NO. 96132-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MATTHEW S. WOODS, Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION, Respondent

AMICUS CURIAE BRIEF OF THE WASHINGTON EMPLOYMENT LAWYERS ASSOCATION

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I. INTRODUCTION AND IDENTITY OF AMICUS

The Plaintiff, Matthew Woods, applied for a position as staff attorney with the Seattle Union Gospel Mission. The Gospel Mission rejected his application because he is bisexual. In November 2017, Mr. Woods filed a complaint against the Gospel Mission in King County Superior Court, seeking nominal damages and injunctive remedies for violating his right to be free from discriminatory employment practices under the Washington Law Against Discrimination ("WLAD"). After a limited period of discovery, the Mission moved for summary judgment and relied upon the provision of the WLAD which excludes religious nonprofit corporations from the definition of employer. RCW 49.60.040(11). The Superior Court granted the Mission's motion for summary judgment, and this Court granted direct review pursuant to RAP 4.2.

This Court should hold that the WLAD's religious exemption provision is unconstitutional as applied to employees who do not qualify as a "minister" or the functional equivalent of one. Because Mr. Woods is not a minister, and did not apply to serve as one, the Gospel Mission is liable for discriminating against him on the basis of his sexual orientation.

The Washington Employment Lawyers Association ("WELA") is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 200 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in

recognition that employment with fairness and dignity is fundamental to the quality of life. WELA urges this Court to reverse the summary judgment order and remand for further proceedings.

II. SUMMARY OF ARGUMENT

Many religious organizations are separately incorporated entities. They include hospitals, universities, schools K-12, Catholic Community Services, CRISTA Ministries, the YMCA, the Salvation Army, St. Vincent DePaul, as well as churches, synagogues, and mosques. Religious organizations employ tens of thousands employees in the State of Washington and generate billions of dollars of annual revenue. In most instances, their employees perform the same functions performed by employees of comparably sized non-profit corporations that are not religiously affiliated and for-profit businesses in the same industry or field. These employees require protection by the Washington Law Against Discrimination ("WLAD") no less than employees of secular nonprofit and for-profit corporations.

The WLAD prohibits discrimination and embodies a public policy of "the highest priority." *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (*quoting Allison v. Housing Auth.*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991)). The statute requires a liberal construction. RCW 49.60.020. It nevertheless provides immunity for employers with less than eight employees and "religious or sectarian organizations not organized for private profit" RCW 49.60.040(11) (hereinafter "religious

organizations"). A broad construction of this statutory exemption would significantly narrow the coverage of the statute, contrary to its liberal mandate. *See Marquis v. City of Spokane*, 130 Wash.2d 97, 108, 922 P. 2d 43 (1996) ("a statutory mandate of liberal construction requires that we view with caution any construction that would narrow the coverage of the law"); *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 247, 59 P.3d 655, 667 (2002) (the statute's "exceptions should be narrowly construed").

In *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 317 P.3d 1009 (2014), the Court considered the constitutionality of the WLAD religious exemption. A divided Court decided that WLAD's religious exemption was unconstitutional as applied to the claims of Mr. Ockletree, who worked as a security guard in the Emergency Room of one of Franciscan's hospitals. The parties did not dispute that Mr. Ockletree performed purely secular tasks and that Franciscan's decision to fire him was unrelated to religious beliefs. 179 Wn.2d at 772. Together, these factors resulted in a 5-4 decision in Mr. Ockletree's favor.

But the Court had no occasion to decide the test to be applied where a religious employer broadly claims that *all* of its employees are exempt because they are "ministers." Here, the Gospel Mission does just that. It claims that every employee is part of its Christian ministry so that it is exempt under the WLAD for discrimination against any employee who falls within a protected classification, regardless of job function.

The Court should reject the Gospel Mission's construction of the WLAD's religious exemption provision and its interpretation of the *Ockletree* decision. If the Court accepts the Gospel Mission's view, tens of thousands of employees will have no protection under the WLAD for discrimination on the basis of any protected classification so long as the religious organization claims, without being subject to challenge, that everyone it employs (from janitors to lawyers) "deliver[s] the religious message." UGM Br. at 3. That result would provide religious corporations broader protection than required by the Free Exercise Clause and would be inconsistent with the legislative intent to eradicate discrimination in the workplace. *See Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995).

