No. 96132-8

SUPREME COURT OF WASHINGTON

MATTHEW S. WOODS,

Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, THE ASSOCIATION FOR BIBLICAL HIGHER EDUCATION IN CANADA AND THE UNITED STATES, AND THE ASSOCIATION OF CLASSICAL CHRISTIAN SCHOOLS

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I. INTRODUCTION AND ISSUE PRESENTED

In *Ockletree v. Franciscan Health Sys.*, 179 Wn. 2d 765, 317 P.3d 1009 (2014), a divided Court held that the Legislature's exclusion of nonprofit religious organizations from the definition of employers subject to discrimination lawsuits, RCW 49.60.040(11), conferred an unconstitutional privilege and immunity in violation of Wash. Const. Art. I, § 12, as applied to an employee whose claims of discrimination and job duties were wholly unrelated to any religious purpose, practice, or activity. This appeal requires the Court to determine whether the exclusion is constitutionally permissible as applied to a prospective employee who is not hired because he expresses disagreement with a nonprofit religious organization's conception of the religious nature of his employment as well as the organization's mission, statement of faith, and standards of conduct.

II. IDENTITY AND INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the American Association of Christian Schools ("AACS"), the Association for Biblical Higher Education in Canada and the United States ("ABHE"), and the Association of Classical Christian Schools ("ACCS").

AACS, founded in 1972, is a nonprofit federation of 38 state and regional Christian school organizations and two international Christian school organizations, representing more than 750 primary and secondary

schools, which enroll nearly 100,000 students, including six schools in Washington State. AACS provides educational programs and services to its constituent schools, including teacher certification, school improvement, and accreditation, all of which are designed to integrate the Christian faith with learning to educate young people to live as good citizens according to the principles of their faith. AACS accreditation is widely recognized by state approving agencies and the U.S. Department of Homeland Security for the Student Exchange Visitor Program.

ABHE, founded in 1947, is a nonprofit network of more than 150 institutions of higher education, throughout Canada and the United States, which enroll more than 50,000 students. ABHE supports academically rigorous education that challenges students to develop critical thinking skills, a biblically grounded Christian worldview, and a manner of living consistent with that worldview. ABHE also provides accreditation of undergraduate and graduate educational programs, and has been recognized by the U.S. Department of Education as a postsecondary accrediting agency since 1952.

ACCS, founded in 1994, is a nonprofit organization of over 290 classical Christian schools located throughout the United States, including Washington State. ACCS assists its member schools in providing a classical education in light of a Christian worldview that cultivates a Christian way

of life. ACCS also accredits member schools that meet its educational requirements.

These educational organizations, along with their member schools, operate according to statements of faith and codes of conduct. These statements of faith and codes of conduct are essential to fulfilling their respective missions because they rely on the employment of administrators, faculty and staff, who will not just impart information about the faith to students, but who will also model the faith themselves and mentor the students as they incorporate the faith into their own lives.

III. STATEMENT OF THE CASE[1]

Seattle's Union Gospel Mission ("SUGM") is a nonprofit Christian ministry formed for the purpose of "preaching the gospel of Jesus Christ by conducting rescue mission work in the City of Seattle, and to carry on such work as may be necessary or convenient for the spiritual, moral and physical welfare of any of those with whom it may work[.]" CP 72 (brackets added). SUGM started by serving meals to homeless people during the Great Depression. Over the years, it has expanded to include over 20 different programs serving poor and vulnerable populations in the Seattle area, including provision of food, transitional housing, education, job placement,

[1] The facts are drawn from the briefing of the parties and cited portions of the record. *See* Amended Brief of Appellant, at 1-3 & 4-13 ("Woods Br."); Brief of Respondent, at 1-11 ("SUGM Br.").

mental health and addiction programs, dental care, and a legal aid clinic. All of these programs are deemed to be in service of, and subordinate to, the "preaching of the gospel." "[A]ny phase of the work other than direct evangelism shall be kept entirely subordinate and only taken on so far as seems necessary or helpful to the spiritual work" of SUGM. CP 72 (brackets added).

