No. 96132-8

SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW S. WOODS, Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION, Respondent

REPLY BRIEF OF APPELLANT

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I. Introduction

This case presents the question of whether Matthew Woods should be able to proceed with his claim under the Washington Law Against Discrimination (WLAD) that Seattle's Union Gospel Mission (SUGM) unlawfully discriminated against him by refusing to consider him for a staff attorney position because of his sexual orientation. To resolve that question, it is necessary for this Court to interpret its fractured decision in *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 317 P.3d 1009 (2014), and to determine what rules apply in deciding whether the WLAD's sweeping exemption of nonprofit religious employers violates the Privileges and Immunities Clause of the Washington State Constitution as applied to Mr. Woods.

SUGM argues that a religious nonprofit employer must be exempt from liability under the WLAD whenever the employer asserts that a job includes any duties that are religious in nature, suggesting that little if any inquiry into the employer's asserted nature of the job duties should be permitted, Response Br. at 22-24 – even where, as here, Mr. Woods has personal knowledge of the staff attorney's duties from working for the organization as a full-time intern and volunteer attorney. If accepted, SUGM's analysis would make *Ockletree* nearly toothless. A nonprofit religious employer could assert that any and every job includes religious duties, thereby allowing unfettered discrimination despite the civil rights protections articulated in the WLAD.

If adopted, the impact of foreclosing any balancing of religious freedoms against civil rights would be that the WLAD's religious exemption would be deemed constitutional as applied unless the employer is willing to concede otherwise, and that a religious non-profit can designate all employees as essential to its religious mission regardless of job duties, discriminate at will, and no one could challenge it (or even conduct meaningful discovery). SUGM's position is untenable under the Privileges and Immunities Clause of the Washington Constitution and would leave vulnerable people unprotected against employment discrimination by religious nonprofit employers regardless of their actual job duties.

II. SUGM attempts to recast its rejection of Mr. Woods based on his sexual orientation as a rejection based on its view that he would "publicly reject" SUGM's religious beliefs.

SUGM does not dispute that Mr. Woods is a Christian and that it invited him to apply for a staff attorney position at its Open Door Legal Services (ODLS) program because of his excellent work as a legal intern and volunteer attorney for the organization – only to be told he was ineligible for the job as soon as he disclosed that he was in a relationship with another man. SUGM has stipulated that if it were not a religious organization, Mr. Woods would have a prima facie case of sexual orientation discrimination under the WLAD. CP 761-62.

In response to Mr. Woods' claims in this Court, SUGM frames the issue as whether it can refuse "to hire someone who would publicly reject the organization's sincerely-held religious beliefs," rather than whether it

can refuse to hire job applicants because of their sexual orientation. Response Br. at 1. But SUGM's framing is not supported by the factual record or timeline.

Instead, the record shows that when Mr. Woods sent a private email disclosing his sexual orientation to ODLS managing attorney David Mace, Mr. Woods was immediately told that he was ineligible to apply for the staff attorney position. CP 408 (Mr. Mace responds that he is "sorry [Mr. Woods] won't be able to apply" for the staff attorney position). The record shows that SUGM deemed Mr. Woods ineligible for the staff attorney position *not* because he would "publicly reject" SUGM's religious beliefs, but only because Mr. Woods had made SUGM aware of his sexual orientation. Indeed, there is no evidence in the record indicating that, until Mr. Woods filed this lawsuit, he made any public statement regarding SUGM's religious beliefs at all. SUGM also does not dispute that Mr. Woods affirmed its Statement of Faith throughout his ODLS tenure, which included one summer as a paid, full time intern and significant volunteer service at the ODLS legal clinic. CP 118, 131, 133.

Notably, SUGM also does not dispute that it provides no notice to job applicants or the public that people who engage in "homosexual behavior" are ineligible for employment. None of SUGM's religious screenings, including its Statement of Faith and its application questions, ask volunteers or job applicants about their sexual orientation. CP 118, 131-33. Indeed, Mr. Mace testified that applicants do not receive any

information about the policy until their first day of employment. CP 731 (Mace 80:2-12).

Mr. Woods does not dispute that SUGM has sincerely held religious beliefs against "homosexual behavior," a view that some (but by no means all) Christian organizations share. However, SUGM is not correct when it repeatedly asserts that Mr. Woods "does not contest that he was disqualified from employment because he openly opposed the Mission's sincerely held religious belief." Response Br. at 13, 18. Mr. Woods contends, and the factual record shows, that he was immediately disqualified by SUGM for employment simply because he told Mr. Mace privately that he was in a relationship with another man.

