No: 96132-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MATTHEW S. WOODS,

Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Does article I, section 12 of the Washington Constitution require a church to hire someone who would publicly reject the organization's sincerely-held religious beliefs? The trial court properly ruled that the answer is "no" and dismissed the case; its ruling should be affirmed.

II. STATEMENT OF THE CASE

A. Seattle's Union Gospel Mission exists to preach the gospel of Jesus Christ.

Seattle's Union Gospel Mission is an overtly evangelical Christian ministry incorporated in 1940 for the purpose of "preaching of the gospel of Jesus Christ by conducting rescue mission work in the City of Seattle." CP 72. Its articles of incorporation provide that "any phase of 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." CP 72. The Mission is a 501(c)(3) nonprofit corporation, formally recognized and classified by the IRS under 26 U.S.C. §170(b)(1)(A)(i) (churches or a convention or association of churches). CP 79.

The Mission takes a relationship-based approach to evangelism, sharing the good news of Jesus Christ in the context of long-term relationships established in its gospel rescue mission work. CP 64-65. It holds itself out publicly as existing "to serve, rescue, and transform those

in greatest need through the grace of Jesus Christ. . . . Our goal is to inspire hope, bring healing, *and point people to a new life through Jesus Christ*." CP 77 (emphasis added).

To create a venue for its evangelism, the Mission operates over twenty different programs serving the poor and vulnerable, with an emphasis on serving the Seattle area's unsheltered homeless population. CP 64. To reach this population, the Mission conducts outreach ministries to bring food, coffee, blankets, and friendship to people on the streets. CP 64. The Mission emphasizes relationship right from the beginning because it often takes many encounters with a homeless person—frequently suffering mental illness, substance abuse, or estranged relationships—to develop the trust to come off the streets and enter the Mission's emergency shelter. CP 64-65.

Once Mission guests begin to physically stabilize, the Mission can help with underlying mental health or addiction issues through long-term recovery programs, provide dental care, and help clients with legal needs. It offers transitional housing, continuing education, and job placement. The goal is to get guests to stable housing, a job, reconciliation with family, sobriety, and, most importantly, faith in Jesus Christ. CP 64-65.

The importance of the Mission's evangelism is explained by the Mission's Chief Program Officer: "[W]e understand [preaching the

gospel] to be our primary responsibility because we take Jesus's words seriously when he asks: 'For what does it profit a man to gain the whole world and forfeit his soul?' Mark 8:36" CP 64. Point six of the Mission's statement of faith affirms its belief in the "everlasting conscious punishment of the lost"—the "lost" being a reference to those who do not believe in the "Lordship and bodily resurrection of Jesus Christ." CP 82.

B. The Mission imposes stringent faith and conduct standards on its employees because all employees are called to share the gospel of Jesus Christ.

Given the urgency of its religious message and the integrated, relational approach to evangelism, the Mission considers it a primary responsibility of all Mission employees to share the gospel of Jesus Christ. CP 64, 331.[1] That is, the Mission does not have one set of employees doing service work and a different set that preach or teach a religious message. CP 65. All employees deliver the religious message. CP 64-65.

Because all employees are called to express the Mission's religious belief that salvation comes through Jesus, the Mission is rigorous about vetting and enforcing religious standards for all of its employees. CP 62-

[1] The Mission has approximately 200 employees. CP 331. A few—less than ten—have been ordained by a denominational body and claim special IRS benefits as ministers (for example, a housing allowance). CP 698-99. Tax classification "has no effect on what they are asked to do at the Mission. As stated earlier, every single employee at the Mission, their first duty is to share the gospel of Jesus Christ." CP 699.

67, 332. Every employee is required to affirm the Mission's seven-point statement of faith, which leads with "We believe the Bible is the inspired, infallible, authoritative Word of God." CP 65, 82, 332. The Mission's standard job application asks ten different questions about the applicant's religious beliefs and practices, including a description of the candidate's "relationship with Jesus Christ," whether the applicant is active in a local church, and the name and contact information for the applicant's pastor. CP 368-69. Candidates who pass initial application and intake screening are then further evaluated for their alignment with—and ability to faithfully represent—the Mission's religious beliefs. CP 67, 332, 702-03.

One way employees accomplish the Mission's "direct evangelism" purpose is by verbally sharing the gospel of Jesus. CP 64, 321, 402, 695. The Mission serves the holistic needs of its guests, sometimes in extremely messy ways. This earns them the opportunity to credibly share the gospel of Jesus. CP 64, 65, 696 (explaining how cleaning up the feces of a guest with a bowel-control problem can create the opportunity for a conversation about Jesus).

For employees to have credibility sharing the message verbally, they must demonstrate their own ongoing transformation through faith in Jesus. CP 65, 695. To that end, the Mission requires its employees to attend monthly All-Mission Worship Services (including prayer, worship

music, Bible reading, a sermon, and occasionally communion), other prayer meetings, all staff meetings (most of which include prayer and devotionals), and be active in a local church. CP 66, 341, 372, 402, 695.

Finally, like many other evangelical churches and ministries, in public commitment to their belief that the Bible is the infallible word of God, the Mission requires its employees to live in accordance with what the Mission believes the Bible teaches. CP 65. One of the core teachings of the Bible, as interpreted by the Mission, is the call to surrender your life to God and live a life of obedience, even if you do not understand or agree with what the Bible teaches. CP 65. Mission employees model this surrender for the Mission's guests, and the Mission believes it is very difficult for an employee to urge a recovering addict to surrender his or her life to God when the employee publicly rejects well-known Christian teaching. CP 65.

One such well-known Christian teaching—and one of the Mission's sincerely held religious beliefs—is that Christians are called to abstain from sexual activity outside of heterosexual marriage. CP 65. This view has existed for millennia and, until recently, has not been controversial within the Christian church. This theological belief is shared by the Roman Catholic Church, the Eastern Orthodox Church, the Church of Jesus Christ of Latter-day Saints; the vast majority of protestant

evangelical denominations such as the Southern Baptist Convention, the Assemblies of God, the Evangelical Covenant Church, and the Presbyterian Church in America; and countless non-denominational churches. CP 38. If an employee publicly rejects the Mission's interpretation of the Bible as it relates to sexuality, it undermines the ability of the Mission to carry out its religious purpose of sharing the message that Jesus is the only way to salvation. CP 65, RP 15.

C. The Mission's legal services program is an opportunity to share the gospel of Jesus Christ.

The Mission opened its legal aid clinic, Open Door Legal Services ("ODLS"), in 1999. Many Mission guests have warrants, child support, debt collection, and other legal issues disproportionately impacting the poor and vulnerable, and on-site legal aid fits well with the gospel rescue work of the Mission. ODLS provides services to Mission guests, who may schedule appointments, and conducts walk-in clinics for individuals who are not participating in other Mission programs. CP 371-72.