SUGM employs approximately 200 people in order to carry out its mission. As conceived by SUGM, the primary responsibility of all employees is to "share the gospel of Jesus Christ." SUGM Br., at 3. To ensure that they are able to fulfill this responsibility, SUGM requires its employees to affirm its Statement of Faith and follow its Standards of Conduct. Among other points of doctrine, the Statement of Faith attests that "the Bible is the inspired, infallible, authoritative Word of God. *Id.* SUGM understands this statement as incorporating traditional Biblical sexual morality, as well as other teachings. *See* SUGM Br., at 44 & n.16. Prospective employees are asked whether they have carefully read the Statement of Faith, and whether they are able to agree to it without reservation. *See* CP 318. In the hiring process, they are evaluated based on their ability to faithfully represent SUGM's beliefs to the populations it serves.

SUGM's Standards of Conduct are described in its employee handbook. Among other specific conduct requirements, they provide that "all staff members are expected to live by a Biblical moral code which excludes extra-marital affairs, sex outside of marriage, homosexual behavior, drunkenness, illegal behavior, use of illegal drugs and any activity which would have the appearance of evil." CP 346.

Matthew S. Woods ("Woods") applied for employment as a staff attorney in SUGM's legal aid clinic, known as "Open Door Legal Services" or "ODLS." The job posting required candidates for the position to agree with the Statement of Faith. CP 402. It also required candidates to be able to "share the gospel of Jesus Christ" in the course of their work. *Id.*

Woods had previously volunteered for ODLS and affirmed the Statement of Faith without expressing any reservation. Before applying for the staff attorney position, however, he disclosed that he was in a same-sex relationship, and asked how that would fit in with SUGM's religious beliefs. After being informed about SUGM's understanding of the Statement of Faith and its Code of Conduct, Woods urged SUGM to change its religious beliefs about sexual morality and how those beliefs relate to the mission of SUGM. *See* Woods Br., at 12 (quoting CP 135).

SUGM declined to hire Woods, and he subsequently filed suit alleging sexual orientation discrimination in violation of the Washington

Law Against Discrimination ("WLAD"), Ch. 49.60 RCW. Woods acknowledges that he was not hired because of SUGM's religious beliefs, and that these beliefs are sincerely held. Woods Br., at 26 & 34; Reply Brief of Appellant, at 4 ("Woods Reply").

The superior court granted SUGM's motion for summary judgment and dismissed Woods' complaint based on RCW 49.60.040(11), which excludes nonprofit religious organizations from the definition of employers subject to suit under the WLAD. On appeal, he argues primarily that the nonprofit religious employer exemption from the WLAD is unconstitutional as applied to him "because of the secular nature of the attorney work performed by ODLS lawyers." *Id.*[2] In making this argument, he separates the duties of the job from the mission of SUGM, and urges the Court to remand the case for fact-finding regarding whether the duties are secular or religious. It is unclear whether he believes the constitutionality of the nonprofit religious employer exemption as applied to him hinges on whether the job duties are wholly, primarily, or only partly secular. At various points in his briefing, he characterizes the job as merely "focusing

[2] Woods also argues that the Court should apply strict scrutiny to RCW 49.60.040(11) under what appears to be traditional equal protection analysis, on grounds that the statute infringes a fundamental right to be free from discrimination in private employment and/or a suspect or semi-suspect class based on sexual orientation. *See* Woods Br., at 27-30; Woods Reply, at 12-13 & n.2. This argument is not addressed in this amicus brief.

on" or "involving" secular legal services.[3] At other points, he suggests the job consists solely of secular legal services.[4] For its part, SUGM maintains that its religious beliefs and related standard of conduct cannot be separated from the job duties.

IV. ARGUMENT

A. Washington Constitution Art. I, § 12, subjects legislative classifications that implicate "fundamental rights of citizenship" to "reasonable grounds" scrutiny; under this provision, fundamental rights of citizenship are defined narrowly with reference to rights recognized at common law when the constitution was adopted.

Washington Constitution Art. I, § 12, 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.

