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No. 96132-8

SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW S. WOODS, Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION, Respondent

APPELLANT'S SECOND AMENDED ANSWER TO BRIEFS OF AMICI CURIAE

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I. Introduction

Article I, Section 12 of the Washington Constitution was enacted to ensure that statutes adopted by the Washington Legislature do not confer privileges or immunities for certain groups over others with respect to rights deemed fundamental to Washington citizens. Its intent is to limit the use of legislation to prevent "undue favor on the one hand or hostile discrimination on the other." *State ex rel. Bacich v. Huse*, 187 Wn. 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). But the Washington Law Against Discrimination's (WLAD) unbounded exemption for religious nonprofit employers does precisely what Article I, § 12 protects against: it purports to confer to religious nonprofit employers the privilege of complete immunization from the WLAD's fundamental civil rights obligations, regardless of an employee's actual job duties and without requiring any showing of a substantial or concrete burden on their free exercise. As a majority of this Court recognized in *Ockletree v. Franciscan Health Systems*, 179 Wn.2d 769, 317 P.3d 1009 (2014), the WLAD's exemption, in some circumstances, is unconstitutional as applied.

Two *amici curiae* briefs have been filed in support of Seattle's Union Gospel Mission's position in this case.[1] Notably, neither brief acknowledges the core issue here: that SUGM discriminated against Mr. Woods based on his sexual orientation, with negative consequences for Mr.

[1] The *amici curiae* brief of the Association of Christian Schools International, *et al.* and the *amici curiae* brief of the Council for Christian Colleges & Universities, *et al.*

Woods that are indistinguishable from those he would have felt had he experienced discrimination by a secular nonprofit employer.

Rather than focus their arguments upon the holdings of this Court in *Ockletree* and Washington constitutional caselaw, *amici* rely primarily on federal constitutional provisions and federal caselaw. Indeed, *amici* Council for Christian Colleges & Universities, *et al.* cites to *Ockletree* only once, and to the Washington State Constitution not at all. Br. of *Amici* Council for Christian Colleges & Univs., *et al.*, at ii-iii.

Amici make a dramatic request of this Court: rather than seeking to interpret and apply this Court's decision in *Ockletree* to Mr. Woods' particular and specific circumstances, they recommend that this Court take the enormous step of overturning *Ockletree* entirely and returning to the unlimited exemption that purports to give religious nonprofit employers a complete and unchallengeable pass from complying with the WLAD's obligation not to discriminate against employees, regardless of their employees' duties to the organization. In *Ockletree,* this Court already rejected granting an unlimited pass to discriminate, and Mr. Woods respectfully requests that the Court reiterate its rejection of *amici's* sweeping argument now.

II. Argument

A. An employee's sexual orientation does not reflect support or rejection of any religious belief.

In its Response Brief, SUGM misstated the record of this case in order to claim it excluded Mr. Woods from employment based on his religious beliefs, rather than acknowledge the incontrovertible evidence that it rejected him because of his sexual orientation. *See* App. Reply Br. at 2-5. Similarly, *amici* frame their arguments in support of religious freedom as encompassing the right of religious nonprofit employers to discriminate in employment on the basis of sexual orientation, without any further inquiry.

Amici (as well as SUGM) put forth legal arguments which stem from the factually unsupported premise that SUGM rejected Mr. Woods for his religious beliefs, not for his sexual orientation. As Mr. Woods previously discussed, the record in this case shows that SUGM immediately told Mr. Woods that he was ineligible to apply for the staff attorney position as soon as he disclosed his sexual orientation, without any inquiry regarding his religious beliefs. *See* App. Reply Br. at 2-6.

This attempt to reframe discrimination based on an LGBT person's sexual orientation as discrimination based on the person's presumed religious beliefs is not new. This argument was raised directly in oral argument before the U.S. Supreme Court in *Christian Legal Society of the University of California, Hastings College of Law v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010):

> At oral argument on April 19, 2010, Justice Sonia Sotomayor asked whether the First Amendment ever protects associations that exclude students based on their race, sex, or disability. "Not at all," replied Professor Michael McConnell for CLS [Christian Legal Society]. "Race, any other *status* basis Hastings is able to enforce." CLS, however, was only excluding unrepentant gay people based upon their conduct and, by inference from their unrepentant conduct, their *beliefs,* the core area protected by the First Amendment. Justice John Paul Stevens then asked, "What if the *belief* is that African Americans are inferior?" McConnell answered that such an organization might have that *belief,* but they could not then exclude students of color based on their *status.*

William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Georgia L. Rev. 657, 659 (2011), *citing* Transcript of Oral Argument at 9-10, *Christian Legal Soc'y*, 561 U.S. 661 (emphasis in original article).