The First Amendment to the United States Constitution protects a religious organization from liability under the anti-discrimination laws so long as the challenged employment decision involves a religious leader who speaks for the organization, *i.e.*, a "minister." *See Hosanna-Tabor v. EEOC*, 565 U.S. 171 (2012). In *Hosanna-Tabor*, the Supreme Court expressly declined to adopt "a rigid formula for deciding when an employee qualifies as a minister," and instead considered "all the circumstances of [the plaintiff's] employment." 565 U.S. at 190. Whether an employee functions as a "minister" is determined by the "totality of the circumstances." *See Biel v. St. James School*, 911 F.3d 603, 607 (9th Cir.

2018) (citing *Hosanna-Tabor*, 565 U.S. at 190). Under the totality of the circumstances test, the presence of some religious job duties is insufficient to justify an exemption from liability. According to the Ninth Circuit, "the exception need not extend to every employee whose job has a religious component." *Id*. at 611. The totality of the circumstances test also considers the necessity of religious training, job title, and whether the employee holds himself out as a minister. *Hosanna-Tabor,* 565 U.S. at 191-92. This Court should adopt this federal analysis in construing the limits of WLAD's religious exemption.

As demonstrated by the Gospel Mission's own "Essential Job Duties," its "staff attorney" position is focused on the secular task of providing high-quality legal services and not performing the job of a "minister." Mr. Woods does not hold himself out as a minister and no religious training is required, only legal training. As such, free exercise concerns are not implicated.

The Gospel Mission also claims that its right to free exercise of religion allows it to discriminate on the basis sexual preference. But the religious exemption is no broader than the Free Exercise Clause, and religious beliefs must yield to the WLAD as a neutral law of general applicability.

The WLAD exemption for religious nonprofit corporations is unconstitutional as applied to Mr. Woods under Article I, section 12 of the Washington Constitution.

III. ARGUMENT

A. The WLAD Religious Exemption is Unconstitutional as Applied to Employees Who Perform Primarily Non-Religious Job Duties and Where No Religious Doctrine is Implicated in the Employer's Decision-Making.

In *Ockletree*, the plaintiff was employed as a security guard. He suffered a stroke that impaired his non-dominant arm. The employer determined he could not perform the essential functions of his job with or without accommodation, refused his requested accommodation, and terminated his employment. Mr. Ockletree brought multiple causes of action in state court, including employment discrimination on the basis of race and disability in violation of federal law and the WLAD. The employer relied upon the religious exemption contained in RCW 49.60.040(11), which defines an "employer" as "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit."

The employer removed the case to federal court. The District Court certified questions to the Washington Supreme Court asking whether the religious employer exemption violates article I, section 11 or article I, section 12 of the Washington Constitution. The Washington Supreme Court filed a fractured decision.

Justice Charles Johnson wrote the lead opinion, joined by Justices Madsen, Owens, and J. Johnson. Justice Johnson opined that the WLAD exemption is not facially unconstitutional in violation of either the state

constitution's privileges and immunities clause, article I, section 12, or the establishment clause, Article I, section 11. In reference to article I, section 12, Justice Johnson wrote that a cause of action for discrimination by a private actor in a private employment setting is not a fundamental right of citizenship, and therefore article I, section 12 did not apply. 179 Wn.2d at 777-782. Moreover, he found reasonable grounds for treating religious non-profits differently than their secular non-profit counterparts. *Id*. at 783-786.

Justice Stephens wrote a "dissenting" opinion, joined by Justices Gonzales, Gordon-McCloud, and Fairhurst. Justice Stephens clearly recognized that "[u]nder long-settled law, article I, section 12 protects the broad privilege of Washington citizens to bring claims in state court," *id*. at 794, and "that employment free from discrimination rests at the core of the sort of 'personal rights' . . . identified as fundamental, *id.* at 795. Freedom from discrimination is not simply a statutory right, "it is a civil right." *Id.* Justice Stephens recognized a reasonable basis for a legislative distinction between non-profit and for-profit corporations. "But this is not what the legislature did." *Id*. at 798. "Religious and secular nonprofits are similarly situated with regard to civil liability for employment discrimination claims and should be treated the same under the law. Instead, the exemption bestows upon religious nonprofits a uniquely valuable asset." *Id.* at 799.

