 138 P.3d

963 (2006) (Chambers, J., concurring) (observing that the legislature may “expand the privileges and immunities of citizenship, but where it does, it is bound by the constitution to do so on equal terms”).

In *American Legion*, moreover, this Court reiterated that the terms “privileges” and “immunities” “pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship,” including “the fundamental right ‘to remove to and carry on business’ within the State. *Am. Legion*, 164 Wn.2d at 607 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). This fundamental right is implicated in at least two respects: First, the law grants an exemption to religious nonprofit organizations that does not belong equally to other employers, including those carrying on precisely the same business. Thus, while FHS is immune from liability under WLAD and, thus, free from the costs attendant on compliance, Tacoma General Hospital, for instance, is not. The fact that Ockletree is not a member of the class of nonexempt employers does not affect his ability to challenge the WLAD’s discriminatory classification. *See Rogers*, 6 Wn.2d at 38 (rejecting argument that respondent could not raise the question of discrimination in favor of a class to which he does not belong because the law was being applied against him).

Second, this Court has not construed the right to carry on business narrowly (as limited to businesses themselves), but broadly to encompass "rights related to livelihood." Comment, Andrew Rorholm Zellers, *Independence For Washington State's Privileges and Immunities Clause*, 87 Wash. L. Rev. 331, 339-40 (2012) (citing *Northwestern Nat'l Ins. Co. v. Fishback*, 130 Wash. 490, 494-96, 228 P. 516 (1924) (holding that law permitting no more than one agent per insurance company in a small city or no more than two agents in a larger city violated article I, section 12)).¹¹

Employment as a security guard furnished Ockletree his livelihood. WLAD's exemption prohibits him from vindicating his right to employment without discrimination and thereby securing his livelihood. In sum, WLAD's exemption for religious nonprofit organizations implicates privileges and immunities of state citizenship.

This Court has explained that "the law must treat alike all of a class to which it applies, and must bring within its classification all who

¹¹ See also *Nathan v. Spokane Cnty.*, 35 Wash. 26, 36, 76 P. 521 (1904) (holding that law allowing a person who paid certain property taxes to deduct payments from the next assessment violated article I, section 12 by "discriminat[ing] between taxpayers of the same class," thereby granting a privilege or immunity to certain taxpayers); *Ex parte Camp*, 38 Wash. 393, 397-98, 80 P. 547 (1905) (holding that a law prohibiting retailers from selling goods in a district but exempting producers violated article I, section 12); *State v. Robinson Co.*, 84 Wash. 246, 250, 146 P. 628 (1915) (holding that regulating sale of food stuffs but exempting flour mills violated article I, section 12); *City of Seattle v. Gibson*, 96 Wash. 425, 432-33, 165 P. 109 (1917) (invalidating law authorizing council to decide which pharmacists should receive license to practice as druggists).

are similarly situated or under the same condition." *Sherman Clay & Co. v. Brown*, 131 Wash. 679, 684, 231 P. 166 (1924) (quoting *City of Spokane v. Macho*, 51 Wash. 322, 325, 98 P. 755 (1909)). WLAD's religious exemption runs afoul of this principle in its attempt "to exempt a class within a class," thereby granting to certain religious nonprofit organizations like FHS "privileges and immunities not granted to the balance, and this without any reasonable distinction between the characters of their businesses." *Brown*, 131 Wash. at 684. Public nonprofit or secular nonprofit hospitals like Tacoma General do not receive this benefit and this highlights the favoritism the exemption provides to religious nonprofits, elevating religion over nonreligion.

4. This Court Should Interpret The Washington Constitution As Requested By The Federal Court.

In a roundabout manner, FHS asks this Court to decline to answer the questions certified to this Court. FHS Br. at 24-25. The unpersuasive arguments advanced by FHS are: (1) this is not a case of favoritism; (2) because it is not a case of favoritism, this Court applies federal Equal Protection analysis to determine whether article I, section 12 is violated; and (3) because RAP 16.16 precludes this Court from deciding questions of federal law when certified, this Court should decline to rule. Each of these claims is inaccurate.

First, this *is* a case of favoritism. Religious non-profits are certainly a minority of all “employers” in this state as the term is defined in RCW 49.60.040(11). Moreover, religious nonprofits are granted a privilege not made available to secular nonprofits and other businesses. To be sure, the legislature has expressly held that the right to be free from discrimination in employment is one of the “privileges of [this state’s] Inhabitants[,]” RCW 49.60.010, and ~~therefore, the immunity from compliance with this requirement is~~ certainly a privilege as well.

