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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.

**BRIEF OF AMICI THE CENTER FOR JUSTICE, ENTRE
HERMANOS, GENDER JUSTICE LEAGUE, GREATER SEATTLE
BUSINESS ASSOCIATION, INGERSOLL GENDER CENTER,
LAVENDER RIGHTS PROJECT, LEGAL COUNSEL FOR
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I. IDENTITY AND OF INTEREST OF AMICI CURIAE

The Court's decision on whether Seattle's Union Gospel Mission (SUGM) may discriminate against LGBTQ job applicants at its Open Door Legal Services (ODLS) program will affect vulnerable communities who depend on SUGM and other religious organizations for legal assistance. Although amici deeply appreciate that SUGM provides services to some members of our community facing the greatest need, it is important to understand that SUGM's discriminatory practices affect not only prospective employees, but also a significant proportion of the population that SUGM serves or may be called upon to serve.

Amici curiae include nonprofit organizations that represent and serve LGBTQ persons, including those who are unhoused, and that employ staff to serve these communities. The amici are the Center for Justice, Entre Hermanos, Gender Justice League, Greater Seattle Business Association (GSBA), Ingersoll Gender Center, Lavender Rights Project, Legal Counsel for Youth and Children (LCYC), and YouthCare. Each of the amici has a strong connection to the LGBTQ community, which is the object of the discriminatory employment practice at issue in this litigation. Amici the Center for Justice, Entre Hermanos, Lavender Rights Project, and LCYC provide direct legal services, including to members of the LGBTQ community. Approximately 20% of youth served through

LCYC's Youth Homelessness Program identify as LGBTQ. Amicus GSBA is Washington State's LGBTQ and allied chamber of commerce, which strives to combine business development, leadership, and social action to expand economic opportunities for the LGBTQ community and its supporters. Amicus Gender Justice League is a gender and sexuality human and civil rights organization providing direct services and community referrals to people experiencing homelessness and gender-based violence. Ingersoll Gender Center, one of the oldest organizations by and for transgender and gender nonconforming communities in the country, provides support groups, advocacy, community organizing, and educational resources. Finally, amicus YouthCare is one of the first runaway and homeless youth shelters on the West Coast, and frequently serves the LGBTQ community because of the high prevalence of LGBTQ youth who experience homelessness.

Amici file this brief to underscore the importance of staffing support services in a way that reflects the communities being served and to describe the harms experienced by unhoused LGBTQ people when they cannot be served by members of their community because their service provider refuses to employ them. The topic of intersectionality is key in this discussion because unhoused LGBTQ young people and people of

color (two identities that frequently overlap) are even more likely to be harmed by discriminatory employment practices of service providers.

Amici also seek to demonstrate the fallacy of exempting from anti-discrimination requirements religious organizations that provide essentially identical legal services as secular organizations, including several amici, which are not exempt.

Amici ask that the Court hold that the Washington Law Against Discrimination's (WLAD's) religious exemption is unconstitutional as applied to the claims raised by the plaintiff, Matthew Woods, just as the secular amici would be precluded from discriminating against LGBTQ employment applicants.

II. SUMMARY

The WLAD is a bulwark that protects groups, including the LGBTQ community, that have been, and continue to be, discriminated against when attempting to access vitally needed resources and services. When interpreting the WLAD's exemption for "religious or sectarian organization[s] not organized for private profit," RCW 49.60.040(11), amici urge the Court to follow a substantive, fact-centered analysis focusing on actual job duties, considering the totality of the circumstances when deciding whether the WLAD exemption applies. A bright-line rule—or one that allows employers to self-select by simply using words

like “ministry” or “faith” in a job description—would result in employers running afoul of the Privileges and Immunities Clause, as occurred in *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 317 P.3d 1009 (2014). As the amici who provide direct legal services are aware, there is no reasonable or just basis in distinguishing between religious and secular organizations that provide these services.

Moreover, while this lawsuit concerns SUGM’s discriminatory policy against potential job applicants who are LGBTQ, it is inescapable that the policy also affects the vulnerable populations that make up ODLS’s clientele. Discrimination is pervasive. As amici who serve the unhoused community know, an essential factor in serving the LGBTQ community is showing they are accepted, unjudged, and included among staff. By unilaterally excluding all LGBTQ job applicants for even non-ministry roles, SUGM instead allows its discriminatory employment practices to trickle down to its clients as well. Because of the disproportionately high number of LGBTQ people in the homeless community, particularly young people and people of color, SUGM’s discrimination against LGBTQ job applicants affects some of the most vulnerable groups it and amici serve.