Nor does the record support SUGM's suggestion that Mr. Woods' answers to its religious screening questions played a part in its rejection of him. Response Br. at 9-10. The record is clear that SUGM disqualified him from employment for the staff attorney position immediately upon his disclosure of his existing relationship with another man, not because of anything he later wrote in his application. CP 740-41 (Mace, 141:1-5, 150:3-21 ("I had already essentially rejected him … at the outset…")). SUGM conflates its immediate rejection of Mr. Woods – when Mace tells him he is "sorry [he] won't be able to apply" to the staff attorney position, CP 408 – with the alleged inadequacy of Mr. Woods' answers to its religious screening questions on the job application Mr. Woods completed later, after he had already learned that SUGM had determined him ineligible. SUGM's religious screening procedures, Response Br. at 3-5,

are wholly irrelevant to Mr. Woods' claim for sexual orientation discrimination, because the record is clear that by the time Mr. Woods submitted his application for employment, SUGM had already disqualified him from employment because he told Mr. Mace that he was in a relationship with another man.

These are significant discrepancies of material fact that should have precluded the trial court's grant to SUGM of summary judgment. Additionally, however, the record in this case presents significant factual differences with the caselaw upon which SUGM relies. For example, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330, 107 S.Ct. 2862 (1987), the Church terminated an employee because he failed to qualify for a "temple recommend." Similarly, in *Spencer v. World Vision, Inc.*, the employer stated in its job postings and required faith statements that applicants must attest to their belief in the Apostle's Creed, and it terminated employees who later renounced that belief. 633 F.3d 723, 739–40 (9th Cir. 2011). Both cases were brought by employees who were challenging Title VII's statutory exemption that permits religious employers only to hire "co-religionists" – so the courts were addressing the employer's ability to discriminate on the basis of "co-religionist" grounds, not based on membership in some other protected class. Here, SUGM did not evaluate Mr. Woods' "co-religionist" qualifications, because it had already disqualified him at the outset on the basis of his sexual orientation.

III. The WLAD's sweeping exemption for nonprofit religious employers must be applied narrowly to avoid violating Article I, § 12 of the Washington Constitution.

A majority of the *Ockletree* Court (the dissent and concurrence) recognized that the WLAD's religious employer exemption bestows a privilege or immunity on religious nonprofit employers which, without reasonable grounds for the distinction, violates Article I, § 12 of the Washington Constitution. 179 Wn.2d at 797 (Stephens, J., dissenting); 806 (Wiggins, J., concurring). While SUGM tacitly encourages the Court to reject the fundamental nature of the civil right to be free from discrimination on the basis of sexual orientation by drawing an equivalence to the "right" to smoke indoors, it also acknowledges that a majority of the *Ockletree* court found that the exemption granted a privilege or immunity that subjects the exemption to further review. Response Br. at 37, n.11.

The privilege or immunity conferred to SUGM also comes at the high cost of denying rights to its employees and job applicants. Where, as here, the privilege or immunity conferred by a statute also burdens the fundamental rights of a vulnerable minority, this Court can and should under the Privileges and Immunities Clause determine *both* whether reasonable grounds exist for the privilege *and* evaluate the statute for equal protection concerns. This point was recognized by this Court in *Schroeder v. Weighall*, 179 Wn.2d 566, 577, 316 P.3d 482 (2014), a case that SUGM repeatedly cites in its response brief.

This analysis does not require disposing of decades of caselaw, as SUGM suggests, but rather is supported by even the earliest review: "[t]he aim and purpose of the special privileges and immunities provision of article 1, section 12, of the state Constitution … is to secure equality of treatment of all persons, without undue favor on the one hand *or hostile discrimination on the other.*" *State ex rel. Bacich v. Huse*, 187 Wn. 75, 80, 59 P.2d 1101 (1936), overruled on other grounds, *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979) (emphasis added).