This provision was, for many years, treated as coextensive with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, *See Ockletree,* 179 Wn. 2d at 776 (C. Johnson, J., lead opinion); *id.* at 791 (Stephens, J., dissenting). However, in *Grant County Fire Prot. Dist. v. City of Moses Lake,* 145 Wn. 2d 702, 42 P.3d 394 (2002) (*Grant I*), *rev'd in part,*

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[3] *See* Woods Br., at 2 (stating "the employment focuses on providing secular legal services" and "[t]he staff attorney job involved providing secular legal services"); *id.* at 5 (stating the work "focused on obtaining secular legal remedies for clients").

[4] *See* Woods Br., at 9 (stating "ODLS only provides secular legal services"); *id.* at 21 (stating "the work performed by ODLS was no different than what he does as a legal aid attorney at his current secular position"); *id.* at 24 n.4 (stating ODLS legal advice "is not influenced by religious ministration"); *id.* at 28 (stating "ODLS provides secular legal services").

150 Wn. 2d 791, 83 P.3d 419 (2004) (*Grant II*), the Court held that Art. I, § 12, has additional significance, apart from traditional equal protection analysis. *See Ockletree*, 179 Wn. 2d at 776 (C. Johnson, J.); *id.* at 791 (Stephens, J.).

Following *Grant I* and *II*, the Court employs a two-step analysis of legislative classifications under Art. I, § 12. In the first step, the Court considers whether the law in question implicates a "fundamental right of citizenship." To define fundamental rights of citizenship, the Court has consistently turned to its decision in *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902), which states in pertinent part:

> The privileges and immunities therein referred to [i.e., in Art. I, § 12] pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defendant 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. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

(Brackets added); *see Ockletree*, 179 Wn. 2d at 778 (C. Johnson, J., quoting *Vance*); *id.* at 793 (Stephens, J., same).[5]

[5] *Accord Association of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wn.2d 342, 360, 340 P.3d 849 (2015); *Schroeder v. Weighall*, 179 Wn.2d 566, 572-73 & n.5, 316 P.3d 482 (2014); *American Legion Post #149 v. Washington*

The rights in question are narrowly defined to reflect the context in which the particular case arises, and "[m]uch of [this Court's] article I, section 12 jurisprudence has narrowed the classification of the rights asserted." *See Association of Washington Spirits,* 182 Wn. 2d at 360-61 & n.6 (defining right at issue as right to sell alcohol rather than the right to carry on a business, and stating "[w]e have also rejected attempts to assert the right to carry on business when a narrower, nonfundamental right is truly at issue"; brackets added).[6] This avoids excessive judicial impingement on legislative authority that would otherwise result from defining fundamental rights of citizenship at a high level of generality.

Fundamental rights of citizenship are also defined in a way that is consistent with the intent of the drafters of Art. I, § 12. *See Vance,* 29 Wash. at 458-59 (indicating fundamental rights of citizenship "may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law").[7] This includes consideration of whether the rights in question existed at common law when the constitution

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State Dep't of Health, 164 Wn.2d 570, 607, 192 P.3d 306 (2008); *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 103, 178 P.3d 960 (2008); *Madison v. State*, 161 Wn.2d 85, 95, 163 P.3d 757 (2007) (Fairhurst, J., lead opinion); *Grant II*, 150 Wn. 2d at 812-14.

[6] *See also American Legion*, 164 Wn. 2d at 607-08 (defining right at issue as right to smoke inside place of employment rather than the right to carry on a business); *Grant II*, 150 Wn. 2d at 815 (defining right at issue as right to petition for annexation rather than right to vote or petition government for redress of grievances).

[7] *See also Ockletree*, 179 Wn. 2d at 778 (C. Johnson, J., quoting *Vance* with approval for this proposition); *Grant II*, 150 Wn. 2d at 814 (same); *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) (quoting *Ockletree* lead opinion and *Vance*).

was adopted,[8] in accordance with the Court's approach to interpretation of other provisions of the state constitution.[9] It does not mean that the scope of fundamental rights of citizenship is "frozen in time" as of 1889, when the state constitution was adopted, but such rights should be defined in a way that is analogous to the original understanding. *See Sofie*, 112 Wn. 2d at 649.