At all relevant times, four Mission employees comprised the paid ODLS staff: a managing attorney, two staff attorneys, and an administrative assistant/interpreter. CP 371. The Mission employees are assisted by a network of volunteer lawyers that staff ODLS's two or three-hour clinics. These volunteers serve with differing degrees of regularity,

but typically once or twice a month. Volunteer lawyers generally do intakes, spot issues, offer initial advice or referrals, and then pass the client's matter on to one of the staff attorneys for further follow-up when appropriate. Although volunteer lawyers are required to affirm the Mission's statement of faith, as in many other Christian ministries (and many secular nonprofits as well), the volunteers are not as heavily vetted as employees. CP 66, 372.

The rationale for the lighter vetting of volunteers is two-fold. First, the extensive reference checks and interviews of the Mission's employee vetting process would deter some volunteers and a volunteer relationship is a less significant commitment for both parties than an employment relationship. CP 66. Second, ODLS staff attorneys have a greater opportunity and obligation to share the gospel of Jesus because they generally develop deeper relationships with clients due to their full-time work and extended contact with clients over the life of a matter. ODLS staff attorneys regularly pray with clients, encourage them, collaborate with the client's Mission caseworker (for those in Mission programs), and otherwise try to show the love of God by loving the client holistically, not just attending to legal needs. CP 321-22, 372.

The Mission's ODLS legal clinic is part of a network of over seventy legal aid clinics affiliated with the Christian Legal Society. CP

372. These Christian legal aid clinics are expressly evangelistic and do not simply provide legal services. For example, the Christian Legal Society's introductory manual for new Christian legal aid clinics offers the following case study:

> A somewhat remarkable scene occurred at an interview office in Albuquerque, New Mexico recently. Jim, a 42-year-old homeless carpenter addicted to crack cocaine, was bowing his head and sincerely praying with a 73-year-old semi-retired volunteer Christian lawyer to recommit his life to Christ.

CP 383. The Mission's ODLS legal clinic operates with this same evangelical purpose: to share the gospel of Jesus Christ through relationships developed in the course of providing legal services. CP 373.

D. Mr. Woods rejected the Mission's religious beliefs in conjunction with his job application.

Mr. Woods signed the Mission's statement of faith—including its declaration that the Bible is the only inspired, infallible, authoritative word of God—when he began volunteering at the Mission's ODLS clinic. CP 118. He took a job at the U.S. District Court in 2015, after which his volunteer service was more sporadic. CP 120, 373. When the ODLS staff position opened in October 2016, Mr. Woods disclosed to the Mission for

the first time that he was in a same-sex relationship and inquired how that would fit with the Mission's religious beliefs. CP 113, 322-23.[2]

As described in Mr. Woods' amended brief at 11-12, the Mission responded honestly and respectfully about its religious behavioral expectations for employees. Mr. Woods, respectfully but forcefully, took the Mission's interpretation of the Bible head-on as a religious issue:

> I understand that . . . all staff members are expected *to live by a Biblical moral code that excludes, among other thing[s], homosexual behavior*. As a bisexual man who is open to the idea of marrying and starting a family with another man, I am therefore excluded from employment. *As a Christian, I firmly believe* that a change in that policy would benefit the organization's mission to serve, rescue, and transform those in greatest need through the grace of Jesus Christ.

CP 135 (emphasis added). The online application Mr. Woods submitted with his cover letter revealed other differences in religious beliefs and practices. Mr. Woods was not involved in a local church and therefore could not provide the name and contact information of his pastor. CP 132. To the question "describe your relationship with Jesus Christ," Mr. Woods answered, "My worldview is shaped by the ministry of Jesus Christ, who teaches me that social justice is critical in a world where we have enough

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[2] Mr. Woods went to an evangelical Christian college that had religious conduct expectations regarding sexual behavior similar to the Mission's. CP 111-12.

resources that no one need go without their basic needs, yet so many tragically do." CP 131. According to the Mission's Chief Program Officer, an ordained minister who oversees hiring, "generally speaking, people who describe their relationship with Christ in purely social justice terms as did Mr. Woods do not share the Mission's view that its rescue work is a means to the end of developing a life-transforming, personal relationship with Jesus." CP 67, 63-64. At the direction of Mission leadership, the ODLS director reached out to Plaintiff to tell him that the Mission would not change its policy of requiring its employees to live consistently with the Mission's religious beliefs regarding marriage and sexuality. CP 374.

E. Mr. Woods puts the Mission's religious beliefs on trial.

In November 2017, Mr. Woods called a press conference to announce the present lawsuit. He again framed his disagreement with the Mission as an interpretation of the Christian faith, with a local paper quoting him saying:

> As a person of Christian faith, I see that leading a Christian life is devoted to social justice, racial justice, economic justice. That's the most important part of my faith, and being able to serve those communities well means being able to serve inclusively, and people from all of those communities working hand in hand, working to be able to serve. That's how I see a good Christian community doing the best possible work.

CP 45.

In litigation, Mr. Woods propounded 41 interrogatories, 44 requests for production, and sought a CR 30(b)(6) deposition on 15 different topics. CP 235-97. Much of the discovery delved into the Mission's religious beliefs and the manner in which they were formulated or possibly reconsidered, and the parties' legal counsel had extensive discussions about the appropriate scope of discovery. CP 299-316. The Mission moved for a protective order before the parties reached a temporary compromise, a material element of which was the Mission's stipulation referenced on page 3 of Mr. Woods' brief—that *if* the Mission were *not* a religious nonprofit, Mr. Woods could establish a prima facie case of discrimination on the basis of sexual orientation. CP 60. Beyond this stipulation, the Mission still made employees available for two full days of depositions and produced 649 pages of documents.

The Mission moved for summary judgment, which was granted ten days after oral argument in the form of a letter opinion and subsequent order. CP 168-175. This appeal followed.

III. ARGUMENT

A. Burden of Proof: Mr. Woods bears the heavy burden of proving the religious employer exemption unconstitutional "beyond a reasonable doubt."[3]

There is no dispute that the Mission is a religious nonprofit within the plain language of RCW 49.60.040(11), the WLAD religious employer exemption. Mr. Woods therefore has the burden of proving beyond a reasonable doubt that the exemption is unconstitutional. *Sch. Districts' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). This burden of proof "do[es] not refer to an evidentiary standard" but, instead, that the court be "fully convinced, after a searching legal analysis, that the statute violates the constitution. *Id.* This "beyond a reasonable doubt" standard applies whether Mr. Woods challenges the exemption facially or as applied. *Id*.[4]

B. Mr. Woods' constitutional challenge fails because it is undisputed that the alleged discrimination relates to the Mission's religious beliefs.

The WLAD religious employer exemption was deemed facially constitutional by all nine justices of the Washington Supreme Court less

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[3] The Mission agrees that de novo is the correct standard of review.