The U.S. Supreme Court found this argument unpersuasive.[2] "CLS contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' . . . Our decisions have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y,* 561 U.S. at 689 (citations omitted).

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[2] It is worth noting, in relation to Mr. Woods' Article I, §12 challenge, that the U.S. Supreme Court found CLS's arguments against Hastings' all-comers student organizations policy, to be asking for a privilege: "CLS, it bears emphasis, seeks not parity with other organizations, but a *preferential exemption* from Hastings' policy." *Christian Legal Soc'y*, 561 U.S. at 669 (emphasis added).

It should go without saying that a person's sexual orientation is not a religious belief. Just as it does not logically follow that every heterosexual person embraces Christian beliefs simply by virtue of their sexual orientation, it does not logically follow that every bisexual or otherwise non-heterosexual person rejects Christian beliefs simply by virtue of their sexual orientation. Indeed, Mr. Woods holds Christian beliefs, and affirmed SUGM's Statement of Faith multiple times as a legal intern and as a volunteer law student and attorney. App. Am. Opening Br. at 4-5.

Amici Association of Christian Schools International, *et al*., argue that SUGM disqualified Mr. Woods from employment "because he disagreed with both its religious beliefs and the religious practices that authenticate agreement with its beliefs." Br. of *Amici* Ass'n of Christian Schools Int'l, *et al*. at 6. This is incorrect. The record shows that Mr. Woods was told he was ineligible for a staff attorney position at SUGM's Open Door Legal Services (ODLS) program by Managing Attorney David Mace immediately after Mr. Woods disclosed, in a private email to Mr. Mace, that he was in a relationship with another man. CP 405. This rejection occurred before Mr. Mace had even received Mr. Woods' cover letter or responses to SUGM's religious screening questions.[3]

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[3] *Amici* also incorrectly assert that SUGM "decided not to employ" Mr. Woods. Br. of *Amici* Ass'n of Christian Schools Int'l *et al*. at 6. But as discussed above, this assertion misses the fact that SUGM told Mr. Woods that he would not be able to apply for the position immediately after he disclosed that he was in a relationship with another man, and refused to afford him a substantive interview to determine either his legal or his religious qualifications for the position. *See also*, CP 740-41 (Mace, 141:1-5, 150:3-21 ("I had already essentially rejected him … at the outset…")).

Excluding an entire class of people from employment performing any among a wide range of secular job duties before asking a single question about their religious beliefs is not necessary to preserve the free exercise rights of religious organizations. As this Court recognized in *Ockletree*, the WLAD's exemption of nonprofit religious employers is not necessary to protect free exercise rights. 179 Wn.2d at 786 n.11 (C. Johnson, J., lead op.), 800 (Stephens, J., dissenting). And as Mr. Woods has noted before, nor does the right to free exercise of religion extend to practices which, like discrimination, threaten the peace and safety of the state – a point *amici* fail to acknowledge, much less address. *See* App. Am. Opening Br. at 31-33 and App. Reply Br. at 8-9.

B. *Amici* Misinterpret *Ockletree*

Amici Association of Christian Schools International, *et al.* rely heavily, and wrongly, on the *Ockletree* dissent's statement that the religious nonprofit employer exemption is "invalid only as applied to plaintiffs whose dismissal was unrelated to their employers' religious beliefs or practices." Br. of *Amici* Ass'n of Christian Schools Int'l, *et al*. at 7, citing *Ockletree*, 179 Wn.2d at 804, n.6 (Stephens, J., dissenting). Their reliance on this statement is misleading.

Putting aside the fact that this statement does not represent the holding of the Court, *amici* ignore that the dissent made this statement in the context of responding directly to the certified "as applied" question presented by the federal court in *Ockletree*: Whether the WLAD 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." 179 Wn.2d at 772 (setting forth second certified question). That question is different from the one presented here, where SUGM does claim that it discriminated against Mr. Woods based on SUGM's religious beliefs. Not surprisingly, the dissent in *Ockletree* reached only the certified, "as applied" question before it; as a result, this statement cannot be taken as an indication that the dissent foreclosed the possibility that the exemption may be held invalid as applied in a different case in which the employer *does* assert that its religious beliefs are the reason for discriminating (here, SUGM's opposition to "homosexual behavior").