Most cases following *Grant I* and *II* have determined that the law in question does not implicate a fundamental right of citizenship and therefore does not confer a privilege or immunity within the meaning of Art. I, § 12.[10] However, if the law does implicate a fundamental right of citizenship, then

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[8] *See Schroeder*, 179 Wn. 2d at 573 (stating "[t]his court has long recognized that the privileges and immunities contemplated in article I, section 12 include the right to pursue common law causes of action in court"; brackets added); *Cotten v. Wilson*, 27 Wn. 2d 314, 178 P.2d 287 (holding statute that increased the common law standard of liability for certain common carriers, from slight negligence to gross negligence, conferred an unconstitutional privilege and immunity).

[9] *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711, 780 P.2d 260 (1989) (holding right to jury trial attaches to actions in which a jury was available at common law when the state constitution was adopted); *State ex rel. Macri v. City of Bremerton*, 8 Wn. 2d 93, 109, 111 P.2d 612 (1941) (explaining state constitutions are documents of first principles that contemplate, without necessarily enumerating, protections of common law existing at the time the constitution was adopted).

[10] *See, e.g., Association of Washington Spirits*, 182 Wn.2d at 362 (holding right to sell and distribute alcohol does not implicate a privilege under Art. I, § 12); *American Legion*, 164 Wn. 2d at 608 (holding no fundamental right to smoke inside place of employment); *Ventenbergs*, 163 Wn. 2d at 103-04 (holding no fundamental right to provide a government service); *King v. King*, 162 Wn.2d 378, 397, 174 P.3d 659 (2007) (holding no fundamental right to counsel in marital dissolution proceedings); *Madison*, 161 Wn. 2d at 95-98 (3-Justice lead opinion by Fairhurst, J., stating fundamental right to vote does not include class of convicted felons who cannot meet statutory criteria for restoration of right); *id.*, 161 Wn. 2d at 121 (2-Justice concurrence by J.M. Johnson, J.); *Grant II*, 150 Wn. 2d at 813 (holding statutory authorization to commence annexation proceedings by petition does not involve fundamental right).

it is deemed to confer a special privilege or immunity, and the Court moves to the next step of the analysis, i.e., whether there are "reasonable grounds" for granting such a privilege or immunity. This analysis focuses on whether "there is a reasonable ground for distinguishing between those who fall within the class and those who do not."[11] The distinctions must rest on "real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act."[12]

B. In *Ockletree v. Franciscan Health Sys.* a divided Court held the nonprofit religious employer exemption from discrimination claims under the WLAD violated Art. I, § 12, as applied to an employee whose claims of discrimination and job duties were wholly unrelated to any religious beliefs, practices, or activities of the employer.

In *Ockletree*, the U.S. District Court for the Western District of Washington certified questions to this Court, asking whether the Legislature's exclusion of nonprofit religious organizations from the definition of employers subject to claims of discrimination under the WLAD violates Art. I, § 12, either on its face or as applied to an employee whose claims of discrimination were wholly unrelated to the organization's religious beliefs, practices, or activities. *See* 179 Wn. 2d at 772 (C. Johnson,

[11] *See Ockletree*, 179 Wn. 2d at 783 (C. Johnson, J., quoting *Grant I*, 145 Wn. 2d at 731); *id.* at 797 (Stephens, J., quoting *Grant I*).
[12] *Ockletree*, 179 Wn. 2d at 783 (C. Johnson, J., quoting *State ex rel. Bacich v. Huse*, 187 Wash. 75, 84, 59 P.2d 1101 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn. 2d 939, 947, 603 P.2d 819 (1979)); *id.* at 797 (Stephens, J., quoting *Bacich*).

J., quoting certified questions). This exemption for nonprofit religious employers has been part of the WLAD since it was enacted in 1949. *See Farnam v. CRISTA Ministries*, 116 Wn. 2d 659, 673 n.4, 807 P.2d 830 (1991) (discussing history of definition/exemption).