The issue before the Court is not whether a religious organization may consider a person’s religious beliefs when hiring for a ministry-

related position. Instead, the issue is whether a religious organization may use its views of a person's religious beliefs or that person's sexual orientation as a litmus test for a job that, by its nature, is not a ministry position.

III. ARGUMENT

A. This case has important implications for reaching and serving homeless people.

The WLAD is a broad remedial statute, the purpose of which is to prevent and eradicate discrimination in employment, public accommodation, health care, insurance, and other areas. *See Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 237, 59 P.3d 655 (2002). "The Act recognizes that the right to be free from such discrimination is a civil right enforceable in private civil actions by members of the enumerated protected classes," including people who have been discriminated against on the basis of sexual orientation. *Id.* (citing RCW 49.60.030). The WLAD provides:

The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right.

RCW 49.60.030(1). The WLAD protects transgender people by including them in the definition of “sexual orientation.” RCW 49.60.040(26). The statute also states that it is to be liberally construed. RCW 49.60.020.

In issue is an exemption for “religious or sectarian organization[s] not organized for private profit.” RCW 49.60.040(11). In *Ockletree*, the Court held that this exemption violated the state constitution’s Privileges and Immunities Clause, at least as applied to the claims raised by the plaintiff in that case. But *Ockletree*—which consisted of three opinions, none commanding a majority—did not establish a legal test that defines cases in which an employee or job applicant of a religious nonprofit would be entitled to the WLAD’s protections.

The Court’s decisions in *Ockletree* and in the present case will affect a large number of job applicants and employees. Religious nonprofit organizations in this state employ tens of thousands of people for non-ministry jobs and generate billions of dollars in revenue. These include hospitals, universities, primary schools, the YMCA, the Salvation Army, and others. Many of these religious nonprofits work to serve the same vulnerable populations as amici. Moreover, with a renewed commitment by governments in this region—including the City of Seattle and King County—to address the “homelessness crisis” and invest more money into

these efforts, it is likely we will see significant growth in services provided by nonprofit organizations, including religious nonprofits.

B. The Court should hold that the exemption does not apply to non-ministry positions.

Although the 4-4-1 decision in *Ockletree* left many questions unanswered, Justice Wiggins’s concurrence appeared to cast the decisive vote. He believed “the constitutionality of the exemption depends entirely on whether the employee’s job responsibilities relate to the organization’s religious practices.” *Id.* at 806. “In other words,” he reasoned, “RCW 49.60.040(11) is constitutionally applied in cases in which the job description and responsibilities include duties that are religious or sectarian in nature.” *Id.* “When the exemption is applied to a person whose job qualifications and responsibilities are unrelated to religion, there is no reasonable ground for distinguishing between a religious organization and a purely secular organization.” *Id.*

Justice Wiggins’s concurrence can be read as creating an exception to the exemption for religious nonprofits—an exception that applies when the job qualifications and responsibilities of an employee are unrelated to religion. In contrast, Justice Stephens’s dissent focused on answering the certified question whether the WLAD exemption may be applied constitutionally “to an employee claiming that the religious non-profit

organization discriminated against him for reasons wholly unrelated to any religious purpose, practice, or activity.” *See id.* at 772, 789. Nonetheless, Justice Stephens’s opinion is at least consistent with Justice Wiggins’s view that—as far as the WLAD’s application to an employer is concerned—there is no reasonable ground for distinguishing between a religious organization and a purely secular organization when a job involves qualifications and responsibilities unrelated to religion.

Justice Wiggins’s concurrence does not elaborate upon what “unrelated to religion” means. Amici believe it is incumbent upon the Court to establish a clear methodology that employers and trial courts can apply to distinguish cases in which the WLAD exemption is constitutionally applied from those in which it is not. Amici recognize there is likely no bright-line rule that can be crafted for summarily determining whether a job relates to ministry. It is necessarily a fact-centric, substantive determination, and amici support adoption of the federal analysis set forth in *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 190 (2012). Under that case, whether an employee functions as a minister is determined by the totality of the circumstances. *Id.*; *see also Biel v. St. James School*, 911 F.3d 603, 607 (9th Cir. 2018). The totality of circumstances takes into account the job title, religious training, and how the person holds themselves out. *Hosanna-Tabor*, 565 U.S. at 191–92.