A. There are not reasonable grounds for the privilege or immunity granted to SUGM in this case.

Where a statute has been found to grant a privilege or immunity to a particular group, it is unconstitutional unless there is "reasonable ground for distinguishing between those who fall within the class and those who do not." *Ockletree*, 179 Wn.2d at 783, 797, citing *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake (Grant County I)*, 145 Wn.2d 702, 731, 42 P.3d 394 (2002). Analyzing whether "reasonable grounds" exist for a privilege or immunity is "more exacting than rational basis review." *Schroeder*, 179 Wn.2d at 574. Unlike rational basis review, the Court cannot "hypothesize facts to justify a legislative decision" when conducting a reasonable grounds analysis. *Id.* (citations omitted). "If we are to uphold [a statute granting a privilege], that law must be justified in fact as well as theory." *Id.* at 575.

As applied to this case, there are not reasonable grounds to afford the privilege of the WLAD exemption to SUGM for two reasons: 1) it does

not enjoy a free exercise right to discriminate against an employee who performs secular job duties as a staff attorney; and 2) the exemption is too broadly written. As a result, the exemption must be narrowly construed to only provide exemption when required to alleviate a substantial and concrete burden on free exercise.

1. The privilege or immunity lacks "reasonable grounds" because the right of religious free exercise does not allow an unfettered right to discriminate.

The Washington Constitution, while affording broader religious freedoms than the U.S. Constitution in certain respects, does not protect a religious organization's freedom to jeopardize public peace and safety. Granting SUGM a wholesale exemption from the obligation to respect the civil rights of its employees, without any specific showing of infringement upon its free exercise rights, is not "reasonable [or] just."

As Mr. Woods noted in his opening brief, Article I, § 11 of the Washington Constitution explicitly *excludes* "practices inconsistent with the peace and safety of the state" from its protections of religious liberty. Const. art. I, §11. Similarly, the WLAD clearly identifies discrimination as threatening "the public welfare, health, and peace of the people of this state" that "menaces the institutions and foundation of a free democratic state." RCW 49.60.010. The similarity in language is presumably deliberate. *See, e.g., Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 594, 278 P.3d 157 (2012), quoting 2A Norman J. Singer, Statutes and Statutory Construction § 48A:16, at 809–10 (6th ed. 2000) (Plain meaning may be discerned from

"related statutes which disclose legislative intent about the provision in question … because legislators enact legislation in light of existing statutes."). Under a plain language reading of both texts, the WLAD's protections should be at least as important, balanced against the right to free exercise, as other religious practices curtailed in the interest of peace and safety. *See* App. Amended Br. at 32-33 (collecting cases). If religious employers do not have the free exercise right to engage in the "menace" of discrimination, then the legislature did not have reasonable grounds to exempt them from a burden which exists for secular nonprofit employers. And as this Court specifically noted in *Ockletree*, the WLAD's sweeping exemption for nonprofit religious employers is *not* required to protect free exercise rights. 179 Wn.2d at 786 n.11, 800 (Stephens, J., dissenting).

SUGM's attempt to rely on federal law ends up reiterating this point. Response Br. at 47-48. Again, the similarities to the WLAD's language are striking: *Wisconsin v. Yoder* allows for legislative regulation when religiously-motivated conduct poses "some substantial threat to public safety, peace or order." 406 U.S. 205, 230, 92 S.Ct. 1526 (1972). Moreover, SUGM asserts that its sexual orientation discrimination is somehow different from the religiously-motivated racial exclusion policy at issue in *Bob Jones University v. U.S.*, Response Br. at 47, but the WLAD draws no distinction among protected classes. *See Floeting v. Grp. Health Coop.*, No. 95205-1, 2019 WL 406923, at *4, (January 31, 2019), *citing* Dana E. Blackman, *Refusal to Dispense Emergency Contraception in Washington State: An Act of Conscience or Unlawful Sex Discrimination?*, 14 MICH. J.

GENDER & L. 59, 72 (2007) ("absent distinguishing factors, the various protected classes should be treated similarly under the law").

2. The exemption must be narrow to only exempt regulation which would pose a substantial burden on SUGM's free exercise rights.

The "reasonable grounds" test does not allow the court to hypothesize facts to justify a legislative decision, and the statutory language must be "justified in fact." *Schroeder*, 179 Wn.2d at 574-75. Under this analysis, there are not reasonable grounds to grant exemption from the WLAD if the religious employer does not articulate a non-hypothetical, concrete and substantial burden which has a coercive effect on the practice of its religion. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642–43, 211 P.3d 406 (2009) (citations omitted).