Finally, Justice Stephens opined that "the exemption violates [article I, section 12] as applied to WLAD claims based on discrimination that is unrelated to an employer's religious purpose, practice, or activity . . . ." *Id*. at 789. "So long as civil liability is predicated on secular conduct, such as discrimination on nonreligious grounds, inquiring into the hiring and firing decisions of religious organizations does not entangle church and state or impair the free exercise of religion." *Id*. at 804.[1] Justice Stephens concluded that the religious exemption was unconstitutional as applied to Mr. Ockletree.

Justice Wiggins wrote an opinion "concurring in part in dissent." *Id.* at 805. Justice Wiggins stated that the WLAD religious exemption was not facially unconstitutional but that the exemption was unconstitutional as applied to Mr. Ockletree. According to Justice Wiggins, "RCW 49.60.040(11) is constitutionally applied in cases in which the job

[1] Prior to *Hosanna-Tabor*, some federal courts applied a similar analysis to that urged by Justice Stephens. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 963 (9th Cir. 2004) (finding no ministerial exception to Title VII claim of sexual harassment by seminarian student because no church doctrine embraces the misconduct involved); *Bollard v. Cal. Providence of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999) (same); *see also Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (discussing examples of liability of religious employers, such as, where a minister is hit by a falling gargoyle). To be sure, the *Rweyemanu* court was not forced to "delineate the boundaries" of the ministerial exception in light of the fact that First Amendment concerns were "easily" triggered. 520 F.3d at 209 (concluding that ministerial exception applied to an ordained minister's challenge to the church's decision to terminate him). Thus, if the "wrongs by the church are wholly non-religious in character," even an ordained minister could have "his day in court." *Rweyemanu*, 520 F.3d at 208; *accord Bollard*, 196 F.3d at 950 ("Whether the exception applies in a particular instance will depend on the nature of the state law claim and its associated remedy….").

description and responsibilities include duties that are religious or sectarian in nature." *Id*. at 806. "I agree with the dissent that the exemption of religious and sectarian organizations in RCW 49.60.040(11) is subject to scrutiny under the privileges and immunities clause of article I, section 12 of the Washington Constitution. But I depart from the dissent because I agree in part with the lead opinion's conclusion that there is a reasonable ground for the exemption for religious and sectarian organizations." *Id*.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977). *Ockletree* holds that the WLAD protects employees who perform secular jobs and who challenge employment decisions that are unrelated to church doctrine. This holding affords WLAD protection for thousands of employees working for religious corporations in the same capacity as employees working for secular non-profit and for-profit corporations. But the Court in *Ockletree* did not have occasion to decide the test to apply where, as here, a religious employer broadly claims that all of its employees are exempt because all of them purportedly carry out the organization's mission, regardless of their primary job functions. *Ockletree* does not apply neatly to the facts of this case. For the reasons stated below, Amicus urges the Court to consider the totality of the circumstances, including the employee's primary job

duties, job title, religious training, and whether the employee holds herself out as a minister.

B. Religious Beliefs Must Yield to the WLAD Because it is a Neutral and Generally Applicable Law.

The United States Supreme Court has recognized both the rights of people in same-sex relationships and the attendant limitations of the Free Exercise Clause. "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason, the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights." *Masterpiece Cakeshop v. Colorado Civil Rights*, ___ U.S. ___, ___138 S. Ct. 1719, 1727 (2018). While the Court recognized "religious and philosophical objections" are protected views, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.*[2] This rationale is no less compelling in the

[2] "[A] member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion." *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (2018). "Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id.*; *see also id.* at 1728-29 (any religious exception must be "constrained," lest merchants be allowed to "put up signs saying 'no goods or services will be sold if they will be used

employment context, and it is beyond dispute that the WLAD is a neutral and generally applicable law.

