No. 96132-8

SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW S. WOODS, Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION, Respondent

APPELLANT'S ANSWER TO BRIEFS OF AMICI CURIAE

J. Denise Diskin, WSBA #41425*
Sara Amies, WSBA #36626
Teller & Associates, PLLC
1139 34th Avenue, Suite B
Seattle, Washington 98122
denise@stellerlaw.com
sara@stellerlaw.com
**Of Counsel*

Andrew Kashyap, WSBA #37240
Legal Voice
907 Pine Street, Suite 500
Seattle, Washington 98101
akashyap@legalvoice.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. Introduction

Mr. Woods responds here to three *amici curiae* briefs filed in support of Seattle's Union Gospel Mission's ("SUGM") position in this case.[1] In so responding, Mr. Woods limits his argument only to those points requiring response and incorporates arguments raised in prior briefing. The unifying characteristic of all three *amici* responded to here is that all seek to make points to the Court based on overreaching interpretations of Mr. Woods' legal position. Both *amici* Citygate and American Association, *et al.*, urge this Court to take the extreme measure of either overturning its precedent in *Ockletree v. Franciscan Health Systems*, 179 Wn.2d 769, 317 P.3d 1009 (2014) or rejecting it as inapposite. *Amicus curiae* Citygate misconstrues the record in order to manufacture conflict between the religious beliefs held by SUGM and Mr. Woods, and relies heavily on federal caselaw to present this case as being about SUGM's desire to restrict religious conduct rather than the status-based discrimination in which SUGM engaged. Finally, *amicus curiae* Legal Educators spin Mr. Woods' narrow analysis of the Rules of Professional Conduct into a dystopian

[1] Mr. Woods limits his response here to arguments raised in the Brief of Citygate Network as *Amicus Curiae* Supporting Respondent ("Citygate"), the Brief of Legal Educators as *Amicus Curiae* in Support of Respondent ("Legal Educators"), and *Amicus Curiae* Brief of the American Association of Christian Schools, the Association for Biblical Higher Education in Canada and the United States, and the Association of Classical Christian Schools ("American Association, *et al.*").

fiction wherein lawyers are prohibited from having a "moral compass," or even practice area preferences.

Mr. Woods urges the Court to remain focused on the core issue of this case: whether religious nonprofit employers enjoy a wholesale exemption from the Washington Law Against Discrimination ("WLAD") where, as here, they seek to exclude all members of a protected class from employment regardless of the duties they perform.

II. Government may enforce laws, including employment discrimination laws, despite conflict with religious belief.

Amicus Citygate opens its briefing with the striking assertion that "a state law regulating employment *must give way* to the Mission's right [to limit hiring to those] faithful to the Mission's doctrinal practices." Citygate, 1 (emphasis added). Leaving aside that adoption of this premise would exempt religious employers from employment regulation like minimum wages, workplace safety requirements, and any other employment protection so long as the employer asserted a religious reason for the exemption, adoption of this premise would also defy the plain language of Washington's religious freedom clause and decades of caselaw. Amended Brief of Appellant ("Am. Br. App."), 31-34.

A. Cases regarding co-religionist discrimination are inapposite.

Like SUGM and previous *amici*, Citygate characterizes SUGM's refusal to hire Mr. Woods as based in SUGM's religious beliefs, not Mr. Woods' sexual orientation. Citygate, 12-13, 18. Its entire argument – that Mr. Woods is asking the Court to "dictate ... how to carry out [SUGM's] religious mission," and force SUGM to hire people whose "beliefs and conduct are [in]consistent with [SUGM's] religious precepts" – is based on the faulty premise that Mr. Woods' sexual orientation is also his religious belief. Citygate, 11. Mr. Woods has already briefed this question exhaustively, and explained how the factual record demonstrates that Mr. Woods was excluded from employment prior to completing SUGM's religious screening. Reply Brief of Appellant ("App. Reply"), 2-6.