Regarding FHS’s second assertion, this Court has not limited its analysis of article I, section 12 only to circumstances of favoritism. Indeed, Chief Justice Madsen’s concurring opinion in *Madison* makes just this point. *Madison v. State*, 161 Wn.2d 85, 117, 163 P.3d 757 (2007) (Madsen, J., concurring) (“The majority misreads *Grant County* to say that an independent state constitutional analysis is always appropriate under article I, section 12.”) As legal commentators have noted, this Court has not yet settled on the manner in which article I, section 12 is interpreted. Zellers, *supra*, at 358-59; Michael Bindas, Seth Cooper, David K. DeWolf & Michael J. Reltz, *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 46 Gonz. L. Rev. J. 1, 31-32 (2011).

Finally, in the event this Court equates article I, section 12 with the federal Equal Protection Clause, the Court should still interpret the state constitution. RAP 16.16 does not forbid this Court from utilizing federal jurisprudence to aid in the interpretation of Washington law.

Should this Court adopt federal jurisprudence to interpret either article I, sections 11 or 12, the religious exemption is unconstitutional under federal jurisprudence. The exemption is focused on a suspect class, and therefore, strict scrutiny must apply. The exemption for religious nonprofit employers is not the most narrowly tailored way to address religious freedom. *Ockletree Opening Br.* at 23. In particular, the limited manner in which Title VII exempts religious discrimination is an example of a more narrowly tailored solution that is constitutional.

5. The Religious Exemption Is Also Unconstitutional Under Article I, Section 11.

FHS argues that article I, section 11's only prohibition is on direct financial payments to a religious organization. *FHS Br.* at 42. This Court, however, has not limited the constitution in such a narrow manner. In *Visser v. Nooksack Valley School Dist.*, 33 Wn.2d 699, 708, 207 P.2d 198 (1949), this Court was presented with a case where the financial payments were made to pay for bus transportation that was also used to take students to a religious school. In holding that this support was unconstitutional, this Court described these

efforts as a "continuing public subsidy[.]" *Id.* FHS attempts to distinguish *Visser* by arguing that some religious non-profits may never face a WLAD claim. FHS Br. at 42, n. 19. However, this argument ignores the obvious costs and expenses attendant upon compliance with the law irrespective of the existence of a claim and is also speculation. Moreover, this position is completely undermined by the facts of this case, where a discrimination claim clearly exists.

Limiting article I, section 11 to only those circumstances where funds are provided directly to a religious organization would lead to unsatisfactory results. For instance, under this interpretation it would be appropriate for the legislature to: (1) amend RCW 18.71.040 to exempt physicians from the required licensing fees provided the physician works for a religious non-profit organization upon licensure; (2) amend RCW 46.61.400 to immunize employees of religious organizations from speeding traffic infractions issued within the scope of employment; (3) exempt automobiles owned by religious organizations from the mandatory liability insurance limits required by RCW 46.30.020; (4) amend RCW 6.13.030 to provide a larger homestead exemption for individuals employed by a religious non-profit; or (5) amend RCW 70.105D.040 to immunize religious non-profit organizations from liability under the Model Toxics Control Act.

Certainly, these are unacceptable results; however, these scenarios must be unconstitutional under either article I, section 12 as unconstitutional privileges, or under article I, section 11 as unconstitutional endorsement and support of religion.

Furthermore, to the extent that this Court holds that without direct financial payment, there is no violation of article I, section 11, then, as discussed above, substituting the *Lemon* test for strict scrutiny equal protection analysis is unworkable. Without an Establishment clause like alternative, as was adopted in *Amos*, the result is strict scrutiny.

FHS is also dismissive of the constitution's admonition that the legislature "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. FHS argues that the purpose behind this provision was limited to polygamy or similar practices. FHS Br. at 40, n. 18. However, FHS cites no support for its restrictive interpretation and also fails to appreciate that the constitution is not simply a stale document relegated only to the context of what was appropriate at the time of enactment.