C. As a general matter, persons providing legal services to homeless individuals are not engaged in ministry.

Amici have deep respect for these religious organizations, including SUGM. What is more, amici are grateful for individuals who have devoted their lives to serving the most vulnerable among us. Some of these people, including some of amici's employees, are called to do this work at least in part because of their religious beliefs, ethical systems, or worldviews. They bring valuable perspectives, each in their own way. Homeless people come from all walks of life, and so do the people who serve them. Amici do not discriminate on the basis of religion or against LGBTQ people, not only because the WLAD prohibits this, but because a diverse group of employees and volunteers promotes greater cultural competence, sends a message of inclusion to clients who have good reason to distrust institutions, and improves client outcomes.

It is also undeniable that some people experiencing homelessness look to religion and feel they are helped by ministry. But the job of a minister—which is fundamentally tied to a set of religious beliefs—is different from that of a legal practitioner. When used in a religious sense, *Merriam-Webster* defines the term “minister” as “one officiating or assisting the officiant in church worship” or “a clergyman or clergywoman

especially of a Protestant communion.”¹ This is far different from the role of an attorney offering legal services, and the distinction is even clearer when legal services are provided in a setting that is held out as “open door” and welcoming to all people, including members of the LGBTQ community.

This appears to be SUGM’s understanding as well, at least in practice. Although it claims that all its employees are ministers, the legal job it denied Mr. Woods did not call for the performance of ministry as that term is commonly understood. There is no contention that Mr. Woods, had he been given the job, would have been asked to proselytize or to share religious beliefs relating to same-sex relationships, for example. Based on the totality of circumstances, the job for which Mr. Woods was rejected was not “ministry.” See *Hosanna-Tabor*, 565 U.S. at 191–92.

D. Members of the LGBTQ community are more likely to experience homelessness than others.

Amici’s strong connection to the LGBTQ population, including through providing legal services and shelter for unhoused young people, informs their understanding of how a homelessness service provider that discriminates against LGBTQ employment applicants also injures clients—whether they be LGBTQ individuals or families with an LGBTQ

¹ *Minister*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003).

member. The LGBTQ community, the same group SUGM precludes from employment at ODLs, is disproportionately overrepresented among the unhoused population that SUGM serves.

A report issued by Chapin Hall at the University of Chicago, for example, found that LGBT youth and young adults (ages 18–25) were 120 percent more likely to report homelessness.² The higher rate of homelessness among LGBTQ youth and young adults “often stems from a lack of acceptance that young people experience both in and outside the home.”³ This is a higher disparity than racial and ethnic groups who disproportionately experience homelessness. African American young adults, for example, have an 83 percent higher risk of reporting homelessness.⁴

Despite a general increase in support for the LGBTQ community in the United States, homelessness among LGBTQ young people remains high. Part of the reason is that people are coming out at younger ages, as society becomes more supportive of equality.⁵ However, because more

² Chapin Hall at the U. of Chicago, *Missed Opportunities: Youth Homelessness in America*, Voices of Youth Count, 12 (Nov. 2017), http://voicesofyouthcount.org/wp-content/uploads/2017/11/ChapinHall_VoYC_NationalReport_Final.pdf.

³ *Id.* at 13.

⁴ *Id.* at 12.

⁵ Nico Sifra Quintana et al., *On The Streets: The Federal Response To Gay And Transgender Homeless Youth*, Ctr. for Am. Progress, 1 (June 2010), <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/lgbtyouthhomelessness.pdf>.

LGBTQ people now come out in their mid-teens, when most youth are dependent on their families, it “can lead to a chain reaction of events that sends [LGBTQ youth] cascading through social safety nets that are not equipped to support them.”⁶ Thus, despite marriage equality and other advancements in LGBTQ rights, the percentage of unhoused persons who identify as LGBTQ remains high.

While it is difficult to determine the prevalence of LGBTQ youth and young adults among the unhoused population, researchers agree that the percentage is extremely high. Studies indicate that where 4 to 10 percent of the general youth population is LGBTQ, it is estimated that those who identify as LGBTQ make up 20 to 40 percent of the homeless youth population.⁷ A federal survey of six cities found that 19 percent of homeless youth identified as LGB and 3 percent as “Q,” or questioning.⁸ Within King County, it is estimated 22 percent of homeless youth are

⁶ *Id.*

⁷ Mary Cunningham et al., *Homeless LGBTQ Youth*, Urban Inst. (Aug. 2014), <https://www.urban.org/sites/default/files/publication/22876/413209-Homeless-LGBTQ-Youth.PDF>.