Originally, the definition of employers subject to the WLAD excluded both secular and religious nonprofits.[13] This exclusion essentially mirrored the charitable immunity that prevailed at common law when the WLAD was adopted.[14] The definition was amended in 1957 to eliminate the exemption for secular nonprofits, but the amendment retained the exemption for religious nonprofits in its current form.[15] This amendment followed the elimination of charitable immunity at common law.

In answering the certified questions, there appeared to be unanimous agreement among the members of the Court that the nonprofit religious exemption did not facially violate Art. I, § 12. The 4-Justice lead opinion

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[13] *See* Laws of 1949, Ch. 183, § 3(b) (providing "[t]he term 'employer' includes any person acting in the interest of an employer, directly, or indirectly, who has eight (8) or more persons in his employ, *and does not include any religious, charitable, educational, social or fraternal association or corporation, not organized for private profit*"; brackets & emphasis added).

[14] *See Pierce v. Yakima Valley Mem'l Hosp. Ass'n*, 43 Wn.2d 162, 163, 260 P.2d 765 (1953) (abandoning common law charitable immunity, in case involving claim of paying customer against nonprofit hospital); *see also Friend v. Cove Methodist Church, Inc.*, 65 Wn.2d 174, 179, 396 P.2d 546, 550 (1964) (confirming "charitable immunity was abandoned in its entirety by this court in *Pierce*," in a case involving claim against church).

[15] *See* Laws of 1957, Ch. 37, § 4 (providing "'Employer' includes any person acting in the interest of an employer, directly, or indirectly, who has eight or more persons in his employ, *and does not include any religious or sectarian organization not organized for private profit*"; emphasis added; currently codified at RCW 49.60.040(11)).

by Justice Charles Johnson rejected both facial and as-applied challenges to the nonprofit religious employer exemption, reasoning primarily that the exclusion does not create a privilege or immunity that implicates the constitutional provision.[16] The lead opinion rejected the employee's argument that "a cause of action for discrimination by a private actor in a private employment setting is a fundamental right of citizenship[,]" because "discrimination in employment cannot 'be said to come within the prohibition of the constitution[.]'" 179 Wn. 2d at 779-80 (quoting *Vance*; brackets added). The lead opinion also rejected the employee's argument that the exemption from discrimination "implicates the fundamental right to carry on business within the state" because nonprofits run by religious organizations were not the type of powerful business interests that the framers of article I, section 12 had in mind when drafting that section." *Id.* at 781 & 782. The lead opinion went on to state that, even if the nonprofit religious employer exemption were deemed to confer a privilege or immunity implicating the constitutional provision, it would nonetheless satisfy reasonable grounds scrutiny because it "accommodates the broad protections to religious freedoms afforded by" the Washington Constitution

[16] *See* 179 Wn. 2d at 782 (concluding that "article I, section 12 does not apply to invalidate the religious nonprofit exemption in WLAD"); *id.* at 788-89 (answering certified question by stating "WLAD's definition of 'employer' under RCW 49.60.040(11) does not involve a privilege or immunity, and therefore does not violate article I, section 12's privileges and immunities clause").

and "gives effect to these protections by choosing to avoid potential entanglements between the state and religion that could occur in enforcing WLAD against religious nonprofits." *Id.* at 785.[17]

While the 4-Justice dissenting opinion by Justice Stephens did not specifically state that the nonprofit religious employer exemption is facially constitutional, the dissent acknowledged the "uncontroversial proposition" that "religious institutions hold a special place in our society and may be granted certain statutory exemptions without offending the constitution," which is consistent with facial constitutionality. *See* 179 Wn. 2d at 789. The dissent otherwise carefully limited its discussion to the as-applied challenge to the nonprofit religious employer exemption.[18]

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[17] While the dissent correctly notes that the lead opinion does not specifically address the as-applied challenge, *see* 179 Wn. 2d at 789 n.14 (Stephens, J.), the lead opinion's rationales would seem to necessarily preclude a finding that the nonprofit religious employer exemption was unconstitutional as applied.