All three decisions in *Ockletree* acknowledged that the Legislature distinguished between religious and secular nonprofit employers to prevent a burden on free exercise that was potential or hypothetical. 179 Wn.2d at 786, n.11 (distinction was "based on *the potential for* governmental interference with religious freedoms," (emphasis added)); 803 (Stephens, J., dissenting) (privilege is only constitutional when necessary to alleviate a substantial and concrete free exercise burden); 806 (Wiggins, J., concurring in part) (exemption was reasonable to promote *goal* of preventing entanglement with religious beliefs).

But the reasonable grounds test does not allow the Court to hypothesize either the nature of the burden on SUGM, nor its coercive

effect. While SUGM articulates its religious beliefs, it has failed to articulate a substantial and concrete burden imposed on its free exercise if it were required to treat Mr. Woods equally to a heterosexual applicant for the staff attorney position.

SUGM asserts that its ability to express its religious beliefs about sexuality and marriage would be abridged by Mr. Woods performing the duties of a staff attorney as a bisexual person, but fails to explain how Mr. Woods' sexual orientation might interfere with his ability to perform the work of an ODLS staff attorney. Religious beliefs regarding sexuality and marriage have been acknowledged by SUGM to be "not relevant" to providing legal services to clients. CP 149 (Mace 28:9-17). Similarly, SUGM fails to explain how employing Mr. Woods as a staff attorney would have a coercive effect upon its religious practices when previously accepting his volunteer labor and his full-time summer internship, where he performed the same duties as staff attorneys, did not.[1] Without such showings, reasonable grounds do not exist for the religious employer exemption to be constitutionally applied to Mr. Woods.

B. Where a privilege or immunity burdens the civil rights of a vulnerable minority, judicial scrutiny should be high.

SUGM acknowledges that the "reasonable grounds" test discussed above requires heightened scrutiny of a privilege or immunity. Response Br. at 38. However, SUGM objects that subjecting the WLAD exemption

[1] The record further indicates that even after disclosing to staff attorney Alissa Baier that he was in a relationship with another man, Ms. Baier told Mr. Woods that "[r]egardless of what happens with the job, you're welcome back to volunteer at any time, too." CP 124.

to strict scrutiny would "create a new test" and "would have the effect of abrogating or calling into question" the Court's interpretation of Article I, § 12. Response Br. at 34.

SUGM's observation that the fundamental right to travel considered in *Macias v. Dep't of Labor and Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983), derives from federal due process is a well taken distinction. Response Br. at 39-40. But it is incorrect that the kind of equal protection analysis undertaken in *Macias* under Article I, § 12 is inapplicable.[2] According to *Schroeder v. Weighall*, Response Br. at 36, the application of a "reasonable grounds" test for a privilege or immunity does not preclude courts from also applying heightened equal protection scrutiny under Article I, § 12 when an immunizing law also burdens a vulnerable minority group. 179 Wn.2d at 577 (finding that a statutory exemption "clearly confers a benefit on one group of citizens, [and] also has the potential to burden a particularly vulnerable minority."). When a privilege or immunity burdens vulnerable minority groups, the Article I, § 12 analysis remains "substantially similar" to federal equal protection analysis, and requires the Court to "apply different levels of scrutiny depending on whether the challenged law burdened a suspect class, a fundamental right, an important

[2] Mr. Woods argued that strict scrutiny should be adopted in his Opening Brief, App. Amended Br. at 29-30. Without specifically identifying it as an equal protection test, Mr. Woods argued that strict scrutiny was appropriate to protect a fundamental right and described the state's compelling interest.

right or semisuspect class, or none of the above." *Id.*, citing *Seeley v. State,* 132 Wn.2d 776, 787 n. 7, 940 P.2d 604 (1997).

Thus, laws that burden "suspect classifications" or "fundamental rights or liberties" should receive strict scrutiny under both the 14th Amendment and Article I, § 12. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Intermediate scrutiny should apply "if the statute implicates both an important right and a semi-suspect class not accountable for its status." *Id.* (citations omitted). This Court, along with many others, has already recognized that "members of the LGBT community are vulnerable to discrimination." *In re Marriage of Black*, 188 Wn.2d 114, 129–30, 392 P.3d 1041 (2017).

There can be no doubt that the religious employer exemption burdens vulnerable minorities, including LGBTQ individuals. The exemption permits religious employers like SUGM, which perform a vast array of social services for the public, to exclude disfavored minorities from employment in a wide range of secular skill sets unrelated to religion. The burden is particularly heavy where the religious employer, like SUGM, does not publicize the exclusionary nature of its religious beliefs toward a vulnerable minority, nor include those views in its application materials. Would-be employees must invest time and energy pursuing employment, only to be turned away because of discrimination that would be unlawful in any other context. SUGM conceded that it does not publicize its views on

sexual orientation. CP 89-90 (Plaintiff Summary Judgment Brief), (collecting evidentiary support).