[4] The court rejected the argument that the correct standard for an as-applied challenge is "preponderance of the evidence" and affirmed *Sch. Districts' Alliance for Adequate Funding of Special Educ. v. State*, 149 Wn. App. 241, 265, 244 P.3d 1 (2009): "We presume that a statute is constitutional and the party challenging the statute as applied bears the burden of proving its unconstitutionality beyond a reasonable doubt."

than five years ago. *Compare Ockletree v. Franciscan Health Systems*, 179 Wn.2d 769, 788-89, 317 P.3d 1009 (2014) (four-justice lead), *and id.* at 804 & n.6 (four-justice dissent), *and id.* at 805 (one-justice concurrence); *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 508, 325 P.3d 193 (2014) (Madsen, J., dissenting) ("We recently rejected a facial challenge to the constitutionality of this exemption in *Ockletree*."). Mr. Woods now relies on *Ockletree* to mount a new as-applied challenge under radically different facts. But unlike *Ockletree*, where it was undisputed that both the alleged discrimination and the plaintiff's job were "wholly unrelated" to religion, the alleged discrimination here is undisputedly related to the Mission's religious beliefs.

The Mission articulated a sincerely held religious belief related to its religious practices. CP 65. Mr. Woods concedes this: "Mr. Woods does not contest that [the Mission's] beliefs are sincerely held." Am. App. Br. at 34. Mr. Woods does not contest that the sole motivation for the Mission's action was its sincerely held religious beliefs. Mr. Woods does not contest that he was disqualified from employment because he openly opposed the Mission's sincerely held religious belief. CP 135, 97; Am. App Br. at 12 (citing Mr. Woods' cover letter, "I understand that . . . all staff members are expected to live by a Biblical moral code that excludes, among other thing[s], homosexual behavior. As a bisexual man who is

open to the idea of marrying and starting a family with another man, I am therefore excluded from employment. As a Christian, I firmly believe that a change in that policy would benefit the organization's mission to serve, rescue, and transform those in greatest need through the grace of Jesus Christ."). Under these undisputed facts, Mr. Woods cannot establish that the alleged discrimination was wholly unrelated to the Mission's religious purpose, practice, or activity.

1. *Ockletree* held the religious employer exemption is facially constitutional, but unconstitutional as-applied where the discrimination and job were "wholly unrelated to any religious purpose, practice, or activity."

Ockletree involved an African-American security guard at a Catholic hospital, whose primary job responsibilities included checking identification and issuing name badges. He suffered a stroke then was denied accommodations and terminated by the hospital. Following his termination, he sued for race and disability discrimination under WLAD. As a defense, the defendant hospital asserted the religious nonprofit exemption at issue here.

The federal district court certified two state constitutional questions to the Washington Supreme Court: (1) was the exemption facially unconstitutional under either article I, section 11 or article I, section 12 of the state constitution, and (2) if not, was it unconstitutional

as applied in the case of discrimination "*wholly unrelated* to any religious purpose, practice, or activity." *Ockletree*, 179 Wn.2d at 772 (emphasis added).

A divided Washington Supreme Court issued a 4-4-1 opinion, holding WLAD's religious employer exemption is facially constitutional in that it did not violate Washington's constitutional privileges and immunities clause or its establishment clause. But the dissent and concurrence each found it unconstitutional as-applied—for different reasons—where the alleged discrimination and the job were both "wholly unrelated to any religious purpose, practice, or activity."

The lead opinion, written by Justice Charles Johnson and joined by Chief Justice Madsen and Justices Owens and Jim Johnson, held that the exemption was constitutional. *Id.* at 788-89. The lead opinion found that the religious exemption in RCW 49.60.040(11) did not involve a privilege or immunity under article I, section 12, but, even if it did, there was a reasonable ground for distinguishing between religious and secular nonprofits. *Id.*

The dissenting opinion, written by Justice Stephens and joined by Justices Fairhurst, González, and McCloud, held that the exemption was unconstitutional as applied to Ockletree, because the discrimination—based on race and disability—was wholly "unrelated to an employer's

religious beliefs or practices." *Id.* at 804 (Stephens, J., dissenting).[5] The dissent concluded that for claims "unrelated to the employer's religious beliefs" the exemption "violates the federal First Amendment establishment clause and therefore cannot satisfy the 'reasonable ground' standard under article I, section 12." *Id.* at 804-05. The dissent did not address article I, section 11.

Justice Wiggins wrote a concurring opinion, joining the lead in recognizing the exemption is facially constitutional but "concur[ring] in part in the result reached by the dissent." *Ockletree*, 179 Wn.2d. at 805 (Wiggins, J., concurring). Justice Wiggins agreed with the dissent that the exemption is subject to review under article I, section 12. He also joined the dissent in its result—that the exemption was unconstitutional as applied to Mr. Ockletree—but qualified his agreement by stating it "assum[ed] there is no relationship between [Mr. Ockletree's] duties and religion or religious practices." *Id.* at 806.

Justice Wiggins reached this result by different reasoning than the dissent. He criticized the second certified question (regarding as-applied constitutionality) and the dissent's reasoning as themselves requiring

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[5] The dissent stated the exemption is "invalid only as applied to plaintiffs whose dismissal was unrelated to their employers' religious beliefs or practices." *Ockletree*, 179 Wn.2d at 804 n.6. Meaning, the exemption is facially constitutional.

excessive entanglement with religious doctrines and practices, which he rejected as "intrusive." *Id.* at 805-06.

Instead, Justice Wiggins re-wrote the second certified question and proposed a test: are the "job description and responsibilities *wholly unrelated* to any religious practice or activity." *Id.* at 805 (emphasis added). Rather than look at the reason for the alleged discrimination, Justice Wiggins would look at "whether the job responsibilities relate to the organization's religious practices." *Id.* at 806.

Employing "reasonable grounds" analysis under article I, section 12, like both the lead and dissent, Justice Wiggins explained "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. But, Justice Wiggins concluded, "[w]hen 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.* at 806. No other justice joined Justice Wiggins' concurrence.

2. All three *Ockletree* opinions would uphold the exemption to bar Mr. Woods' claim.

Ockletree's lead opinion—emphasizing the legislature's reasonable grounds and rejecting the argument that a fundamental right of Washington citizenship was implicated—would apply the exemption to the present case. So would the four-justice dissent. The dissent was explicit about the scope of the exemption's constitutionality: "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. *Ockletree*, 179 Wn.2d at 804 n.6 (Stephens, J., dissenting) (emphasis added). The dissent noted that if an employer can "articulate a sincerely held belief" related to the purpose for its hiring decisions, the exemption applies. *Id.* at 803.

The Mission articulated a sincerely held religious belief, CP 65, which Mr. Woods concedes: "Mr. Woods does not contest that [the Mission's] beliefs are sincerely held." Am. App. Br. at 34. Mr. Woods does not contest that the sole motivation for the Mission's action was its sincerely held religious beliefs. Mr. Woods does not contest that he was disqualified from employment because he openly opposed the Mission's sincerely held religious beliefs. CP 135, 97; Am. App. Br. at 12 (citing Mr. Woods cover letter, "I understand that . . . all staff members are

expected to live by a Biblical moral code that excludes, among other thing[s], homosexual behavior. As a bisexual man who is open to the idea of marrying and starting a family with another man, I am therefore excluded from employment."). Given these uncontested facts, application of the religious exemption is constitutional under the *Ockletree* dissent.