Unlike here, the hospital employer in *Ockletree* did not claim that its decision to terminate the plaintiff was based on any sort of religious belief. But while a majority of the *Ockletree* Court found that the exemption was unconstitutional as applied to the plaintiff in that case, it does not follow that a majority of the Court also found that employment discrimination is permissible under Washington law in any and every case where a religious nonprofit employer claims any sort of nexus between its religious beliefs and its employment practices.

Instead, this Court must now consider the constitutionality of *this* employer's decision to exclude *this* employee from a position as a staff attorney because of his sexual orientation. For the reasons Mr. Woods has described in his prior briefing, the exemption is not constitutional as applied

to his exclusion from SUGM on the basis of his sexual orientation. At a minimum, on this record, there are genuine disputed issues of material fact that preclude summary judgment in favor of SUGM.

Amici's selective reading of *Ockletree* proves this point. While *amici* Association of Christian Schools International, *et al.* favorably cite the dissent's opening language about the "special place" religious institutions hold in our society (*Amici* Br. at 6), they omit the remainder of the paragraph, which describes the "unprecedented heights" to which religious institutions are raised by "disclaiming any limits" on the ability of religious nonprofit employers to discriminate. *Ockletree*, 179 Wn.2d at 789 (Stephens, J., dissenting). It is noteworthy that neither *amici* undertake any analysis of Article I, § 12 of the Washington Constitution, or the cadre of Washington cases interpreting that provision of our Washington State Constitution. Instead, they importune this Court to rely upon federal cases upholding religious freedoms, which are different and distinguishable from the facts and issues in this case.

C. Amici's reliance on *Amos* is misplaced, and its analysis overreaches its application to the facts of this case.

Echoing the arguments of SUGM, *amici* focus substantial attention on the U.S. Supreme Court's decision in *Corporation of Presiding Bishop of Church of Latter-day Saints v. Amos*, 483 U.S. 327, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987). But, as Mr. Woods has noted, the *Ockletree* Court rejected *Amos* explicitly and implicitly, finding that *Amos* does not resolve

the constitutionality issues of the WLAD exemption because of significant differences in the underlying statute. App. Reply Br. at 21. Specifically, *Amos* dealt with the constitutionality of an exemption to Title VII protection that allows religious nonprofit employers to discriminate against those employees who are not "co-religionists," but not against other classes protected in the statute. 483 U.S. at 330. Furthermore, *amici* ignore that analysis of the WLAD exemption under article I, § 12 of the Washington Constitution requires heightened scrutiny. *Ockletree*, 179 Wn.2d at 794, 797 (Stephens, J., dissenting). By contrast, the Supreme Court's analysis of the Title VII exemption at issue in *Amos* was subject only to rational basis review. *Amos*, 483 U.S. at 339.

Also missing from *amici's* arguments regarding *Amos* are the factual differences in the expectations placed upon employees, and whether the exclusion implicates protected classes. In *Amos*, the employee failed to qualify for a "temple recommend", a certification issued by Mormon temple leadership that attests to certain behavioral norms which do not burden any particular protected class. 483 U.S. at 330, n.4 ("Temple recommends are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco."). *Amos* is inapposite here – not only because it has been rejected by this Court as inapplicable to the WLAD exemption, but also because regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco are not proxies for exclusion of any protected class. While *amici* argue, by comparing SUGM's policy to the

one at issue in *Amos*, that abstinence from same-sex relationships should be treated the same as abstinence from other dietary or recreational behaviors, such a conclusion would return Washington State to the days where being gay or bisexual was dismissed as a sordid vice and something that a person somehow "chose." This would render the existence of protected classes meaningless. Put another way, a tax on yarmulkes would be simply that – a tax on a form of headwear, not a tax on Jews. *See Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (summarizing that some conduct is so linked to a particular group of people that targeting it can readily be interpreted as an attempt to disfavor that group by stating that "[a] tax on wearing yarmulkes is a tax on Jews").