At the very least, the religious employer exemption in the WLAD should be recognized for the burden it places upon the rights of groups of people the Legislature otherwise opted to protect. Even the lead *Ockletree* opinion understood the WLAD to convey "important" rights, 179 Wn.2d at 780-81, and other courts have recognized that LGBTQ people constitute at least a semi-suspect class. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014) (holding that heightened scrutiny applies to classifications based on sexual orientation and that courts must "ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status").[3]

Regardless of the level of scrutiny this Court ultimately applies, the people of Washington, and Mr. Woods, need greater clarity about when the WLAD's religious employer exemption is unconstitutional as applied to members of protected classes. This broad exemption is inconsistent with the strong language of the WLAD itself, which ensconces its enumerated rights as constitutionally derived, broadly construed, and vital to the peace and safety of our state. RCW 49.60.010-.020. The WLAD demands that the people of Washington be free from discrimination on the basis of who

[3] This Court has also recognized that its decision in *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006), that declined to apply heightened scrutiny to laws that discriminate on the basis of sexual orientation has since been abrogated by the U.S. Supreme Court's decision in *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2585 (2015). *See Black*, 188 Wn.2d at 129.

they are as a person – that is to say, their race, religion, sexual orientation, or other protected characteristic – and that any exception, religious or otherwise, which would circumscribe those rights should be especially narrow.

IV. Burden of proof is "beyond a reasonable doubt" but the lack of clarity of the precedent set by *Ockletree* does not mean Mr. Woods cannot meet his burden.

Mr. Woods does not dispute that statutes are presumed constitutional and he has the burden of proving beyond a reasonable doubt that the WLAD's exemption is unconstitutional as applied to him. *Sch. District's Alliance for Adequate Funding for Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). But a lack of clarity as to the precise precedent set by the *Ockletree* decision does not mean, as SUGM suggests in a footnote, that this burden cannot be met. *See* Response Br. at 20, n. 6. In *Ockletree,* this Court already found that the WLAD's religious exemption is unconstitutional as applied in some circumstances; Mr. Woods now asks the Court to interpret its own decision in *Ockletree* and to determine whether he is entitled to pursue his WLAD claims as well. Mr. Woods has at a minimum raised genuine issues of material fact as to whether the religious employer exemption is unconstitutional when it permits SUGM to bar Mr. Woods from employment as a staff attorney based on his sexual orientation.

V. Neither the litigation process nor the discovery propounded by Mr. Woods infringed on SUGM's right to free exercise.

Arguing that allowing Mr. Woods' claims to proceed would unconstitutionally infringe on its free exercise rights, SUGM repeatedly asks the Court to broadly interpret the discovery Mr. Woods conducted during the initial stages of this litigation as unconstitutional "trolling" for the source and nature of its religious beliefs. *See* Response Br. at 11, 24.

But throughout the brief litigation of this matter, Mr. Woods was careful to limit his discovery requests to the origins, meaning, and implementation of SUGM's policy.[4] *See* CP 252-53 (Interrogatories Nos. 16, 17), 259-60 (Requests for Production Nos. 15, 16, 17), 281 (Interrogatories No. 30, 31), 286 (Request for Production No. 36), 288 (Request for Production No. 42), and 294-97 (Notice of CR 30(b)(6) Deposition). Repeatedly, Mr. Woods explained that he was not seeking SUGM's biblical support for its policy, nor justification or explanation of its religious significance. *See, e.g.,* CP 304 ("We agree that a request for the biblical support … would likely overstep Defendant's rights"); CP 306-07 ("Plaintiff does not request justification, scriptural citation, or rationale for Defendant's beliefs – the questions merely ask what the belief is, and what the nature and application of the job requirements are.").

[4] Mr. Woods propounded a small number of requests related to religious affiliation and adjudication in light of jurisdictional issues raised in Washington caselaw that SUGM might have raised in its anticipated summary judgment motion. *See* CP 304-05 ("We trust you can appreciate that it would be foolhardy to agree to waive outstanding discovery in light of a dispositive motion we haven't yet seen."). Those requests were either waived as part of the meet and confer process or were not pursued further.