Justice Wiggins' concurrence would also apply the exemption to bar Mr. Woods' claim. Justice Wiggins was centrally concerned with avoiding entanglement with religious organizations' sincerely held beliefs and practices. He states the only WLAD claims permitted against a religious nonprofit employer are those where the job is "*wholly* unrelated" to religion and "there is *no* relationship between [the employee's] duties and religion or religious practices." *Ockletree*, 179 Wn.2d. at 805-06 (Wiggins, J., concurring) (emphasis added). To the extent there is any dispute of fact, it is a dispute of degree. As described in section III.E, *infra*, at 27, there is undisputed evidence in the record that there is—at minimum—some relationship to religion. Given Justice Wiggins' particular concern with religious entanglement, under both the plain language of his opinion and the constitutional analysis discussed in section III.D, *infra*, at 22, Justice Wiggins' concurrence would apply the exemption here.

C. The "job duties" test presented by Mr. Woods is not the holding of *Ockletree*.

Mr. Woods suggests it "is not clear" whether Justice Wiggins' concurrence is binding precedent. Am. App. Br. at 20 ("the answer is not clear").[6] But the answer is clear: on the issue of Mr. Woods' proposed job duties test, the *Ockletree* concurrence is not binding precedent.

Washington follows the "narrowest ground of agreement" rule for interpreting plurality opinions and has emphasized that precedent requires the assent of five or more votes. *City of Seattle v. Erickson*, 188 Wn.2d 723, 732, 398 P.3d 1124 (2017). Where a majority agrees on a result, but not a rationale, there is no precedent. *In re Detention of Reyes*, 184 Wn.2 340, 346, 358 P.3d 394 (2015).

The *Ockletree* dissent and concurrence agreed on only two issues: (1) that the religious nonprofit exemption in RCW 49.60.040(11) implicated the privileges and immunities clause; and (2) that applied to Mr. Ockletree—where both the job and the alleged discrimination were "wholly unrelated" to religion—the exemption was unconstitutional as applied.

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[6] Given that Mr. Woods bears the burden to make this court "fully convinced, after searching legal analysis" that the exemption is unconstitutional beyond a reasonable doubt, framing the issue as "unclear" is an admission that he has not met his burden. All the more so where the lawsuit, by its very nature, has a chilling effect on religious expression. *See* section III.D.1 *infra* at 25.

But there was no agreement on Justice Wiggins' duties and qualifications test. The dissent addressed the second certified question and focused on the nature of the alleged discrimination. Justice Wiggins rejected the dissent's rationale and the second certified question as "an intrusive inquiry into religious doctrine" and focused on the nature of the job's duties and qualifications. *Ockletree*, 179 Wn.2d at 806 (Wiggins, J., concurring).

The divergence between concurrence and dissent is also apparent if viewed through the "logical subset" analysis presented by Mr. Woods. In *U.S. v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (cited with approval by Mr. Woods at Am. App. Br. at 19-20), the court refused to recognize a one-vote concurrence as controlling "[b]ecause [the dissent and concurrence] would allow [a result] in situations where the other would not," "agree on very little except the judgment," and one "explicitly rejected" the other's reasoning. *Davis* emphasized that a "fundamental divergence in reasoning is enough to demonstrate [the concurrence] is not controlling." *Davis*, 825 F.3d at 1020, 1023. Just as in *Davis*, the *Ockletree* concurrence and dissent allow different results and agree on little except the result, and the concurrence explicitly rejected the dissent's reasoning.

The answer to whether the test presented in Justice Wiggins' *Ockletree* concurrence is controlling is apparent when framed plainly: is a

test proposed in a one-vote concurrence, disagreeing with the reasoning of the other justices, and considering a question not before the Court controlling? No. And no Washington case or principle of interpretation supports another conclusion.

D. Mr. Woods' proposed "job duties test" is unconstitutional.

Justice Wiggins' one-vote concurrence is not the *Ockletree* holding. Moreover, the test proposed by Mr. Woods—an "individualized fact-intensive inquiry" of undefined scope in order to "have [Mr. Woods'] case heard fully and on the merits," Am. App. Br. at 26-7—is unconstitutional.

1. *Amos* and *Spencer* reject religious vs. secular job duties tests as a violation of the First Amendment.

The Supreme Court and Ninth Circuit have rejected legal tests requiring extensive discovery and trial to determine the degree to which job duties are religious or secular. In *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987), the Supreme Court rejected a constitutional challenge to the application of Title VII's religious exemption for "secular," "non-religious" jobs. *Id.* at 330, 107 S. Ct. at 2865. The Court held:

> [I]t is a *significant burden* on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. *The*

> *line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.* Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336, 107 S. Ct. 2862 (emphasis added). Concurring, Justice Brennan further criticized a test like the one proposed by Mr. Woods: "A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity." *Id* at 344, 107 S. Ct. 2862 (Brennan, J., concurring).

In *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011), the Ninth Circuit rejected a religious vs. secular job duties inquiry, observing that "[t]he Supreme Court, however, has repeatedly cautioned courts against venturing into this constitutional minefield." *Id.* at 730.

The Ninth Circuit held that it was not just the potential adverse result that infringed on First Amendment rights of religious organizations, but also discovery and trial: "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, *but also the very process of inquiry leading to findings and conclusions*." *Spencer*, 633 F.3d at 731 (emphasis in original) (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 502, 99 S. Ct. 1313, 59 L.Ed.2d 533 (1979)). "[I]nquiry into . . . religious views . . . *is not only unnecessary but also offensive.* It is well established . . . that courts should

refrain from trolling though a person's *or institution's* religious beliefs." *Spencer*, 633 F.3d at 731 (emphasis added) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828, 120 S. Ct. 2530, 147 L.Ed.2d 660 (2000)).

The constitutional offensiveness of the inquiry is illustrated here: Mr. Woods propounded 41 interrogatories, 44 requests for production, and sought a CR 30(b)(6) deposition on 15 different topics. CP 235-97. Much of the discovery delved into the Mission's religious beliefs and the manner in which they were formulated or possibly reconsidered. *Spencer* recognizes that if religious organizations are forced to reveal their internal discussions and deliberations about theological views—including who took part in those discussions—it will have a severe chilling effect on the First Amendment free exercise rights of organizations and those who associate with them. *Spencer*, 633 F.3d at 731.

2. *Hosanna-Tabor* does not support adoption of the invasive inquiry proposed by Mr. Woods and, instead, emphasizes the First Amendment's "special solicitude to the [association] rights of religious organizations."

Mr. Woods cites *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) for the proposition that a fact-intensive religious inquiry is constitutionally permitted. In *Hosanna-Tabor*, a unanimous Court recognized the "ministerial exception" to a generally applicable law.

Hosanna-Tabor does not support Mr. Woods' request to scrutinize the WLAD religious exemption under a "job duties" test.

First, *Hosanna-Tabor* rejected the Sixth Circuit's adoption and application of a job duties test like that proposed by Mr. Woods. In that case there was no apparent dispute between the parties about whether particular duties were religious or secular, but, even so, the *Hosanna-Tabor* Court emphasized that the Sixth Circuit erred by "place[ing] too much emphasis on [the employee's] performance of secular duties" and rejected the Sixth Circuit's duties test, which focused on parsing religious vs. secular duties. *Id.* at 171, 193-94, 132 S. Ct. 694.