In *Ingersoll v. Arlene's Flowers,* 187 Wn.2d 804, 389 P.3d 543 (2017), this Court held that under Free Exercise Clause of the First Amendment the WLAD is a neutral and generally applicable law which prohibits discrimination because of sexual orientation regardless of a person's deeply held religious beliefs. *Id*. at 843. The WLAD exemption for religious non-profit corporations is no broader than the reach of the Free Exercise Clause.[3] The religious exemption therefore cannot be applied to deny employment because of sexual orientation notwithstanding the religious beliefs of the Gospel Mission. Construing the WLAD religious exemption more broadly than what the constitution requires would denigrate Mr. Wood's right to be free from discrimination because of his sexual orientation and violate his right to seek redress in the courts. The Gospel Mission's strongly held religious beliefs must yield to the WLAD as a neutral and generally applicable law.

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for gay marriages,' something that would impose a serious stigma on gay persons").

[3] The WLAD religious exemption is constitutional under article I, section 12 only to the extent that discrimination by a religious non-profit is required by the Free Exercise Clause. Ockletree, 179 Wn.2d. at 789 (Stephens, J dissenting). "A law that grants a special privilege to religious organizations is unconstitutional if it 'is not required by the Free Exercise Clause and... either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion.'" *Id*. at 801 (citation omitted). Justice Stephens's dissent concluded that the WLAD "exemption is not necessary to satisfy [the employer's] free exercise right" and "exceeds the limits of an accommodation of religion . . . ." *Id*. at 804.

C. The Court Should Focus on the Employee's Primary Job Duties.

The Court should focus on the employee's primary job duties in determining whether WLAD's religious exemption is unconstitutional as applied. A focus on primary duties allows differentiation between employees who serve as bona fide spiritual leaders (*i.e.*, who "speak" for the church or synagogue or mosque) and those who perform primarily secular functions. This focus would ensure that religious non-profits maintain the broad authority to select their own leaders, but stop short of granting privileges or immunities to one class of corporations beyond what the constitution compels. Moreover, this approach is consistent with the Court's holding in *Ockletree*, and draws from the rationale applied by federal courts adjudicating employment claims brought under analogous federal laws. *See Hosanna-Tabor*, 565 U.S. at 192-93 (adopting "ministerial exception" to Title VII claim, which considers, *inter alia,* the nature of the employee's job duties). Further, a focus on job duties guards against abuse from those organizations who seek of avoid application of a secular law of the highest public policy. *Cf. Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006) ("[I]f to avoid having to pay the minimum wage to its janitor a church designated all its employees 'ministers,' the court would treat the designation as a subterfuge . . . .").

Nonprofit religious corporations employ tens of thousands people in the State of Washington, and the overwhelming majority of those employees perform job functions that are entirely secular, *i.e.*, accounting, janitorial, driving, teaching, and nursing. If the religious exemption applies to all job positions such as these, the equal opportunity for employment for tens of thousands of jobs will be subject to otherwise illegal discrimination on the basis of any of the protected classifications listed in the WLAD. That would be contrary to the mandate of the WLAD to eradicate discrimination in the workplace. Moreover, it would confer special immunities upon a select group of nonprofit corporations in violation of article I, section 12 of the Washington Constitution. *See Ockletree* at 789 (Stephens, J., dissenting). The Court should reject the Gospel Mission's request to construe the religious exemption so broadly. Instead, the Court should adopt a test that focuses *inter alia* on the nature of the job functions at issue.

D. The WLAD Religious Exemption is Constitutional Only as it Applies to Bona Fide "Ministers."

The Free Exercise Clause of the First Amendment to the United States Constitution protects religious organizations from government interference only with respect to their employment decisions involving "ministers." *See Hosanna-Tabor*, 565 U.S. at 172. ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."). In *Hosanna-Tabor,* a former teacher at a

Lutheran school alleged that the school fired her in violation of the ADA after she was diagnosed with narcolepsy. 565 U.S. at 178–79. The Supreme Court expressly declined to adopt "a rigid formula for deciding when an employee qualifies as a minister," and instead considered "all the circumstances of [the plaintiff's] employment." *Id.* at 190. The Court focused on four major considerations to determine if the ministerial exception applied: (1) whether the employer held the employee out as a minister, (2) whether the employee's title reflected ministerial substance and training, (3) whether the employee held herself out as a minister, and (4) whether the employee's job duties included "important religious functions." *Id*. at 191-192. Although the Court has cautioned against relying too heavily on "the relative amount of time ... spent performing religious functions," it has recognized that "the nature of the religious functions performed" and "[t]he amount of time an employee spends on particular activities" are relevant considerations. *Id.* at 174.