Citygate, like SUGM, argues that SUGM's religious beliefs entitle it to make its own personnel decisions and create a community consistent in religious belief. Citygate, 12-15. Mr. Woods is not challenging its authority to do those things – but they are not what SUGM did here. None of SUGM's application materials request information about a candidate's own sexual orientation, nor their beliefs regarding sexual orientation or marriage. CP 118, 131-33. While these facts do not change the sincerity of SUGM's beliefs, they do distinguish SUGM's position from that of employers whose co-religionist hiring policies have been upheld. Unlike

the employees in *Amos* and *Spencer*, whose employers required, as part of the hiring process, that employees attest to particular religious beliefs (*i.e.*, in the Holy Trinity) or obtain particular religious certifications (*i.e.*, a temple recommendation), SUGM does not screen for adherence to any particular beliefs regarding sexual orientation or marriage. Instead, it only announces those beliefs through requirements contained in its employee handbook, which is issued after an employee is hired and begins their first day of work. App. Reply, 4-5. SUGM's failure to screen for applicants' beliefs regarding sexual orientation and marriage indicates that SUGM's motive for excluding Mr. Woods from employment was his sexual orientation, not whether his religious beliefs aligned with SUGM's.

B. Citygate's cited caselaw does not support the right of religious employers to exclude employees on the basis of sexual orientation.

Citygate cites to several cases regarding religious organizations excluding employees on the basis of conduct. But at no point does Citygate address Mr. Woods' critical argument that, under these facts, discrimination on the basis of *conduct* is indistinguishable from discrimination on the basis of *status* in a protected class. Appellant's Second Amended Answer to Briefs of Amici Curiae ("App. Answer"), 4, 9-10. Instead, the cases cited by Citygate address only conduct which, when prohibited, does not result

in the exclusion of entire protected classes of people outside the scope of religion.

The closest analogous case cited by Citygate is *Hall v. Baptist Mem'l Health Care Corp.* In this Sixth Circuit case, the plaintiff, while a lesbian, brought only religious discrimination claims, not sexual orientation discrimination claims, thus directly positioning the conflict between the employee and the employer as doctrinal. 215 F.3d 618, 623 (6th Cir. 2000). Moreover, the employer "would not intervene in Hall's choice of where to attend church" until she was ordained as a lay minister at her LGBTQ-welcoming congregation and her employer determined her to have a position with "considerable influence over students." *Id.* Even then, the employer did not squarely disqualify her from employment, as SUGM has done to Appellant and LGBTQ employees, but rather it offered her another position, which the employee declined. *Id.* The court found it significant *not* that the plaintiff was a lesbian, but that she took "a leadership position in an organization that condones a lifestyle the College considers antithetical to its mission." *Id.* at 627. As Mr. Woods addressed in his discussion of *Boy Scouts v. Dale*, SUGM excluded him from employment because of his private disclosure of his relationship, not a leadership position, church membership, or other public stance. App. Answer, 16-18,

citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

Citygate frames Mr. Woods' claims as asking the court to "decide what beliefs or conduct is consistent (or not) with a religious organization's orthodoxy." Citygate, 11. In keeping with this assertion, Citygate repeatedly cites cases arising out of religious discrimination claims; *i.e.*, cases where the parties explicitly frame their differences as arising out of religious practices. Citygate, 12-15. *See Little v. Chicago*, 929 F.2d 944 (3d Cir. 1991) (finding a Catholic school was not subject to Title VII when it fired a Protestant teacher for remarriage and teacher brought religious discrimination claim); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 190-91, 196 (4th Cir. 2011) (finding a Catholic nursing home was not subject to Title VII when it refused to accommodate the religious beliefs, in the form of religious garb, of a non-Catholic employee).

Even where Citygate argues that protected classes other than religion are implicated, the cases it cites do not address a religious employer's religiously-motivated desire to exclude an entire protected class. Citygate 15-17. For example, in *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, the Court recognized the employer to be subject to Title VII with respect to the employee's claim of retaliation related to race discrimination, but held the employee failed to adequately prove that claim. 503 F.3d 217,

232 (3d Cir. 2007). Thus, *LeBoon* offers no guidance as to how this Court should resolve Mr. Woods' claims. In *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, the employee brought a sex discrimination claim – not because she was excluded from employment due to her sex or sexual orientation, but because she wanted the court to weigh her employer's treatment of her pro-choice activity against its treatment of male employees' Jewish faith and opposition to war. 450 F.3d 130, 134-35, 140 (3d Cir. 2006). Because she did not offer evidence that male employees had engaged in comparable activity, *i.e.*, public espousal of pro-choice beliefs, the court held that her claims required it to engage in an unconstitutional assessment of the "relative severity of [doctrinal] offenses." *Id.* at 139.