Nevertheless, SUGM accused Mr. Woods of seeking justification as to "how the Mission leadership interprets the biblical texts on homosexuality," CP 302, offered evidence of the biblical interpretation of "infallibility," and objects that any inquiry into workplace practices *at all* would impermissibly touch on religious belief. *See* Response Br. at 22-24, 44, n. 16.

If SUGM's approach were to be adopted, it would preclude litigants from making even the basic discovery requests necessary to prove their claims. Without the ability to pursue discovery into the employer's reasons for disqualifying applicants, job duties, and other, more routine employment matters like the adoption and implementation of policies, harmed plaintiffs would be deprived of a right of action as a practical matter. The only religious employers that would be subject to the WLAD would be those who opted to concede to it, and any religious employer seeking to avoid liability would need only assert the impenetrable shield of religious beliefs.

Such a result was anticipated and specifically rejected in even the earliest Article I, § 12 caselaw. In *Bacich*, the Court expressly rejected any statutory distinction which "rest[s] upon a mere fortuitous characteristic or quality of persons, *or upon personal designation.*" 187 Wn. at 84 (emphasis added). Moreover, Mr. Woods' discovery requests aligned with the language in *Ockletree* discussing approaches for determination of the exemption's constitutionality based on religious beliefs and job responsibilities, respectively. *See* 179 Wn.2d at 803 (Stephens, J., dissenting) ("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*." (emphasis added)); 806 (Wiggins, J., concurring) (the job duties test "permits an objective examination of an employee's job description and responsibilities in the organization."). SUGM similarly overstates the holding of *Spencer v. World Vision, Inc*., Response Br. at 24, which addressed the religious nature of the employer itself, not discovery disputes about the development of any particular policy or "internal discussions or deliberations about theological views." *See gen.* 633 F.3d 723.

SUGM has offered no authority for the proposition that religious organizations should be liberated from basic fact-finding procedures when excluding protected classes other than "co-religionists" from employment, and no explanation for how the Court might apply well-established legal principles to religious organizations if routine discovery is deemed to be religiously intrusive. Nor would reversing the trial court's grant of summary judgment cause infringement: to the extent further discovery into SUGM's interpretation and application of its hiring policies is required, such inquiry would be limited to determining whether any non-discriminatory reason for disqualifying Mr. Woods from employment existed (e.g., comparing his qualifications against those of the candidate hired). The evidence might show that Mr. Woods was simply not the most qualified candidate for the position, but by disqualifying him immediately

because of his sexual orientation, SUGM foreclosed his opportunity for a fair assessment.

VI. SUGM misstates the work performed by Mr. Woods and relies upon inapposite caselaw in arguing against the application of a "job duties" test.

The trial court should not have granted summary judgment when significant material questions of fact exist as to the job duties and responsibilities of the ODLS staff attorney position. App. Amended Br. at 20-23. In response to this argument, SUGM offered factual representations about the position and Mr. Woods' experience which are not supported by the record and which do not resolve the material factual disputes. *See* Response Br. at 7 (describing staff attorney relationships with clients as "deeper" due to "full-time work and extended contact with clients over the life of a matter"), 30 (dismissing Mr. Woods' first-hand observations of work performed by staff attorneys as "conclusory" and "inadmissible").

Mr. Woods served as a legal clinic volunteer for many years, "do[ing] intake, spot[ting] issues, offer[ing] initial advice or referrals." Response Br. at 7. He also worked full-time at ODLS for a summer, where Mr. Mace gave him "an opportunity to represent a client and to brief a legal issue and then to represent that client at [a child support] hearing." CP 727 (Mace, 56:10-24). In that child support case, he performed the same work a staff attorney would have done, providing representation to the client from the beginning of the case to the end. *Id.* He also had ample opportunity to develop his first-hand knowledge of the staff attorney position and to form

deep relationships with clients, as ODLS interns are "paired with a staff attorney throughout the summer" and "help with daily tasks associated with the current caseload" and work side-by-side with their attorney partner for "daily supervision and training." CP 719.