D. Amicis' attempt to re-litigate and overturn *Ockletree* should be rejected.

In *Ockletree*, a majority of this Court (the dissent and concurrence) formed a majority to issue a landmark decision that the WLAD's exemption for religious nonprofit employers was unconstitutional as applied to the plaintiff in that case. As noted above, *amici* Council for Christian Colleges & Universities *et al.* chooses to ignore *Ockletree* almost entirely, citing the case only once in its brief. By contrast, *amici* Association of Christian Schools International takes the opposite approach of essentially attempting to re-litigate *Ockletree*, devoting most of its brief to criticizing the analysis of both the dissent and the concurrence. Br. of Ass'n of Christian Schools Int'l at 10-19. The Court should reject this attempt to overturn *Ockletree*.

The extremity of *amici's* argument, that this Court ought to throw out its decision in *Ockletree,* is underscored by its assertion that the dissent's opinion is "entirely dependent" upon its conclusion that the religious employer exemption violates the Establishment clause of the First Amendment to the U.S. Constitution. Br. of *Amici* Ass'n of Christian Schools Int'l at 10. In fact, the *Ockletree* dissent's argument is dependent upon several other factors, including its conclusion that "exempting nonprofit religious employers from WLAD claims bestows a 'privilege' or 'immunity' on them" within the meaning of article I, § 12 (179 Wn.2d at 797) and that there are no "economic or regulatory distinctions" between religious and secular nonprofit organizations. 179 Wn.2d at 799.

Amici further ignore Mr. Woods' argument that article I, § 11 of the Washington Constitution does not protect the right to discriminate on the basis of sexual orientation because of the risk to peace and safety such discrimination presents. *See* App. Am. Opening Br. at 31-34. And if it did, the Court must recognize that heightened scrutiny must apply to any legislative exemption which burdens a vulnerable group while privileging another group.

Repeatedly, both *amici* express concerns to the Court that it should not engage in questions as to the religious nature of the ODLS staff attorney job duties, asserting that it is not for a court to determine whether such duties are religious or secular. *See* Br. of *Amici* Council of Christian Colleges and Universities, *et al.* at 7-13; Br. of *Amici* Ass'n of Christian Schools Int'l at 18-19. As Mr. Woods has noted before, however, prohibiting courts from

engaging in any inquiry about the religious nature of a job would effectively permit all religious employers to claim an unchallengeable blanket exemption from the WLAD simply by asserting that all its employees perform religious duties. App. Reply Br. at 17. SUGM's assertion to that effect only underscores the need for this Court to consider the peace, safety, and welfare of the people of Washington when reviewing religious exemptions, so that the fundamental right to be protected from discrimination is not curtailed by religious belief.

Amici's arguments, especially those of *amici* Council for Christian Colleges and Universities, *et al.*, are also muddled by their failure to distinguish caselaw which evaluates whether the nature of an institution in its entirety is pervasively religious or secular. *See* Br. of Amici Council of Christian Colleges and Universities, *et al.* at 9-13, citing *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) (evaluating whether an institution was sufficiently religious to exempt it from NLRB jurisdiction); *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (addressing a statutory distinction between "pervasively sectarian" and other religious schools). In this case, there is no dispute that SUGM is a religious organization, and therefore no need to argue about that question. Similarly, caselaw regarding distinctions between "worship services" and other activities, such as hiking and religious meetings, has only limited applicability to SUGM's claims, because the constitutionality of the religious employer exemption does not rely upon whether any particular staff attorney job duty is equivalent to a "worship service." *Id.*, citing *New*

York v. Cathedral Academy, 434 U.S. 125, 132, 98 S.Ct. 340, 54 L.Ed.2d. 346 (1977) (regarding state reimbursement of teacher-prepared tests and other educational activities); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (regarding use of public buildings for religious purposes excluding worship services); *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953) (regarding use of city parks for worship services but not religious meetings); *Grand County Board of Commissioners v. Colorado Property Tax Administrator*, 401 P.3d 561, 567 (Colo. Ct. App. January 14, 2016) (regarding whether hiking is a religious activity).

Amici attempt to apply these cases (notably, none arising in Washington) to Mr. Woods' situation only briefly, but incorrectly. They dismissively assert: "As applied in this case, the idea that a court could conclude, as Mr. Woods asserts, that SUGM's particular job requirements - accepting its statement of faith and attending staff meetings that include prayer - are not religious in nature is absurd on its face." Br. of *Amici* Council for Christian Colleges and Universities, *et al.* at 13. But Mr. Woods has not asserted that accepting SUGM's Statement of Faith or engaging in prayer with colleagues, at staff meetings or otherwise, is not religious in nature. His assertion, which *amici* leave unaddressed, is that the job duties of a staff attorney – advising and representing clients about secular areas of law, without regard to religious belief or sexual orientation – are not religious in nature, and that those duties must take precedent over any religious indoctrination or instruction (if any) because of the special

relationship required by the Rules of Professional Conduct between attorneys and their clients.