Second, in *Hosanna-Tabor*, it was the *employer* who put the job role at issue as a constitutional, affirmative defense to a generally applicable law. Here, the roles are reversed. The WLAD is not generally applicable; the Mission has a plain statutory exemption and Mr. Woods is attempting to shift his heavy burden to the Mission.

Finally, *Hosanna-Tabor* emphasizes the importance of the religion clauses in the First Amendment, particularly its association protections: "the text of the First Amendment itself, [] gives special solicitude to the rights of religious organizations." *Id*. at 189, 132 S. Ct. 694. Emphasizing this, the *Hosanna-Tabor* Court explains that the constitution prohibits "government interference with an internal church decision that affects the

faith and mission of the church itself." *Id.* at 190, 132 S. Ct. 694; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___U.S.___, 137 S. Ct. 2012, 2021 n.2, 198 L. Ed. 2d 551 (2017).

Concurring in the 9-0 *Hosanna-Tabor* holding, Justices Alito and Kagan emphasized that "the messenger matters" and affirmed the rationale for the Mission's lifestyle expectations (discussed in section II.B, *supra*, at 5):

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that *the messenger matters*. Religious teachings cover the gamut from *moral conduct* to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character *and conduct* of its teachers. *A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts* that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful."

Id. at 201, 132 S. Ct. 694 (Alito, J., concurring). Because Mr. Woods challenges application of a statutory religious exemption, *Amos* is

controlling, and nothing in *Hosanna-Tabor* supports the case-by-case, fact-intensive, religious vs. secular inquiry he requests.[7]

E. There is no dispute of *material* fact even under Justice Wiggins' duties and qualifications test.

Even if the as-applied constitutionality of the religious employer exemption depended on Judge Wiggins' duties and qualifications test, the undisputed evidence in the record demonstrates that the ODLS ministry relates to the Mission's religious purpose and activities, the position had religious qualifications and duties, and staff attorneys' religious motivation and duties are not in conflict with the Rules of Professional Conduct.

Under the summary judgment standard, "when reasonable minds can reach but one conclusion," summary judgment is appropriate. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). Moreover, a material fact is one on which the outcome of the litigation depends. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004). Even with disputes and reasonable inferences in Mr. Woods'

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[7]Mr. Woods cannot explain just what sort of individualized, fact-intensive inquiry he would present to a jury and how a jury's factual determination would not impact the Mission's First Amendment rights. And he cannot explain how the inquiry would avoid evaluating the relevance, sincerity, or acceptability of the Mission's religious beliefs and practices.

favor, there are no genuine disputes of material fact and summary judgment was appropriate.

1. It is undisputed that the job had religious qualifications and duties—the extent or degree of those religious qualifications and duties is not outcome determinative.

Mr. Woods relies entirely on Justice Wiggins' job duties and qualifications test—permitting claims only where "there is *no* relationship between [the employee's] duties and religion or religious practices" *Ockletree*, 179 Wn.2d at 806 (Wiggins, J., concurring)—but concedes that the job application had ten different questions about the applicant's religious faith and practices, CP 131-32, and implies he would be willing to provide additional information about his personal faith and practices. CP 115. Further, he does not dispute any of the following evidence presented to the trial court:

- Otherwise-qualified candidates who pass initial screening are further vetted for religious qualifications. CP 67, 332.
- Prospective employees are subject to more stringent screening than volunteers. CP 66, 373.
- All Mission employees are responsible for preaching the gospel of Jesus Christ. CP 64, 694-96 (Mr. Woods had the May 18, 2018 declaration of Mr. Pallas, CP 63-67, when his counsel

deposed Mr. Pallas just five days later, CP 694, and asked questions on this very topic. CP 696).

- In addition to "work cooperatively with other Mission departments as a team to efficiently and positively accomplish the work of the Mission," the job description required candidates to have "an active church/prayer life," and "share the gospel of Jesus Christ." CP 401-02.
- The staff attorney job required providing spiritual guidance and lawyers are encouraged to talk openly about faith, pray with clients, and explicitly tell them about Jesus. CP 321.[8]

During his press conference to announce this lawsuit, Mr. Woods was asked by a reporter about the requirement that ODLS staff attorneys share their faith. Mr. Woods' response was summarized as "[t]hat's fine with him; he's a strong Christian and serving others is the best way he can show his faith." CP 57; *see also* Am. App. Br. at 5, 22 n.2, and 24 n. 4 (Stating Mr. Woods' Christian faith drew him to ODLS' work and implying he would be open to praying with clients and attending religious staff meetings).

[8] Mr. Woods, at page 22 of his brief, mischaracterizes the ODLS Director's deposition testimony. The director unambiguously stated "I would not employ an attorney who never prayed with their clients." *See* CP 151-53.

Mr. Woods points to no evidence that the ODLS staff attorney job duties and qualifications are entirely secular. Instead, he provides one-sentence, conclusory statements describing *his* subjective belief about *his* obligations as a *volunteer*, CP 113, the *substantive legal work* he performed as a volunteer, CP 115, and the fact that he never attended all-staff meetings as a volunteer, CP 113. He does not purport to have personal knowledge or other admissible evidence regarding the full job duties and qualifications of ODLS staff attorneys. His conclusory assertions are insufficient to defeat summary judgment because "[a] declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment." *Lane v. Harborview Med. Ctr.*, 154 Wash. App. 279, 288, 227 P.3d 297 (2010).

2. Mr. Woods concedes that staff attorneys' duty to share the gospel creates no ethical problems.

Mr. Woods attempts to create a dispute of fact by suggesting there is a conflict between the Mission's religious purpose and the Rules of Professional Conduct. While raising this speculative conflict, he admits no actual conflict exists in practice. Am. App. Br. at 24 n.4. The Mission provides legal advice without regard to sexual orientation or any other protected class, CP 723-24, 751. And Mr. Woods concedes that the Mission's religious purposes do not improperly influence its legal advice.

Am. App. Br. at 24 n.4 ("It is important to note that the record clearly reflects that SUGM's legal advice to clients is not influenced by religious ministration. . . . Mr. Woods does not assert that ODLS is performing legal services which violate the RPCs.").

Instead, Mr. Woods implies that the RPCs and professional independence of a staff attorney mean the job is necessarily secular. But he does not explain why ODLS cannot provide excellent, ethical, substantive legal advice alongside prayer and spiritual discussions. For example, during a 30-minute client meeting, a lawyer and client could spend 20 minutes filling out a proposed parenting plan and 10 minutes praying for the client's children and discussing matters of faith.[9] Mr. Woods concedes that ODLS does not violate the RPCs, Am. App. Brief at 24, and his speculation about a theoretical conflict between the RPC's and ODLS's religious purpose creates no dispute of material fact.