⁸ *LGBT Populations: A Snapshot of the Knowledge Base & Research Needs*, Office of Planning, Research & Evaluation (OPRE), 1 (Mar. 12, 2015), <https://www.acf.hhs.gov/opre/resource/lgbt-populations-a-snapshot-of-the-knowledge-base-and-research-needs>.

LGBTQ, which is far higher than the LGBTQ portion of the general population.⁹

The disparity is only growing. In a 2014 survey of youth homelessness service providers, “[a]gency staff reported average increases in the proportion of LGBTQ youth they served over the past 10 years, and this change is higher for transgender youth.”¹⁰ The survey concluded that “nearly all providers of homeless youth services recognize that they are working with LGBTQ youth.”¹¹ Moreover, duration in homelessness is longer: “LGBTQ youth accessing these homelessness services were reported to have been homeless longer and have more mental and physical health problems than non-LGBTQ youth.”¹²

The disproportionate rates of homelessness are even higher among LGBTQ youth and young adults of color. Survey results published by the Williams Institute at UCLA School of Law, among others, show that LGBTQ youth were significantly overrepresented among those experiencing homelessness and that youth of color were overrepresented

⁹ *Stats and Facts about Youth Homelessness*, United Way of King Cty., <http://uwkc.pub30.convio.net/our-focus/homelessness/stats-on-youth-homelessness.html> (last visited Aug. 26, 2019).

¹⁰ Soon Kyu Choi et al., *Serving Our Youth 2015: The Needs & Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness*, True Colors United, 4 (June 2015), <http://truecolorsunited.org/wp-content/uploads/2015/05/Serving-Our-Youth-June-2015.pdf>.

¹¹ *Id.* at 20.

¹² *Id.*

among LGBTQ clients accessing homeless services.¹³ Survey respondents reported that 31% of LGBTQ clients identified as African American/Black and 14% identified as Latino(a)/Hispanic.¹⁴

Transgender persons also experience homelessness at far greater rates than cisgender individuals. According to the 2015 U.S. Transgender Survey, 37% of Washington respondents had experienced homelessness at some point in their lives, and 13% had experienced homelessness *in the past year* because of being transgender.¹⁵

Thus, members of the LGBTQ community, particularly LGBTQ youth and young adults, people of color, and transgender individuals, are at far greater risk for experiencing homelessness and make up a highly disproportionate percentage of the unhoused community. This is significant to the Court's decision in this matter because, as discussed below, discriminatory practices barring LGBTQ persons from providing legal services to the unhoused community also discriminate against the vulnerable groups that depend on those services.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ 2015 U.S. Transgender Survey: Washington State Report, Nat'l Ctr. for Transgender Equal., 2, [http://www.transequality.org/sites/default/files/docs/usts/USTSWAStateReport\(1017\).pdf](http://www.transequality.org/sites/default/files/docs/usts/USTSWAStateReport(1017).pdf) (last visited Aug. 26, 2019).

E. Vulnerable LGBTQ communities that amici serve are affected by discriminatory employment rules.

Although SUGM's refusal to hire based on an applicant's sexual orientation is directed toward potential employees, the discriminatory effects trickle down to the vulnerable groups SUGM serves.

As explained by amicus YouthCare, which was founded in 1974 as one of the first runaway and homeless youth shelters on the West Coast, young people need supportive adults in their lives to feel safe, and especially adults who share their identities and experiences. Through decades of experience, YouthCare has found it is vital to recruit and retain employees who reflect the identities of the youth and young adults they serve. Indeed, a study of LGBTQ youth conducted by researchers at the University of Washington found that "the most frequently mentioned negative factor associated with an LGBTQ identity was feeling the need to hide it from others such as teachers and from the community in general...."¹⁶ Consistent with the importance of demonstrating to LGBTQ youth that they do not need to hide their identity, some homeless services agencies have "indicated that having staff who identified as LGBTQ was a factor in the success of working with LGBTQ youth."¹⁷

¹⁶ Darrel Higa et al., *Negative and Positive Factors Associated With the Well-Being of Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning (LGBTQ) Youth*, 46(5) Youth Soc. 663-687 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4337813/>.

¹⁷ Choi, *supra* note 10, at 20.