Nor does it infringe upon SUGM's religious beliefs to employ staff attorneys without discriminating on the basis of sexual orientation. Neither *amici* squarely address *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171, 132 S. Ct. 694, 181 L.Ed.2d 650 (2012), which addresses whether a religious employer may discriminate on grounds *other than* "co-religionism."[4] Indeed, *amici* barely acknowledge *Hosanna-Tabor* at all.

As previously addressed by Mr. Woods, SUGM's right to free exercise and expression is amply protected by the constitutionally-derived ministerial exemption, regardless of whether the WLAD has a religious nonprofit employer exemption or not. App. Am. Opening Br. at 35; CR 104 (Opposition to Summary Judgment). Moreover, applying the same careful analysis that the U.S. Supreme Court used in *Hosanna-Tabor*, Mr. Woods' role as an ODLS staff attorney – where he does not provide religious instruction, does not refer to religious texts, does not publicly disseminate the organization's religious views, and is bound by his primary duty to meet

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[4] *Amici* Council of Christian Colleges and Universities, *et al.* address *Hosanna-Tabor* only once, arguing that it created a religious exemption to a law that "interfere[d] with an internal church decision that affects the faith and mission of the church itself." Br. of *Amici* Council for Christian Colleges and Universities, *et al.* at 16. *Amici's* reading of *Hosanna-Tabor* misses the mark; while the court held the church to be exempt from the Americans with Disabilities Act, it did so only after performing a searching analysis of the employee's job duties and role within the organization and determining that the employee held sufficient leadership and religious instruction duties to afford a "ministerial exemption" to the employer. It did not create a blanket exemption to the antidiscrimination law for religious employers as related to any employee determined to have duties which touch on religion.

the legal needs of his client – cannot be viewed as ministerial in nature. *See* App. Am. Br. at 26-27; App. Reply Br. at 22-23. At a minimum there are genuine disputed issues of material fact regarding the religious nature of a staff attorney's job duties, which should have precluded the trial court from granting summary judgment in SUGM's favor.

E. SUGM's right to freedom of association is not infringed by treating Mr. Woods the same as a heterosexual applicant.

Amici Council for Christian Colleges and Universities *et al.* assert that SUGM's right to free association would be infringed, as a form of religious free exercise and expression, if the religious nonprofit employer exemption were held to be unconstitutional as applied to Mr. Woods' application for employment with ODLS. Br. of *Amici* Council for Christian Colleges and Universities *et al.* at 3-6. This argument fails for multiple reasons, particularly under the record in this case.

In *Hosanna-Tabor*, the U.S. Supreme Court noted that the right to freedom of association "is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor*, 565 U.S. at 189. A religious employer's rights to freedom of association are the same as the rights of a secular employer, *id.,* and the Supreme Court has recognized before that a secular employer does not have a freedom of association right to engage in employment discrimination. *See Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). When the "ministerial exception" recognized in *Hosanna-Tabor* is not implicated, all employers,

whether secular or religious, do not have a First Amendment right to engage in employment discrimination. If such a sweeping right to discriminate in employment based the right to freedom of association existed, then the ministerial exception recognized in *Hosanna-Tabor* would have been unnecessary because anti-discrimination laws would not protect any employee, whether ministerial or not.

Amici attempt to support their freedom of association argument by citing to *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) without any discussion of the case. However, even if *Dale* were applicable in an employment discrimination case, the *Dale* test does not support a finding that SUGM's right to freedom of association would be infringed based on the record before this Court.

In *Dale*, the Court applied a three-part test to ultimately determine that the Boy Scouts of America could expel an assistant scoutmaster from membership on the basis of his sexual orientation.[5] First, the Court must determine whether SUGM engages in expressive association. *Id.* at 648. Mr. Woods does not dispute that SUGM does. Next, the Court must determine whether the existence of any contrary message significantly burdens expression: that is, "if the presence of that person affects in a