The Court concluded that the plaintiff was given the title of "minister" which "reflected a significant degree of religious training followed by a formal process of commissioning. . . including eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher." *Id*. at 191. She also claimed an IRS tax exemption only available to those in the "exercise of the ministry," *id*. at 192, had formal religious teaching responsibilities including teaching "students religion four days a week, and led them in

prayer three times a day. Once a week, she took her students to a school-wide chapel service, and about twice a year she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. *Id*.

After analyzing these factors, the Supreme Court held: "In light of these considerations —the formal title given [the teacher] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that [the teacher] was a minister covered by the ministerial exception." *Id*. at 192. The Court rejected the argument that the ministerial exception applied only to employees who performed exclusively religious duties. *Id*. at 193. It nevertheless recognized the exception did not automatically apply whenever there existed a mix of religious and secular duties. Rather, the Court considered "all the circumstances of her employment." *Id*. at 190.

This Court should adopt a similar approach here in construing the WLAD's religious exemption, which as discussed below, takes into account the "totality of the circumstances" of the employee's job to determine who is a bona fide "minister." Only when a religious employer's decision involves the hiring or firing of a minister (or equivalent) should that organization be permitted to claim an exemption from the WLAD.

E. The "Totality of the Circumstances" Test Determines if an Employee is a Minister. Mr. Woods is Not a Minister.

In *Biel v. St. James School*, the Ninth Circuit considered training, job title, and job duties to decide whether a teacher for a Catholic school was a minister. 911 F.3d 603 (9th Cir. 2018); *accord Puri v. Khalsa*, 844 F. 3d 1152, 1160 (9th Cir. 2017) (adopting the four-factor test). In *Biel*, a teacher was terminated from employment after she informed the school that she had breast cancer. Her ADA claim was dismissed at summary judgment based upon the ministerial exception. The teacher appealed, and the Ninth Circuit reversed. *Id*. at 605.

Biel received a bachelor's degree in liberal arts and a teaching credential from California State University. She is Catholic but being Catholic was not a condition of employment. Biel taught the fifth graders at St. James all their academic subjects. Among these was a standard religion curriculum that she taught for about thirty minutes a day, four days a week, using a workbook on the Catholic faith prescribed by the school administration. Biel also joined her students in twice-daily prayers but did not lead the prayers; that responsibility fell to student prayer leaders. She likewise attended a school-wide monthly Mass where her sole responsibility was to keep her class quiet and orderly. Biel's contract stated that she would work "within [St. James's] overriding commitment" to Church "doctrines, laws, and norms" and would "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." St. James's mission statement provides that the school "work[s]

to facilitate the development of confident, competent, and caring Catholic-Christian citizens prepared to be responsible members of their church[,] local[,] and global communities." *Id*. at 605-06.

The Ninth Circuit relied upon the "totality of the circumstances" test, joining the Second, Sixth, and Seventh Circuits. *Id*. at 615. It ruled that Biel was not a minister for the purposes of the ministerial exception. The "totality of the circumstances" test would ensure that religious non-profits maintain the broad authority to select their own leaders, but stop short of granting privileges or immunities to one class of corporations beyond what the constitution compels. The "totality of the circumstances" is a test well recognized in Washington law.[4]

The Gospel Mission argues, in effect, that it can build religious job functions into every one of its employment positions to insulate it from

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[4] *E.g., Glasgow v. Georgia-Pacific*, 103 Wn.2d 401,406-07, 693 P. 2d 708 (1985) ("Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well-being of an employee is a question to be determined with regard to the totality of the circumstances"); *Dunlap v. Wayne*, 105 Wn.2d 529, 639, 716 P.2d 842 (1986) ("We agree that examining a statement in the totality of the circumstances in which it was made is the best means to determine whether a statement should be characterized as nonactionable opinion"); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 225-26, 797 P.2d 477 (1990) ("Under the totality of the circumstances surrounding the inception of this contract, Indian Wells has not satisfied its burden of proving the exclusionary clause is unconscionable"); *Alonso v. Qwest Communications Co., LLC*, 178 Wn. App. 734, 315 P.3d 610 (2013) ("To determine whether conduct was severe or pervasive enough to affect the terms and conditions of employment, we look at the totality of the circumstances, ..."); *State v. Rupe*, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984) (criminal confessions - "totality of circumstances test of voluntariness; circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police").