[18] *See* 179 Wn. 2d at 789 (stating "[t]he broad exemption of religious nonprofit corporations from Washington's Law Against Discrimination (WLAD), at RCW 49.60.040(11), cannot constitutionally be *applied* to allow race or disability discrimination against a hospital security guard"; brackets & emphasis added); *id.* at 789 (stating "I would hold the exemption violates this provision *as applied* to WLAD claims based on discrimination that is unrelated to an employer's religious purpose, practice, or activity"; emphasis added); *id.* at 804 (stating "I would hold it [i.e., the nonprofit religious employer exclusion] is invalid *as applied* to Ockletree and all similarly situated plaintiffs"; brackets & emphasis added); *id.* at 804 (stating "[*a*]s *applied* to Ockletree, the WLAD exemption immunizes FHS from potential liability for employment discrimination based on grounds unrelated to its religious beliefs or practice …. I would answer yes to certified question number 2 and hold that RCW 49.60.040(11) cannot be *applied* to bar WLAD claims alleging race or disability discrimination"; brackets, emphasis & ellipses added); *id.* at 804 n.6 (stating "I would hold only that portion of RCW 49.60.040(11) granting a privilege to religious nonprofits invalid, and only *as applied* to plaintiffs whose dismissal was unrelated to their employers' religious beliefs or practices"; emphasis added).

The concurrence in part by Justice Wiggins expressly agreed with the lead opinion's conclusion that the nonprofit religious employer exemption is facially constitutional.[19] The concurrence further agreed that the exemption can be "constitutionally applied in cases in which the job description and responsibilities include duties that are religious or sectarian in nature" because "it was reasonable for the legislature to exempt religious nonprofit organizations from the definition of 'employer' in order to promote two goals: avoiding excessive entanglement with religious doctrines and practices and facilitating the free exercise of religion guaranteed by our Washington Constitution." *Id.* at 806.

A 5-Justice majority of the Court, comprised of the dissent and concurrence, agreed that the nonprofit religious employer exemption implicates Art. I, § 12, but the dissent and concurrence did not expressly agree on the rationale supporting this conclusion. The dissent concluded that "exempting nonprofit religious employers from WLAD claims bestows a 'privilege' or 'immunity' on them within the meaning of the article I, section 12 privileges and immunities clause," based primarily on the expansive statement of purpose underlying the WLAD, which "makes clear

[19] *See* 179 Wn. 2d at 805 (Wiggins, J., stating "I agree with the lead opinion's conclusion that Washington's Law Against Discrimination's (WLAD) definition of "employer" is not *facially* unconstitutional"; footnote omitted & emphasis added); *id.* at 806 (stating "[r]egarding the first certified question, I would answer that the statute is not *facially* unconstitutional"; brackets & emphasis added).

that employment free from discrimination rests at the core of the sort of 'personal rights' this court in *Vance* identified as fundamental." *Id.* at 795-96 (citing RCW 49.60.010, .020 & .030).[20]

In his concurrence, Justice Wiggins stated only that "I agree with the dissent that the exemption of religious and sectarian organizations in RCW 49.60.040(11) is subject to scrutiny under the privileges and immunities clause of article I, section 12 of the Washington Constitution[,]" without elaborating on the basis for his agreement. 179 Wn. 2d at 806 (brackets added). He otherwise noted that he concurred only "in the result reached by the dissenting opinion," without expressly adopting its rationale. *Id.* at 805.