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[9] In *Hosanna-Tabor*, while criticizing a clock-based job duties test, the Court nevertheless held that a person who performed only 45 minutes per day of expressly religious activities was still subject to the ministerial exemption. *Hosanna-Tabor*, 565 U.S. at 708, 132 S. Ct. 694. In practice, the substantive legal and spiritual aspects of the ODLS staff attorney job are more intertwined. CP 322. But never at the expense of the client or the ethical rules: "Our legal advice is our legal advice." CP 724. Indeed, despite stating that he never did pray with clients as a volunteer, Mr. Woods states that he would not "object to praying with clients upon request in keeping with his Christian faith." Am. App. Br. at 24 n.4. This is a concession that there is, at minimum, *some* spiritual aspect to the job and that the spiritual aspect is consistent with the RPCs.

F. Application of WLAD's exemption is not barred under article I, section 12 because the legislature had reasonable grounds to exempt the Mission from Mr. Woods' claim.

All three *Ockletree* opinions recognized that the legislature had reasonable grounds for crafting the religious employer exemption. *Ockletree*, 179 Wn.2d at 785 (four-justice lead) ("[T]he legislature made a reasonable policy choice to avoid the potential pitfalls of attempting to reconcile Washington's growing list of protected categories (arguably, many of which with a religious aspect) with the multitude of religious belief systems"); *id.* at 794, 797, 804 & n.6 (four-justice dissent) (recognizing reasonable grounds if alleged discrimination related to employer's religious beliefs or practices); *id.* at 806 (one-justice concurrence) (joining lead opinion to conclude that reasonable grounds included avoiding excessive entanglement with religious doctrines and practices and facilitating the free exercise of religion). These reasonable grounds are applicable here where Mr. Woods acknowledges the sincerity of the Mission's religious beliefs but asks this Court to declare them irrelevant, troll through the Mission's activities, and impose liability on the Mission's exercise of its religious beliefs.

1. The Legislature's reasonable grounds are apparent in the history, language, and effect of the exemption.

The blanket exemption reflects the legislature's decision to lift from religious nonprofit organizations the "significant burden" of

predicting "which of its activities a secular court will consider religious," *see Amos*, 483 U.S. at 336; avoid placing courts in the "constitutional minefield" of discerning religious employers' true motivation; and forbid claims like Mr. Woods'—seeking to impose liability for the exercise of sincerely held religious beliefs.

The religious employer exemption has existed since WLAD was enacted in 1949. Laws of 1949, ch. 183, § 3(b). Sexual orientation was added to the WLAD as a protected class in 2006 when the legislature passed ESHB 2661. Laws of 2006, ch. 4. The religious employer exemption was explicitly mentioned in the final bill report, Fin. B. Rep. HB 2661, at 1 (Wash. 2006) ("non-profit religious or sectarian organizations are exempt from this law."). The exemption was preserved and remains in its current form today.

Further, Washington's legislature is not alone in recognizing the reasonable grounds for this exemption: approximately twenty other states and the District of Columbia now recognize sexual orientation as a protected class and all already had, or simultaneously enacted, a religious exemption.[10]

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[10] *e.g.*, CONN. GEN. STAT. § 46a-81p; DEL. CODE ANN. tit. 19, § 710; VT. STAT. ANN. tit. 21, § 495(e); OR. REV. STAT § 659A.006(5).

2. The religious employer exemption is not subject to strict scrutiny.

Mr. Woods devotes a single paragraph, devoid of legal authority, to argue that the exemption does not satisfy article I, section 12's reasonable grounds test. Am. App. Br. at 28. He then asks this Court to apply strict scrutiny to the exemption, Am. App. Br. at 29, asking this Court to either: (1) abrogate decades of its independent privileges and immunities analysis under article I, section 12; or (2) conflate the "fundamental rights" of all Americans protected under the Fourteenth Amendment with "fundamental rights of Washington citizenship" under article I, section 12 privileges and immunities analysis.

(a) Application of strict scrutiny to article I, section 12's privileges and immunities analysis would abrogate decades of jurisprudence—including all three *Ockletree* opinions.

Mr. Woods asks this Court to create a new test for independent constitutional analysis under article I, section 12, and apply strict scrutiny to any privilege or immunity that implicates certain fundamental rights of Washington citizenship. Mr. Woods' proposal is extreme; it would have the effect of abrogating or calling into question all of the Washington Supreme Court's recent article I, section 12 privileges and immunities decisions—including all three *Ockletree* opinions—because the court has unwaveringly applied "reasonable grounds" analysis since formalizing the

test in 2002. Further, he provides no framework, rationale, or limiting principles for determining *which* fundamental rights of Washington citizenship must be afforded the strictest scrutiny or explain this distinction in light of article I, section 12's purpose to prevent "favoritism rather than discrimination." *Ockletree*, 179 Wn.2d at 791 (Stephens, J., dissenting); *see also id.* at 775-76 (Johnson, C.J.).

(i) ***"Reasonable ground" has been the test for challenged privileges or immunities since independent analysis under article I, section 12 was established in* Grant I.**

Article I, section 12 provides that "[n]o 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." From the mid-twentieth century until 2002, Washington courts construed article I, section 12 consistent with the federal equal protection clause.

In 2002, the Washington Supreme Court noted article I, section 12's historical and textual differences, and, applying the *Gunwall* factors, concluded that article I, section 12 calls for analysis independent of the Fourteenth Amendment. *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 731, 42 P.3d 394 (2002) (*Grant I*), *rev'd in part by Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150

Wn.2d 791, 83 P.3d 419 (2004) (*Grant II*); *see Ockletree*, 179 Wn.2d at 783 (Johnson, C.J.) (noting that the "reasonable grounds" test for privileges and immunities analysis is derived from the Court's early 20th century cases and has been applied since *Grant I*).

Since *Grant II*, courts "have subjected legislation to a two-part test under this 'privileges' prong of article I, section 12 analysis. First, [the court] ask[s] whether a challenged law grants a 'privilege' or 'immunity' for purposes of our state constitution. If the answer is yes, then [the court asks] whether there is a 'reasonable ground' for granting that privilege or immunity." *Schroeder v. Weighall*, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014) (citations omitted).

However, "[n]ot every benefit constitutes a "privilege" or "immunity" for purposes of independent article I, section 12 analysis. Rather, the only benefits triggering analysis are those implicating 'fundamental rights ... of ... state ... citizenship.'" *Id.* at 573; *see Ockletree*,

179 Wn.2d at 794 (Stephens, J., dissenting).[11] If a challenged statute grants a privilege or immunity implicating a fundamental right of Washington citizenship, the second step of article I, section 12 analysis is to determine whether the legislature had a "reasonable ground" for granting the privilege or immunity. *Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wn.2d 342, 359-60, 340 P.3d 849 (2015); *Schroeder*, 179 Wn.2d at 573.