While it is obviously true that employment discrimination was lawful at the time the constitution was enacted, our society's progress

on these points is equally clear. In fact, the legislature has recognized Larry Ockletree's constitutional privilege to be free from discrimination: "[t]his chapter shall be known as the 'law against discrimination.' It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights." RCW 49.60.010.

It would be inconsistent with article I, section 11's prohibition on breaches of the peace in the name of religion to allow an undefined and attenuated religious interest to erode Ockletree's rights and the public's interest in eliminating discrimination. As previously noted, article I, section 11 is entitled "Religious Freedom" and must, on fair reading, be said to serve that purpose. However, no purpose is served for "religious freedom" by allowing non-profit religious organizations to discriminate when there is no connection between the discrimination and religion. While Ockletree does not argue that the legislature must regulate certain activities; however, when it chooses to do so and enacts laws and regulations it must do so fairly, in a way that comports with equal protection and does not subsidize religion.

6. The Religious Exemption Is Unconstitutional Under Any Test As Applied To Ockletree.

This Court typically assesses whether a party presents a facial or as-applied challenge to a statute at the outset. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Here, the issue before this Court is presented on two certified questions from the United States District Court which clearly pose questions as to the constitutionality of WLAD's religious exemption under article I, sections 11 and 12, both "facially" and "as applied."

Holding a statute facially unconstitutional means the court has found "no set of circumstances exists in which the statute, as currently written, can be Constitutionally applied" and the remedy is to render the provision at issue inoperative *id.* at 669. On the other hand, an "as applied" challenge to the constitutional validity of a statute, "is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d ___, 291 P.3d 876, 882 (2012) (quoting *City of Redmond v. Moore*, 151 Wn.2d at 668-69). "Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *id.*

Under any of the various approaches articulated by this Court in a strict scrutiny context, WLAD's religious exemption is facially invalid because it does not meet the requirements of strict scrutiny. In addition, if the Court applies the test of asking first whether a privilege or immunity exists, and then asking whether it is evenly applied, RCW 49.60.040(1.1)'s religious exemption also fails. The statute is not the most narrowly tailored means to recognize religious freedom and it unquestionably bestows a privilege or immunity, out of favoritism, to a minority subset of employers (based solely on religious affiliation). These facts do not change irrespective of any hypothetical scenario conceived by FHS or this Court, therefore it is facially unconstitutional. To the extent this Court disagrees, FHS completely failed to articulate a rational basis for this religious preference as applied to Ockletree, a hospital security guard. Having to forego discriminating against Ockletree based on his disability or race has no burden whatsoever on FHS's religious mission or purpose. Even if FHS could articulate a situation where the statutory exemption as written would pass strict scrutiny or fail to bestow a privilege or immunity, the exemption is still unconstitutional as applied to Ockletree, whose employment was in no way linked to any religious ceremony, practice, or pursuit.

In its brief, FHS fails to even respond to the “as applied” question or otherwise explain how, as applied to Ockletree — an African-American disabled hospital security officer whose job has no religious implication — the exemption for religious nonprofit employers from WLAD has any rational basis. It fails to do so because there is no reasoned basis to show it meets constitutional requirements and FHS cannot justify allowing it to discriminate against Ockletree.

C. CONCLUSION

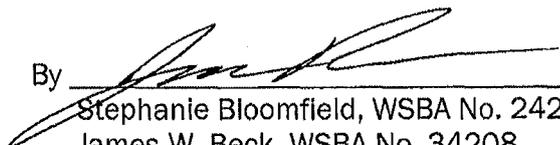
For the above reasons Plaintiff asks the court to answer the certified questions by holding that WLAD’s religious exemption is unconstitutional under the state constitution.

Dated this 7th day of March, 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, Gina A. Mitchell, declare that on this 8th day of March, 2013, I provided to the Washington State Supreme Court for filing a copy of Plaintiff Larry C. Ockletree's Reply Brief via email and served upon the parties indicated below:

Copy to:

Sheryl D. J. Willert
Williams Kastner & Gibbs
601 Union Street, Suite 4100
Seattle, WA 98101

Sent via:

Legal Messenger and Email:
swillert@williamskastner.com

Karen Glickstein
Polsinelli Shughart PC
120 West 12th Street, Suite 1600
Kansas City, MO 64105

Federal Express and Email:
kglickstein@polsinelli.com

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

Dated this 8th day of March, 2013 at Tacoma, Washington.



Gina A. Mitchell
Legal Secretary