The same 5-Justice majority, comprised of the dissent and the concurrence, also agreed that the nonprofit religious employer exemption cannot withstand reasonable grounds scrutiny under the circumstances present in *Ockletree*, but they disagreed regarding the rationale for this conclusion. The dissent concluded that the exemption is unreasonable under Art. I, § 12, because a blanket exemption from suit privileges religious nonprofits over secular nonprofits and violates the Establishment Clause of

[20] The dissent also relied on the decision in *Cotten v. Wilson*, 27 Wn. 2d 314, 317, 178 P.2d 287 (1947), which held that a statute increasing the common law standard of liability for certain common carriers, from slight negligence to gross negligence, conferred an unconstitutional privilege and immunity. *See* 179 Wn. 2d at 796 (Stephens, J.).

the First Amendment to the U.S. Constitution. 179 Wn. 2d at 797-804. In keeping with the premise embedded in the certified questions, the dissent emphasized the lynchpin of its analysis was the fact that the alleged reasons for discrimination were wholly unrelated to the employer's religious beliefs, practices, or activities.[21]

The concurrence focused on the employee's job duties, rather than the claim of discrimination, reasoning that focusing on the claim of discrimination

> requires courts to engage in excessive entanglement with religious doctrines and practices. Washington courts would be asked to determine what constitutes a particular religion's purpose, practice, and activity and determine whether the reason for discrimination is related. This is an intrusive inquiry into religious doctrine.

179 Wn. 2d at 805-06 (Wiggins, J.). The concurrence further reasoned that focusing on job duties "permits an objective examination of an employee's job description and responsibilities in the organization." *Id.* at 806. Despite the difference in focus, the lynchpin of the concurrence's analysis was

[21] *See* 179 Wn. 2d at 789 (Stephens, J., criticizing lead opinion for "disclaiming any limits on the ability of religious-affiliated corporations to engage in discrimination *unrelated to their religious beliefs or practices*"; emphasis added); *id.* at 789 (stating the religious nonprofit employer exemption violates Art. I, § 12, as applied to "claims based on discrimination that is *unrelated to an employer's religious purpose, practice, or activity*"; emphasis added); *id.* at 789 n.14 (criticizing lead opinion for failing to explain how the nonprofit religious employer exemption can be applied to allow employment discrimination on grounds "*wholly unrelated to religious exercise*"; emphasis added); *id.* at 804 (stating the "exemption immunizes [a nonprofit religious employer] from potential liability for employment discrimination based on grounds *unrelated to its religious beliefs or practice*"; brackets & emphasis added); *id.* at 804 (noting the "WLAD grants immunity from discrimination claims that are *unrelated to the employer's religious beliefs*"; emphasis added).

similar to the dissent, i.e., "there is no reasonable ground for distinguishing between a religious organization and a purely secular organization," because "there is no relationship between [the employee's] duties and religion or religious practices." *Id.* (brackets added).

C. While the Court could distinguish *Ockletree* and find reasonable grounds to uphold the religious employer exemption as applied to this case because Woods' claims of discrimination and job duties are both related to SUGM's admittedly sincere religious beliefs, the Court should take the opportunity to hold that Art. I, § 12, is not implicated because there is no right to sue a nonprofit religious employer for discrimination under these circumstances.

The Court could conceivably distinguish *Ockletree* and find reasonable grounds to uphold the nonprofit religious employer exemption here because both Woods' claims of discrimination and the duties of the job he applied for are related to SUGM's religious beliefs. However, given the absence of express agreement by a majority of the Court regarding the rationale for holding the nonprofit religious employer exemption implicates Art. I, § 12, the Court has latitude to revisit the issue here and should do so to provide guidance to the bench and bar. "A plurality opinion has limited precedential value and is not binding on the courts." *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).[22] "Where there is no majority

[22] *See also State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) (citing *Isadore* with approval); *Lauer v. Pierce Cty.*, 173 Wn.2d 242, 258, 267 P.3d 988 (2011) (quoting *Isadore* with approval).

agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998).[23]

The dissenting and concurring opinions in *Ockletree* agreed only that the nonprofit religious employer exemption implicated Art. I, § 12, under the circumstances present in that case. The dissent reasoned that the exemption conferred a privilege or immunity because the employee's claims of discrimination were wholly unrelated to the employer's religious beliefs, practices or activities, based on the employee's fundamental right to be free from discrimination in employment. The concurrence reasoned that the exemption conferred a privilege or immunity because the employee's job duties were wholly unrelated to the employer's religious beliefs, practices or activities, without specifically identifying the fundamental right at issue. The language and reasoning of these opinions does not establish that the nonprofit religious employer exemption confers a privilege or immunity under the circumstances present in this case, where the employee's claim of discrimination and job duties are both related to the employer's religious beliefs.