Though it "resembles certain articulations of rational basis review," *Ockletree*, 179 Wn.2d at 797 (Stephens, J., dissenting), the reasonable grounds test "is more exacting than rational basis review." *Schroeder*, 179 Wn.2d at 574. Unlike rational basis, under the reasonable grounds test, a court will not "hypothesize facts to justify a legislative decision." *Id.*; *see Ockletree*, 179 Wn.2d at 797 (Stephens, J., dissenting)

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[11] Under the *Ockletree* facts, the dissent recognized a right to be free from discriminatory employment practices in private employment as a fundamental right of state citizenship. *Ockletree*, 179 Wn.2d at 796 (Stephens, J., dissenting). Justice Wiggins concurred that article I, section 12 was implicated, but did not address what fundamental right of Washington citizenship was implicated. But Mr. Woods' claim is more extreme. He argues for the right to be free from discrimination based on religion when applying for private employment with an evangelical, religious nonprofit organization because the religious beliefs touch on issues of marriage and sexuality. No case, law, or history suggests the Washington Constitution provides such a right. The Washington Supreme Court's article 1, section 12 jurisprudence has repeatedly "rejected attempts to assert [a fundamental right of Washington citizenship] when a narrower nonfundamental right is truly at issue." *Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wn.2d 342, 360-63, 340 P.3d 849 (2015). *Am. Legion Post No. 149*, 164 Wn.2d 570, 607-08, 192 P.3d 306 (2008) (rejecting an attempt to characterize "[s]moking inside a place of employment" as the fundamental right to "carry on business therein").

("a distinction is reasonable if it has 'a natural, reasonable and just relation to the subject matter of the act'"). A court will "scrutinize[s] the legislative distinction to determine whether it in fact serves the legislature's stated goal." *Schroeder*, 179 Wn.2d at 574. Importantly, no Washington court has compared, much less equated, "reasonable grounds" to strict scrutiny.

(ii) *Neither the* Ockletree *dissent nor* Macias *support application of strict scrutiny.*

Mr. Woods relies exclusively on the *Ockletree* dissent and *Macias v. Department of Labor and Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983), to argue for application of strict scrutiny to article I, section 12's privileges and immunities analysis; neither supports his extreme proposal.

First, Mr. Woods implies that *Ockletree*'s dissenting opinion supports application of strict scrutiny. Am. App. Br. at 29. It does not. *Ockletree*'s dissent flatly rejects any "sweeping reinterpretation of article I, section 12 [that] would require us to overturn cases dating back to territorial days in which we upheld laws under a standard less stringent than strict scrutiny." *Ockletree*, 179 Wn.2d at 793 (Stephens, J., dissenting), and unambiguously states that courts review challenged privileges and immunities under the "heightened scrutiny" of article I, section 12's "reasonable grounds" test. *Compare* Am. App. Br. at 29, *with*

Ockletree, 179 Wn.2d at 793. Further, the dissent criticizes the exact reasoning presented by Mr. Woods because it "mistakes the privileges and immunities of state citizenship protected by article I, section 12 for the fundamental rights of all Americans guaranteed by the federal due process clause," which are "irrelevant to [the exemption's] status under article I, section 12." *Id.* at 792 and 794 (Stephens, J., dissenting).

Second, Mr. Woods relies on *Macias*, where the Court applied strict scrutiny to a statute implicating the fundamental right to travel (a fundamental right of all Americans guaranteed by the federal due process clause), stating "Mr. Woods was no less deprived of protection in his livelihood than the farmworkers in *Macias*. His rights are no less fundamental." Am. App. Br. at 30. But *Macias* does not support application of strict scrutiny under article I, section 12's privileges and immunities analysis.

Macias was decided under due process and equal protection principles, and strict scrutiny was applied because the challenged statute burdened the fundamental right to travel (a right of all Americans protected under the federal due process clause). *Macias*, 100 Wn.2d at 274 (relying on *Shapiro v. Thompson*, 394 U.S. 618, 630, 89 S. Ct. 1322, 1329, 22 L. Ed. 2d 600 (1969) ("the right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union.

It is a right that has been firmly established and repeatedly recognized.")).[12]

The entirety of *Macias*' article I, section 12 analysis is contained in the opinion's penultimate sentence: "Furthermore, our state constitution privileges and immunities clause, Const. art. 1, section 12, independently supports our conclusion that this provision denies appellants equal protection of the law." *Macias*, 100 Wn.2d at 275. This is unremarkable because *Macias* pre-dates *Grant I* (where the Washington Supreme Court adopted independent article I, section 12 privileges and immunities analysis and formalized the "reasonable grounds" test) by almost twenty years. *Macias* may be instructive for a substantive due process claim, but does not call into question the "reasonable grounds" test that has been unfailingly applied to article I, section 12 privileges and immunities analysis since 2002.

[12] Further, the *Macias* Court explicitly declined to apply strict scrutiny on the basis that the challenged legislation was discriminatory or disparately impacted a protected class. *Macias*, 100 Wn.2d 263 at 271 ("Since the appellants present no evidence establishing purposeful discrimination, their first argument for strict scrutiny is rejected.").

(b) Mr. Woods cannot succeed in any as-applied substantive due process challenge or equal protection challenge.

Mr. Woods does not argue that WLAD's religious exemption violates equal protection or substantive due process—neither phrase appears in his brief and he offers no authority beyond *Macias*.[13] Nevertheless, he states that because "fundamental rights are at issue, strict scrutiny is appropriate," Am. App. Br. at 29, which seems to imply a substantive due process or, perhaps, equal protection challenge—either of which would fail.

Mr. Woods has alleged no impermissible state action. *See State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006) ("We apply strict scrutiny if . . . the state action threatens a fundamental right."); *see Ockletree*, 179 Wn.2d at 779 (Johnson, C.J.) ("absent state action, courts have uniformly declined to prohibit employment discrimination on constitutional grounds."). He challenges no suspect or impermissible classification. *See State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d

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[13] Although *Macias* is an equal protection/substantive due process case, Mr. Woods does not treat it as such. In arguing for strict scrutiny under Washington's separate article I, section 12 privileges and immunities analysis, Mr. Woods conflates the fundamental rights of all Americans protected under the Fourteenth Amendment (triggering strict scrutiny) with state "fundamental rights of Washington citizenship." *See* Am. App. Br., at 29-30. In doing so he "mistakes the privileges and immunities of state citizenship protected by article I, section 12 for the fundamental rights of all Americans guaranteed by the federal due process clause." *Ockletree*, 179 Wn.2d at 792 (Stephens, J., dissenting).

876 (2010) (suspect classifications triggering strict scrutiny include race, alienage, and national origin). He alleges no discriminatory state purpose. *See Macias*, 100 Wn.2d 263 at 271 ("Since the appellants present no evidence establishing purposeful discrimination, their first argument for strict scrutiny is rejected."). And he raises no fundamental right of all Americans recognized as a liberty interest and protected under due process jurisprudence. *See id.*

G. The relief sought by Mr. Woods violates the Mission's rights under the First Amendment and article I, section 11.

Mr. Woods attempts to shift his constitutional burden of proof to the Mission, as if the Mission were asking this Court for relief from a law of general applicability. Am. App. Br. at 34 (The Mission "has provided no evidence that hiring [Mr. Woods] would substantially burden its beliefs."). But Mr. Woods has the burden of proving the WLAD exemption unconstitutional beyond a reasonable doubt. *See* Section III.A, *supra*, at 12. Mr. Woods cites no legal authority for the proposition that the Mission must articulate a specific burden on religious expression in order to claim the WLAD exemption.[14] Nevertheless, the burden on the

[14] The cases cited at pages 31-34 of Mr. Woods' brief involve laws of general applicability.