Here, Mr. Woods is not asking the Court to tell SUGM what its religious beliefs should or should not be, nor is he asking the Court to find that SUGM's beliefs about sexual orientation are less important than other of its beliefs. He is, instead, asking the Court to recognize the significant harm to the peace and safety of the state posed by discrimination, regardless of its motivation – not to "draw impossible lines in the gray area between religious and secular activities ... but simply [...] not to discriminate." *Ockletree*, Catholic (Stephens, J., dissenting).

Mr. Woods' arguments are in keeping with the line of federal cases arising from *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct.

1313 (1979). These cases specifically reject Citygate's assertion that "a religious organization's right to be free from governmental intervention outweighs any governmental interest in eliminating discrimination." Citygate, 10. First, this language, which Citygate attributes to the *Little* case, refers narrowly to the application of the religious discrimination exemption of Title VII and is not a broad assertion that governmental interests must defer to religious beliefs when other forms of discrimination are at play. 929 F.2d at 951. Under *NLRB v. Catholic Bishop of Chicago* and following cases, courts have *not* simply held religious institutions to be exempt from government regulation, but rather have used a three-part test to apply government regulation where Congress so intended and where no "significant risk of infringing the First Amendment" was posed. *See, e.g., Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324, 326-28 (3d Cir. 1993) ("Since *Catholic Bishop*, the Court has indicated that religious institutions are subject to some regulation" and discussing following caselaw).

Woods does not contest SUGM's right to ask him questions about his faith to ensure doctrinal alignment, though he did not answer those questions fully because he had already been told he would not be hired if he applied. CP 115. His cover letter for the staff attorney position requested that SUGM change its employment policy, not its religious beliefs. CP 135.

SUGM's free exercise rights under the Washington Constitution do not encompass practices which, like discrimination, jeopardize the peace and safety of the state. Am. Br. App., 31-34; App. Reply, 8-10. Nor does the First Amendment or caselaw applying Title VII's exemptions for religious discrimination exempt SUGM from government regulation of discrimination against other protected classes of employees. *See supra.* Mr. Woods deserved to be evaluated on the basis of his qualification for the staff attorney position and SUGM's religious application questions – not on the basis of his sexual orientation.

In light of the cases cited by *amicus* Citygate and the interests represented by *amici* American Association, *et al.* and Council for Christian Colleges and Universities, *et al.*, it is important to note that the interests of religious schools are distinguishable from those of a nonprofit religious social services provider or legal services provider. "The religious significance of parochial schools – and their teachers in particular – is proclaimed by the Catholic Church," *Little*, 929 F.2d at 948, because of "the integration of religious truth and values with the rest of life ... its unique curriculum... [and] the presence of teachers who express an integrated approach to learning and living in their private and professional lives." *Id.* at fn. 5. By design, religious schools are set up for families to opt their children in because they want their children to be inculcated with

a particular set of beliefs as they grow. Social services providers – deemed nonprofits entitled to the exemption specifically because of the public good they perform – provide a range of services, usually for free, to people who lack the economic resources to meet their basic human needs on their own. SUGM's constituents have little choice to exercise over where they obtain meals, housing, dentistry, or legal services, and the Court should take those factors into account when considering caselaw related to the religious duties of educational employees versus the religious duties of social and legal services employees.

III. An *Ockletree* majority held that the religious employer exemption implicated fundamental rights.

Amici Citygate and American Association, *et al.* both argue that the Court should disregard its *Ockletree* decision under the facts of this case. Citygate, 19; American Association, *et al.*, *passim*. This Court should not take the extreme and unnecessary step of rejecting the precedent set in *Ockletree*, and does not need to in order to reach a just result here.

Mr. Woods only challenges the constitutionality of the exemption as applied to him, so arguments as to its facial constitutionality are unnecessary. American Association, *et al.*, 12-14. The Court reached a clear majority that the use of the exemption implicates Art. I, Sec. 12 because the WLAD grants fundamental civil rights. App. Reply, 6-7, citing

Ockletree, 179 Wn.2d at 797 (Stephens, J., dissenting); 806 (Wiggins, J., concurring). This is a settled question, so the Court should also reject American Association, *et al.*'s argument that no fundamental right is implicated.[2] American Association, *et al.*, 21-22.