Moreover, because of the higher rate of homelessness among LGBTQ youth and young adults of color, discriminatory practices such as SUGM's refusal to hire LGBTQ people for non-ministry roles have an even larger effect on this group that faces increased discrimination at the intersection of being marginalized based on race, sexual orientation, and housing status. Intersectionality is the belief that "social justice movements must consider all of the intersections of identity, privilege, and oppression that people face in order to be just and effective."¹⁸ SUGM's discriminatory employment policy not only affects potential job applicants and clients who are LGBTQ, but it also has a disproportionate effect on LGBTQ people of color because of their high prevalence among people experiencing homelessness.

As evidenced by the starkly disproportionate percentage of LGBTQ persons who experience homelessness, it is vital to *increase* effective and supportive resources available to this community. By barring LGBTQ persons from applying for a position to provide legal services, SUGM is doing just the opposite, and denying LGBTQ clients a safe and accepting resource.

¹⁸ Ijeoma Oluo, *So You Want to Talk About Race* 73 (Amazon Kindle ed. 2018).

F. Religiously affiliated organizations should not be granted a blanket exemption from anti-discrimination laws when providing legal services.

The core function of SUGM's legal services program, ODLS, is to provide legal services. The "Essential Job Duties" in the job description for an ODLS staff attorney, for example, include providing legal counsel and direct representation services to clients, representing clients in court hearings, and conducting client intakes and initial interviews. CP 401. Case work includes quashing warrants, addressing child support and medical debts, and assisting with family law issues. CP 719. Moreover, ODLS purports to serve clients without regard to their faith or sexual orientation. CP 727 (Dep. Tr. of David Mace 54:13–18), 751.

Amici include nonprofit organizations that provide similar services to the community and are bound to follow the WLAD. The Center for Justice, for example, is "Spokane's community law firm." It serves approximately 1,000 clients each year, providing direct legal services on issues including housing and criminal justice. Amicus Entre Hermanos, which serves the Latino/a LGBTQ community, also provides legal services in the areas of immigration and family law. Amicus LCYC provides a wide range of civil legal services to young people, 12–24 years who are struggling with homelessness in King County. Roughly 20% of young people served through this program identify as LGBTQ+.

Although these amici provide similar legal services as those offered through ODLS, it is undisputed that they are subject to the WLAD when making hiring decisions. There is no basis for distinguishing between religious and non-religious organizations in the provision of professional legal services. At the very least, analysis of any religious function served by an attorney at ODLS should be the subject of careful analysis, encompassing the totality of the circumstances. *See Hosanna-Tabor*, 565 U.S. at 190.

The issue is not whether a religious organization may take a person's religious beliefs into account when hiring for a ministry-related employment position, but rather whether a religious organization may use its views of a person's religious beliefs or that person's sexual orientation as a litmus test for a job that is not a ministry position by its nature.

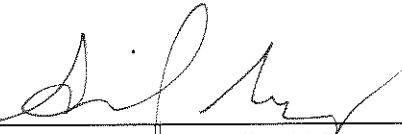
IV. CONCLUSION

Amici ask the Court to adopt a fact-specific test for determining whether a religious organization may rely on the WLAD's exemption. To hold otherwise would invite frequent violations of the State's Privileges and Immunities Clause, as occurred in *Ockletree*, by organizations that attempt to evade the WLAD completely by labeling all employees ministers. As amici are aware, providing direct legal services is an important, but non-ministry role in addressing homelessness.

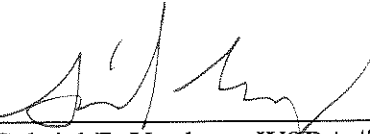
Amici also ask the Court to consider the effect that SUGM's policy regarding non-ministry employees has on the at-risk communities SUGM serves. LGBTQ people are disproportionately represented among the homeless community to a great extent. And people of color are overrepresented even among the LGBTQ homeless population. When serving the LGBTQ community, it is essential to show that they are supported and accepted, including as staff members. Thus, the effects of SUGM's discriminatory hiring policy regarding non-ministry employees do not end at the injury inflicted on potential job applicants but pervade SUGM's services offered to some of the neediest members of our community.

RESPECTFULLY SUBMITTED this 26th day of August, 2019.

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I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 26th of August, I served the forgoing document via the Supreme Court e filing service to the following:

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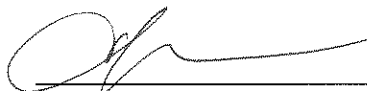
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