Mission's rights under the First Amendment and article I, section 11[15] is well established in the trial court record.

1. Mr. Woods openly opposed the Mission's religious beliefs and forcing the Mission to hire him would unconstitutionally regulate its religious expression.

Mr. Woods states that because he self-identifies as a Christian the Mission cannot claim that its employment decisions were based on religion. Am. App. Br. at 35-6. But the record demonstrates that Mr. Woods disagrees with the Mission's sincerely held religious beliefs, *see* section II.D, *supra*, at 8, and in prior pleadings he charged the Mission with holding "anti-gay religious belief[s]" and described its beliefs as "invidious." CP 97, 107.

Mr. Woods counters that he affirmed the Mission's Statement of Faith "multiple times as a volunteer and in his application for employment." Am. App. Br. at 36. But it is for the Mission, not a court, to determine whether Mr. Woods would fairly express the Mission's religious message. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990)

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[15] The Washington constitution imposes even greater protection for the Mission's free exercise of religion than the First Amendment. *See First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 224, 840 P.2d 174 (1992) (applying analysis from *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) in determining that the free exercise provisions of article I, section 11 of the Washington Constitution are "significantly different and stronger than the federal constitution.").

(The Supreme Court will not "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.") (internal quotations omitted); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450, 89 S. Ct. 601, 21 L.Ed.2d 658 (1969) (holding that "the First Amendment forbids civil courts from" interpreting "particular church doctrines" and determining "the importance of those doctrines to the religion").

As described in section II.B, *supra*, at 5, the Mission requires all of its employees to express its religious beliefs and believes that publicly rejecting traditional Christian teaching on marriage and sexuality is tantamount to rejecting that the Bible is the infallible, inspired, authoritative word of God.[16]

Mr. Woods' rejection of the Mission's beliefs implicates the Mission's ability to accomplish its expressive religious purpose for the reasons Justices Alito and Kagan describe in their *Hosanna-Tabor* concurrence: "When it comes to the expression and inculcation of

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[16] Sidestepping the doctrine of infallibility, Mr. Woods argued at the trial court level that many Christian churches are open and affirming. CP 90. The Mission designated a seminary professor as an expert in biblical hermeneutics who would testify that the Mission's beliefs on marriage and sexuality flow directly from the doctrine of infallibility contained in the Mission's statement of faith. RP 15.

religious doctrine, there can be no doubt that *the messenger matters*. . . . both the content and credibility of a religion's message depend vitally on the character *and conduct* of its teachers. *A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts* that he or she espouses." *Hosanna-Tabor*, 565 U.S. at 201, 132 S. Ct. 694 (Alito, J., concurring) (emphasis added).

2. Forcing the Mission, under threat of liability, to employ a person who opposes its religious beliefs would unconstitutionally interfere "with an internal church decision that affects the faith and mission of the church itself."

The WLAD employment provisions are not generally applicable because Washington—like all other states where sexual orientation is a protected class—has a religious exemption. But even if a court were to do what Mr. Woods requests—pretend the exemption did not exist—it would violate the Mission's rights under the First Amendment and article I, section 11.

Mr. Woods' desired remedy—civil liability and injunctive relief–would unconstitutionally interfere in the internal affairs of the Mission. The Supreme Court in *Hosanna-Tabor* emphasized that religious organizations' freedom of association is significantly greater than that enjoyed by secular groups: "the text of the First Amendment itself, []

gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189, 132 S. Ct. 694 (unanimous opinion). Moreover, there is distinction between constitutionally permissible state interference with "outward physical acts"—like denying unemployment benefits for ingestion of peyote—and "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 190, 132 S. Ct. 694; *see Trinity Lutheran*, ___U.S.___, 137 S. Ct. 2012, 2021 n.2 ("This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause."); *see generally Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 682-83, 130 S. Ct. 2971, 2986, 177 L. Ed. 2d 838 (2010) (the Supreme Court has emphasized "in diverse contexts" that its "decisions have distinguished between policies that require action and those that withhold benefits."); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624 (1981) (recognizing the "substantial pressure" on an adherent to modify religious beliefs, burdening religious exercise, where a benefit is conditioned on "conduct proscribed by a religious faith.").

3. In *Obergefell v. Hodges*, the Supreme Court affirmed that religious beliefs like the Mission's are nothing like the race discrimination at issue in *Bob Jones*.

Though not explicitly comparing the Mission's religious beliefs to race discrimination, Mr. Woods nevertheless cites *Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 76 L.Ed.2d 157 (1983) in arguing "where civil rights are on the line, the U.S. Supreme Court has declined to uphold a policy derived from religious beliefs." Am. App. Brief at 36.

Bob Jones is distinguishable in several ways. First, the *Bob Jones* Court qualified its holding as not applying to churches. While recognizing that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education," *id*. at 604, it stated "[w]e deal here only with religious schools—not with churches or other purely religious institutions." *Id.* at 604 n.29; *see also Wisconsin v. Yoder*, 406 U.S. 205, 215, 230, 92 S. Ct. 1526, 1540, 32 L. Ed. 2d 15 (1972) (noting the high bar for regulation of acts prompted by religious belief on the basis of a substantial threat to safety, peace, order, or welfare and stating "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion").

Second, *Bob Jones* recognized the distinction discussed above between withholding a benefit and coercing a result. *Id.* at 604 (withholding tax benefits "will not prevent those schools from observing their religious tenets"). Here, Mr. Woods asks the state to force a church to hire employees who do not agree with or represent its religious beliefs—ignoring that the very way the church expresses its religious beliefs is through its employees.

Finally, and most importantly, the issue here is not race, but religious views on marriage and sexuality internal to the Mission. The *Obergefell* Court stated "it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts" their views on marriage and sexuality and that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Obergefell v. Hodges*, ___U.S.___, 135 S. Ct. 2584, 2607, 192 L.Ed.2d 609 (2015). The Mission's religious belief "has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.* ___U.S.___, 135 S. Ct. at 2594, 192 L. Ed. 2d 609.

IV. CONCLUSION

Mr. Woods bears the burden of proving the WLAD religious exemption unconstitutional beyond a reasonable doubt "after searching legal analysis." He acknowledges the sincerity of the Mission's sincerely held religious beliefs. He does not contest that the Mission's employment decisions were based on its sincerely held religious beliefs. But he wants this Court to completely rewrite existing article I, section 12 jurisprudence, then remand for a trial on how the Mission's purpose to share the gospel of Jesus Christ is carried out in its work serving the poor and vulnerable.

Mr. Woods' request for an invasive inquiry into the Mission's religious practices perfectly illustrates the reasonable grounds for WLAD religious exemption. The trial court correctly entered summary judgment and its ruling should be affirmed.

DATED this December 7, 2018

Respectfully submitted,

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