[23] This is not a new issue because both parties address the extent to which *Ockletree* should be deemed precedential in this case. *See* Woods Br., at 18-20; SUGM Br., at 20-22. Moreover, SUGM argues that Woods' claim does not implicate a fundamental right of citizenship. *See* SUGM Br., at 37 n.11.

The Court should hold that there is no fundamental right of citizenship to sue nonprofit religious organizations for discrimination in employment when the claim of discrimination and/or the job duties relate to the employer's religious beliefs. The dissenting opinion in *Ockletree* relied on the right to obtain employment without discrimination recognized in and evidenced by the WLAD to conclude that the religious employer exemption implicated Art. I, § 12. This expansive definition of the right at issue was arguably warranted by the facts of *Ockletree* because the nonprofit religious employer sought to assert its exemption as a defense to claims of discrimination that were wholly unrelated to any religious belief, practice, or activity. However, a similarly expansive definition of the right at issue is not warranted here because Woods' claims of discrimination and his job duties are related to SUGM's religious beliefs.

As noted above, fundamental rights of citizenship should be defined narrowly in light of the context in which the particular case arises. *See Association of Washington Spirits*, 182 Wn. 2d at 360-61 & n.6. The provisions of the WLAD were adopted "in fulfillment of the provisions of the Constitution of this state concerning civil rights." RCW 49.60.010. Those civil rights include freedom of religion and the right to be free from discrimination based on "creed," no less than sexual orientation or any other protected classification under the WLAD. *See* RCW 49.60.010, .020,

.030(1); Wash. Const. Art. I, § 11. Although it is phrased as an exclusion from the definition of employers subject to suit under the WLAD, the nonprofit religious employer exemption is a means of "avoiding excessive entanglement with religious doctrines and practices and facilitating the free exercise of religion guaranteed by our Washington Constitution," as both the lead opinion and concurrence in *Ockletree* recognized. *See* 179 Wn. 2d at 785 (C. Johnson, J.); *id*. at 806 (Wiggins, J.). It is no less substantive, just because it is definitional. In this way, the nonprofit religious employer exemption inheres in and should modify the definition of the fundamental rights of citizenship recognized in and evidenced by the WLAD.

Also as noted above, fundamental rights of citizenship should be defined in a way that is consistent with the intent of the drafters of Art. I, § 12, as reflected in the state of the common law when the constitution was adopted. *See Vance,* 29 Wash. at 458-59; *Sofie,* 112 Wn. 2d at 648-49. The fact that nonprofit religious employers were entitled to claim charitable immunity at common law is indicative that the drafters did not contemplate a right to sue such employers. The nonprofit religious employer exemption to the WLAD is analogous to common law charitable immunity, no less than the right to sue for discrimination under the WLAD is analogous to the "'personal rights' this court in *Vance* identified as fundamental." 179 Wn. 2d at 795 (Stephens, J.). Accordingly, regardless of whether there is a

fundamental right to citizenship to sue for discrimination in other contexts, there is no fundamental right of citizenship to sue a nonprofit religious organization for employment discrimination when the claim of discrimination or job duties relate to the organization's religious beliefs.

VII. CONCLUSION

The Court should resolve this appeal in accordance with the analysis set forth in this brief, and hold that that Art. I, § 12, is not implicated in this case because there is no fundamental right of citizenship to sue nonprofit religious organizations for employment discrimination when the claim of discrimination and/or the job duties relate to the organization's religious beliefs.

DATED this 26th day of August, 2019.

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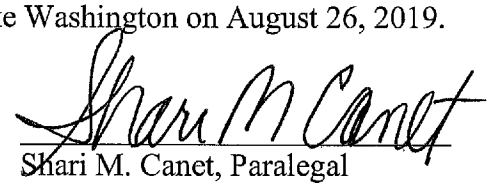

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