SUGM's assertion that ODLS attorneys are capable of providing both legal advice and spiritual connection with clients is another red herring. Response Br. at 31. Mr. Woods' point is not that duality of the attorney's role is not possible, but rather that SUGM cannot *require* ODLS attorneys to preach its religious beliefs to clients without overstepping those attorneys' duties under the Rules of Professional Conduct.[5]

There is a lack of congruity between SUGM's representation of staff attorney job duties and Mr. Woods' firsthand observation and performance of those duties as an ODLS volunteer and full-time intern. These are questions of material fact which should have precluded summary judgment. Without some sort of objective test, such as evaluating an employee's job duties, the only religious nonprofit employers who would be subject to the WLAD would be those who effectively "opt out" of the exemption by admitting that their discrimination is not supported by either religious belief or job duties, as did Franciscan Health in the *Ockletree* case. While some

[5] It also begs the question how SUGM would be able to provide legal advice without regard to sexual orientation or any other protected class, while also expecting staff attorneys to preach its religious beliefs against marriage equality or same-sex relationships, without running afoul of public accommodation laws. *See* RCW 49.60.215.

employers may make that choice, it remains unconstitutionally overbroad for religious employers to enjoy wholesale exemption from broad-reaching civil rights protections by categorizing all employment it offers as religious, regardless of the position's actual responsibility to disseminate a religious message.

SUGM relies heavily on *Amos* in support of its argument that any "job duties" test would be religiously intrusive. Response Br. at 22-23. It is important to note that this Court both explicitly and implicitly rejected *Amos* as not germane to the religious employer exemption. *Ockletree*, 179 Wn.2d at 802 (Stephens, J., dissenting) ("In its rush to adopt *Amos*, the lead opinion fails to consider that the WLAD exemption is not the equivalent of Title VII of the Civil Rights Act of 1964 … *Amos* does not resolve the constitutionality of our law"), 806 (Wiggins, J., concurring in part) (implicitly rejecting *Amos* by recommending adoption of a "job duties" test).

Even looking squarely at *Amos*, however, as well as the similar analysis undertaken in *Spencer v. World Vision, Inc.*, the factual differences in the cases preclude application here. In both cases, the desire on the part of the employer was to limit hiring to "co-religionists," as authorized by Title VII – i.e., the Mormon church wanted to be allowed to only hire other Mormons, *Amos*, 483 U.S. at 330, and World Vision wanted to be allowed to exclude employees who did not attest to their belief in the Apostle's Creed. *Spencer*, 633 F.3d at 739–40. Neither sought to exclude employees

based on any protected class other than being "co-religionist." Put simply, the burden presented when a court is asked what makes a person "Mormon enough" to be employed by the Church of Jesus Christ of Latter-Day Saints is different than the burden presented when a court is asked to determine what a building engineer (as in *Amos*) or a staff attorney's job duties are.

Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C. provides guidance as to the extent of the First Amendment-derived free exercise right to discriminate on grounds *other than* being "co-religionist." *See gen.* 565 U.S. 171, 132 S.Ct. 694 (2012). There, the Supreme Court performed a fact-based analysis of religious versus secular job duties. *Id.* at 191-92. The result was that a church seeking to discriminate against an employee with a disability could only permissibly do so if the employee's job duties were ministerial – not by adopting any particular quota of religiosity, *id.* at 190 ("We are reluctant … to adopt a rigid formula") but because the duties and qualifications denoted the employee's responsibility for teaching and disseminating her employer's religious message. *Id.* at 192 ("In light of these considerations—the formal title given Perich 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 Perich was a minister covered by the ministerial exception.").

In this case, Mr. Woods has extensive personal knowledge about the job duties performed by SUGM's staff attorneys based on his long service

to the organization as a full-time legal intern and a volunteer attorney. Based on his experience, he has offered evidence to raise material issues of fact regarding whether the job duties for the position are religious in nature. Mr. Woods asks that this Court narrowly tailor the religious employer exemption to only the accommodation absolutely necessary to avoid a concrete and substantial burden on SUGM's religious freedom, and allow Mr. Woods to pursue his claims.

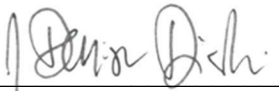
VII. Conclusion

For the foregoing reasons, Mr. Woods respectfully requests that the Court reverse the trial court's summary judgment order and establish a test by which the right to be free from employment discrimination is deemed fundamental and religious nonprofit employers are only exempt from the WLAD's civil rights obligations under the narrowest possible circumstances.

DATED THIS FEBRUARY 5, 2019.

Respectfully submitted,

TELLER & ASSOCIATES, PLLC



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 5th day of February, 2019, I served the foregoing REPLY BRIEF OF APPELLANT with the Clerk of the Court via e-filing and Respondent's counsel via email:

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