The *Ockletree* opinion applied a two-part test, first asking whether a statute involves a privilege or immunity, and if so, asking whether the legislature had reasonable grounds for granting it. 179 Wn.2d at 776-777. The employer's religious motivations go to the question of whether reasonable grounds for the exemption exist, not to the question of whether the wholesale statutory exemption afforded to religious nonprofit employers creates a privilege or immunity disallowed by Art. I, Sec. 12. *Id.* at 798 (Stephens, J., dissenting) ("The WLAD exempts only religious nonprofits, not secular ones, from employment discrimination claims, and the question is whether its distinction is justified by some 'reasonable and just difference' between the two types of employers."). The exemption grants a

[2] The universe of rights contemplated by the legislature is far more expansive now than it was when the exemption was last amended in 1957. In the meantime, the legislature has repeatedly amended the WLAD to keep pace with the evolution of our society's rejection of bigotry and the harms it causes, and both the legislature and this Court have had the opportunity to encounter many factual scenarios illustrating the need for continued and expanded civil rights protections. It is virtually certain that the legislature in 1957 did not contemplate the proliferation of religious nonprofit employers that exist today, the direct conflict that some religious employers would perceive between their beliefs and LGBTQ civil rights, or that the exemption would affect the employment rights of many thousands of Washingtonians working for religious nonprofit institutions.

privilege or immunity prohibited by Art. I, Sec. 12 because it circumscribes fundamental rights of citizenship afforded by the WLAD. App. Reply, 6-7, 11-15. The employer's religious motivation (and the disagreement in rationale between the dissent and the concurrence in determining the scope of free exercise when civil rights are on the line) goes to whether the Court should permit the unconstitutional privilege to stand in light of the employer's free exercise rights. In short, American Association, *et al.*'s analysis assigns the dissent and concurrence's difference in rationale to the first question in the privileges and immunities analysis, when it should be assigned to the second.

Amicus Citygate similarly urges that the Court disregard its decision in *Ockletree*, on the grounds that application of the exemption to an employer that does not assert a religious motivation for its employment decision is irrelevant to the application of the exemption to an employer that does. Citygate, 19-20. But it is the same religious exemption at issue in both cases, implicating the same fundamental rights of citizenship described by the WLAD (the right to be free from discrimination in employment, unless one's employer is a religious nonprofit). It is the implication of those fundamental rights that gives rise to this case, and Mr. Woods' request that the Court ask the question the *Ockletree* case did not: where do his

fundamental rights stand in relation to SUGM's when it asserts the right to harm him by discriminating?

IV. The RPCs do not preclude lawyers from having a "moral compass," but rather preclude placing religious beliefs before client interests.

Amicus Legal Educators urge the Court to "recognize the right and duty of a lawyer to hold personal beliefs and integrate those beliefs into the practice of law." Legal Educators, 4. Legal Educators' argument overreaches the issues in this case. Mr. Woods raised his concerns about RPC compliance based on SUGM's assertion that all of its employees, including ODLS staff attorneys, must have religious proselytizing as their *primary* job duty. Am. App. Br. 24-25. While SUGM is free to require that of non-lawyer employees, the RPCs demand of each and every attorney/client relationship that the *client's* interests are paramount. RPC 2.1, 5.4. Legal Educators grossly overstate Mr. Woods' argument by equating lawyers to "taxi drivers," "mere technicians," and mischaracterizing Mr. Woods' argument as urging that lawyers leave any moral compass at their office door. Legal Educators, 3, 5-6.

Mr. Woods agrees that attorneys should operate with a moral compass, including, in this case, one informed by religious beliefs. Indeed, Mr. Woods described his own work as being motivated and informed by both his Christian faith and his membership in a minority group. CP 135.

But an attorney's moral compass cannot override his client's interests. RPC Preamble and Scope, ¶8 (where conflicting responsibilities are encountered, the basic principles underlying the Rules "include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests."). SUGM's requirement that religious proselytizing have *priority* over delivery of all other services stands in direct conflict with the obligations ODLS attorneys have toward their clients – especially when the religious beliefs it is proselytizing do not treat all sexual orientations equally, and especially when ODLS clients lack the economic freedom to choose where they receive their legal services.