liability under the WLAD. This broad interpretation of the religious exemption is inconsistent with the statute's liberal mandate, *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 247, 59 P.3d 655, 667 (2002), and would eviscerate the protections provided by the WLAD. Similar arguments have been carefully scrutinized and rejected by federal courts. *See Biel*, 911 F.3d at 611 ("[T]he [ministerial] exception need not extend to every employee whose job has a religious component."); *see also Richardson v. Northwest Christian University*, 242 F. Supp.3d 1132, 1145 (D. Oregon 2017) ("any religious function was wholly secondary to her secular role: she was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer"); *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp.3d 1168, 1177 (N.D. Ind. 2014) (declining to apply the ministerial exception to a "lay teacher" at a Catholic school who had no special religious training and never held herself out as a minister even though her job duties included attending and participating in prayer and religious services with students). As the Ninth Circuit reasoned in *Biel*: "We cannot read *Hosanna-Tabor* to exempt from federal employment law all those who intermingle religious and secular duties but who do not "preach [their employers'] beliefs, teach their faith, . . . carry out their mission . . . [and] guide [their religious organization] on its way." *Id.* (citing *Hosanna-Tabor*, 565 U.S. at 196); *see also Alcazar v. Corporation*

of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1292 (9th Cir. 2010) ("Additionally, we agree with the courts that have held that, if a church labels a person a religious official as mere "subterfuge" to avoid statutory obligations, the ministerial exception does not apply"); *Tomic*, 442 F.3d at 1039 ("The ministerial exception….do[es] not place the internal affairs of religious organizations wholly beyond secular jurisdiction.").

Here, like the secular school teacher in *Biel*, Mr. Woods is not a minister when the "totality of the circumstances" is taken into account. The necessity of religious training, his job title, whether Mr. Woods holds himself out as a minister, and job functions are all components of the totality of the circumstances.

The Mission's "Essential Job Duties" confirms that the "staff attorney" position at the Gospel Mission requires no religious training, only legal training.[5] The Director of the Mission's legal clinic holds exclusively secular degrees and none of the legal staff qualify for the special IRS treatment afforded to other "employee-ministers" at the organization. The job application process did not require Woods to be selected by a congregation or otherwise "called" to the position.

[5] This case differs from *Ockletree*, *Biel*, and *Hosanna-Tabor* insofar as Mr. Woods is an attorney and his relationship with his clients is governed by the Rules of Professional Responsibility. RPC 8.4(g) prohibits discrimination by an attorney on the basis of sexual orientation. RPC 5.4(c) prohibits the Gospel Mission from "direct[ing] or regulat[ing] the lawyer's professional judgment in rendering such legal services." The Gospel Mission therefore could not require Mr. Woods to condition legal services on the basis of sexual orientation or religious faith. While a client could voluntarily pray with the staff attorney or attend Mission religious services, neither could be required.

Moreover, although the Mission anticipates that staff attorneys will pray with clients, this is not a primary job duty. His primary duties, rather, would have centered on providing legal services to a diverse population of clients, including members of the LGBT community – just as he had capably done as a volunteer. Finally, there is no evidence to suggest that the Mission held out its staff attorneys as ministers, and no argument or evidence that Woods held himself out as one. On this record, the Court should conclude that Woods is not a "minister" and that the WLAD's religious exemption is unconstitutional as applied to his claim.

IV. CONCLUSION

The Court should rule that the WLAD's religious exemption is constitutional only insofar as it applies to a religious organization's ministers. Whether an employee is a "minister" is determined by the "totality of the circumstances." Mr. Woods is not a minister. Religious beliefs must yield to the WLAD as a neutral and generally applicable law.

Respectfully submitted this 16th day of August 2019.

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