[5] The Boy Scouts of America has reversed its position on membership of LGBTQ scouts and scoutmasters, and recently began extending membership to girls. *See* Kurtis Lee, *Here is How the Boy Scouts Has Evolved on Social Issues Over the Years*, L.A. Times, Feb. 5, 2017, *available at* https://www.latimes.com/nation/la-na-boy-scouts-evolution-2017-story.html (last viewed 2/23/2017); Kurtis Lee; *First Came Acceptance of Gay and Transgender Scouts. Now Girls Can Be Boy Scouts*, L.A. Times, Oct. 11, 2017, *available at* https://www.latimes.com/nation/la-na-boy-scouts-girls-20171011-story.html (last viewed 2/23/2017).

significant way the group's ability to advocate public or private viewpoints." *Id.* at 653. Here, SUGM cannot show that treating Mr. Woods' application for employment equally to a heterosexual applicant's would significantly burden its expression. SUGM requires, as a job qualification, that ODLS staff attorneys demonstrate respect and understanding for diversity, including sexual orientation, and that they be respectful of doctrinal differences. CP 132, 702 (Pallas 86:17-25), 727 (Mace 53:18–54:12). Moreover, SUGM did not deny Mr. Woods because he engaged in advocacy. He was immediately disqualified as soon as he disclosed his relationship with another man in a private email to David Mace at ODLS. App. Reply Br. at 3.

Mr. Woods made this private disclosure voluntarily. Notably, SUGM asked neither Mr. Woods nor any other candidate to disclose their sexual orientation in the course of applying for employment. Had Mr. Woods not disclosed it voluntarily, there is no reason to believe his relationship would have impacted SUGM at all. *Id.* at 3-4.

Furthermore, as a staff attorney at ODLS, Mr. Woods would not perform the duties of religious education or indoctrination deemed "ministerial" by the U.S. Supreme Court. App. Am. Opening Br. at 9, 26-27. The Boy Scouts of America is a membership organization, and it expelled Mr. Dale from membership, not a job. 530 U.S. at 643.

In any case, the U.S. Supreme Court has not found freedom of expressive association to be an absolute right. It may be overridden "by regulations adopted to serve compelling state interests, unrelated to the

suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (citations omitted). Here, Washington's compelling interest in prohibiting discrimination against protected classes is uncontroverted. *See* App. Am. Opening Br. at 30, 32-33. Indeed, this same interest has also been recognized specifically as related to religious hiring practices. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014)) (rejecting "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction" because "[t]he Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race").

Finally, Mr. Woods is bringing an as-applied challenge to the constitutionality of the religious nonprofit employer exemption to the WLAD, specifically related to his desire to work as an ODLS staff attorney, where he would provide legal advice and representation to unhoused individuals without regard to sexual orientation, religious belief, or any other protected class. The concerns, associational and expressive, raised by *amici* with respect to religious education institutions, *see* Br. of *Amici* Ass'n of Christian Schools Int'l, *et al.*, at 19, are not at issue in this litigation, and have already been adequately addressed by the U.S. Supreme Court in *Hosanna-Tabor*. The Court need not address *amici's* concerns here.

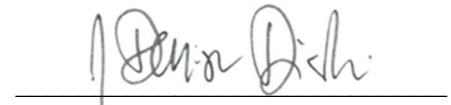
III. Conclusion

In effect, a*mici* ask this Court to overturn its decision in *Ockletree* and to permit all religious nonprofit employers in Washington to enjoy an unlimited exemption from Washington's employment anti-discrimination laws. They make this request despite a nearly complete failure to address the provisions and requirements of the Washington Constitution at issue in this case, particularly the requirements of article I, § 12. *Amici's* audacious request should be rejected. Instead, this Court should resist *amici's* invitation to ignore the facts and Washington law, and instead closely examine the record before the Court and applicable Washington law. Mr. Woods respectfully asks that this Court interpret and apply the Court's decision in *Ockletree* to the specific facts of this case.

DATED THIS MARCH 8, 2019.

Respectfully submitted,

TELLER & ASSOCIATES, PLLC



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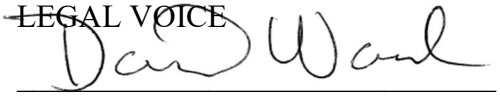

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 8th day of March 2019, I served the foregoing APPELLANT'S SECOND AMENDED ANSWER TO BRIEFS OF AMICI CURIAE with the Clerk of the Court via e-filing and Respondent's counsel via email:

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Comments:

Second Amended Answer to Amicus Curiae, correcting various typographical and formatting errors. No change was made to content or substance other than these corrections, and any changes to pagination in the TOA or TOC is the result of these changes.

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