V. Conclusion

Mr. Woods respectfully requests that this Court reject the expansive view of this case urged by *amici*, and instead closely examine the important rights at play, the record before the Court, and applicable Washington law, and apply the Court's decision in *Ockletree* to the specific facts of this case.

DATED THIS SEPTEMBER 24, 2019.

Respectfully submitted,

TELLER & ASSOCIATES, PLLC

J. Denise Diskin, WSBA #41425*
denise@stellerlaw.com
Sara Amies, WSBA #36626
sara@stellerlaw.com
* Of Counsel

LEGAL VOICE

Andrew Kashyap, WSBA #37240
akashyap@legalvoice.org

Attorneys for Plaintiff/Petitioner

VI. CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 24th day of September 2019, I filed with the Clerk of the Court and served upon all parties the foregoing APPELLANT'S ANSWER TO BRIEFS OF AMICI CURIAE using the Court's electronic service and filing system.

Sara Amies

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, September 24, 2019 4:21 PM
To: 'Sara Amies'
Cc: 'ntaylor@elmlaw.com'; 'asthilaire@elmlaw.com'; 'lnowlin@aclu-wa.org'; 'gahrend@ahrendlaw.com'; 'smcfarla@worldvision.org'; 'kcolby@clsnet.org'; 'iruiz@plaintifflit.com'; 'gverdugo@kellerrohrback.com'; 'kwaggoner@adflegal.org'; 'david@albrechtlawfirm.com'; 'ejohnson@shermanhoward.com'; 'slark@shermanhoward.com'; 'jneedlel@wolfenet.com'; 'jessew@mhb.com'; 'lkaley@aclu.org'; 'rsaxe@aclu.org'; 'dmach@aclu.org'; 'akashyap@legalvoice.org'; Denise Diskin; Chad-Henry Goller-Sojourner
Subject: RE: 96132-8 - Matt Woods v. Seattle's Union Gospel Mission

Received 9-24-19.

From: Sara Amies [mailto:sara@stellerlaw.com]
Sent: Tuesday, September 24, 2019 3:37 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'ntaylor@elmlaw.com' <ntaylor@elmlaw.com>; 'asthilaire@elmlaw.com' <asthilaire@elmlaw.com>; 'lnowlin@aclu-wa.org' <lnowlin@aclu-wa.org>; 'gahrend@ahrendlaw.com' <gahrend@ahrendlaw.com>; 'smcfarla@worldvision.org' <smcfarla@worldvision.org>; 'kcolby@clsnet.org' <kcolby@clsnet.org>; 'iruiz@plaintifflit.com' <iruiz@plaintifflit.com>; 'gverdugo@kellerrohrback.com' <gverdugo@kellerrohrback.com>; 'kwaggoner@adflegal.org' <kwaggoner@adflegal.org>; 'david@albrechtlawfirm.com' <david@albrechtlawfirm.com>; 'ejohnson@shermanhoward.com' <ejohnson@shermanhoward.com>; 'slark@shermanhoward.com' <slark@shermanhoward.com>; 'jneedlel@wolfenet.com' <jneedlel@wolfenet.com>; 'jessew@mhb.com' <jessew@mhb.com>; 'lkaley@aclu.org' <lkaley@aclu.org>; 'rsaxe@aclu.org' <rsaxe@aclu.org>; 'dmach@aclu.org' <dmach@aclu.org>; 'akashyap@legalvoice.org' <akashyap@legalvoice.org>; Denise Diskin <Denise@stellerlaw.com>; Chad-Henry Goller-Sojourner <chad@stellerlaw.com>
Subject: RE: 96132-8 - Matt Woods v. Seattle's Union Gospel Mission

Dear Supreme Court Clerk:

I request that the attached Answer to Amici be filed today. We are not able to connect to the e-filing portal at this time.

Respectfully,

SARA AMIES *(SHE/HER PRONOUNS)*
TELLER AND ASSOCIATES, PLLC
1139 34TH AVENUE, SUITE B| SEATTLE, WA 98122
206-324-8969| FAX 206-860-3172| WWW.STELLERLAW.COM