NO. 21-144

IN THE
SUPREME COURT OF THE UNITED STATES

SEATTLE'S UNION GOSPEL MISSION,
Petitioner,

v.

MATTHEW S. WOODS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, ASSOCIATION FOR BIBLICAL HIGHER EDUCATION, AND ASSOCIATION OF CLASSICAL CHRISTIAN SCHOOLS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The American Association of Christian Schools ("AACS"), the Association for Biblical Higher Education in Canada and the United States ("ABHE"), and the Association of Classical Christian Schools ("ACCS") and their member schools operate according to statements of religious belief and codes of personal conduct, which are essential to maintain their religious identity and fulfill their religious functions. These organizations and their member schools seek to uphold the highest standards of academic excellence and integrate the Christian faith with academic study. They rely on administrators, faculty, and staff who will not just impart information about Christianity, but who will also model the practice of the faith and mentor students as they develop their own faith and incorporate Christian beliefs and morality into their own lives. In this way, they view education as integral to Christian discipleship and fulfilling the Great Commission. *See* Matt. 28:18-20.

AACS, founded in 1972, is a nonprofit federation of 38 state and regional Christian school organizations and two international Christian school organizations, representing nearly 700 primary and secondary schools, which enroll nearly 100,000 students. AACS provides educational programs and

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties have consented to its filing.

services to its constituent schools, including teacher certification, school improvement, and accreditation, all of which are designed to integrate the Christian faith and life with learning and educate young people to live as good citizens according to the principles of their faith. AACS accreditation is widely recognized by state approving agencies and the U.S. Department of Homeland Security for the Student Exchange Visitor Program.

ABHE, founded in 1947, is a nonprofit network of more than 150 institutions of higher education, throughout North America, which enroll more than 63,000 students. ABHE supports academically rigorous education that challenges students to develop critical thinking skills, a biblically grounded Christian worldview, and a manner of living consistent with that worldview. ABHE also provides accreditation of undergraduate and graduate educational programs and has been recognized by the U.S. Department of Education as a postsecondary accrediting agency since 1952.

ACCS, founded in 1994, is a nonprofit organization of over 400 classical Christian schools located throughout the United States. ACCS assists its member schools in providing a classical education in light of a Christian worldview that cultivates a Christian way of life. ACCS also accredits member schools that meet its educational requirements.

AACS, ABHE, and ACCS jointly submitted an amicus curiae brief on the merits in this case before the Washington Supreme Court.

SUMMARY OF ARGUMENT

In the decision below, the Washington Supreme Court held that Seattle's Union Gospel Mission ("SUGM"), a nonprofit religious organization, is subject to liability under the Washington Law Against Discrimination ("WLAD") for sexual orientation discrimination against Matthew S. Woods ("Woods"), an applicant for a staff attorney position in SUGM's legal aid clinic who was unwilling to comply with SUGM's code of conduct, unless SUGM satisfies the requirements of the "ministerial exemption" recognized by this Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). SUGM views its legal clinic as an important manifestation of its religious mission, and also views its staff attorneys' personal faith and conduct as essential to fulfilling that mission.

The decision below imposes a substantial burden on nonprofit religious organizations like SUGM because it subjects them to administrative investigation and enforcement as well as claims for injunctive relief, damages, and attorneys' fees and costs by prospective employees who disagree with their conception of their own religious mission, and even those, like Woods, who applied in "protest" of SUGM's religious beliefs and seek to "change" those beliefs. Pet. for Cert., at 127a ("protest"); *id.* at 195a ("change"). Such actions threaten the ability of nonprofit religious organizations to maintain their religious identity and mission.

The WLAD is not a neutral law of general applicability, and is therefore subject to strict scrutiny, because it exempts small employers without limitation, whereas nonprofit religious employers

who do not qualify for the small employer exemption are subject to the WLAD unless they establish, as an affirmative defense, that the employee in question qualifies as a "minister." The WLAD cannot satisfy strict scrutiny because the exemption for small employers demonstrates the lack of a compelling interest in denying a similar exemption to nonprofit religious employers. Applying the WLAD to nonprofit religious organizations like SUGM under the circumstances present in this case conflicts with this Court's precedent, notably recent decisions addressing COVID 19-related restrictions, and review is warranted under Supreme Court Rule 10(c).

ARGUMENT

The Washington Legislature exempted nonprofit religious employers and small employers who employ fewer than eight persons from employment discrimination claims under the Washington Law Against Discrimination ("WLAD"). Wash. Rev. Code § 49.60.040(11). The Washington Supreme Court previously upheld the exemption of small employers under the state constitution. *Griffin v. Eller,* 130 Wash. 2d 58, 70, 922 P.2d 788, 793 (1996). However, in the decision below, the court held the exemption of nonprofit religious employers unconstitutional as applied to employees other than those who qualified for the "ministerial exemption" required by the First Amendment and recognized by this Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). *Woods v. Seattle's Union Gospel Mission,* 197 Wash. 2d 231, 252, 481 P.3d 1060, 1070 (2021). The effect of the decision is to eliminate the WLAD's exemption of nonprofit religious employers regarding all other employees, as

if it had never been enacted. *Palmer v. Laberee,* 23 Wash. 409, 416-17, 63 P. 216, 218 (1900).

Following the decision below, small employers remain exempt from employment discrimination claims under the WLAD without limitation, whereas nonprofit religious employers who do not qualify for the small employer exemption are subject to such claims unless they establish, as an affirmative defense, that the employee in question is a "minister." *Woods*, 197 Wash. 2d at 252 (majority opinion, endorsing concurrence by Yu, J., as "helpful" in applying the ministerial exemption); *id.* at 258 (Yu, J., concurring; stating employer must "raise[] the ministerial exception as an affirmative defense"). Nonprofit religious employers face investigative and enforcement actions by the Washington Human Rights Commission along with claims for injunctive relief and liability for damages and attorneys' fees and costs by applicants and employees. Wash. Rev. Code § 49.60.030(2) (private cause of action); Wash. Rev. Code §§ 49.60.120(4), .140, .150, .160 & .170 (administrative investigation and enforcement); Wash. Admin. Code ch. 162-08 (same).[2]

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[2] As noted by SUGM, Washington recognizes a common-law tort of wrongful discharge in violation of public policy against all employers, including small employers who are exempt from claims under the WLAD, Pet. for Cert., at 31 n.4, but the WLAD "is significantly broader than the tort of wrongful discharge[,]" permitting an employee to recover "damages sustained as a result of discriminatory refusal to hire, workplace discrimination, and discriminatory employment advertising, as well as discriminatory discharge." *Roberts v. Dudley*, 140 Wash. 2d 58, 76, 993 P.2d 901, 911 (2000). The common-law claim "applies only in a situation where an employee has been discharged." *Id.*, 140 Wash. 2d at 76; *accord White v. State*, 131

I. The WLAD is not neutral or generally applicable because it exempts small employers while denying an exemption for nonprofit religious employers, in the absence of any reason to believe that small employers are less likely to engage in prohibited discrimination.

This Court has "held time and again that the First Amendment demands 'neutrality' in actions affecting religion." *South Bay United Pentacostal Church v. Newsom*, — U.S. —, 141 S. Ct. 716, 720 (Kagan, J., dissenting; citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993)). "Facial neutrality is not determinative" because "[t]he Free Exercise Clause … extends beyond facial discrimination" and "forbids subtle departures from neutrality." *Lukumi*, 508 U.S. at 534.

Government regulations are not neutral "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, — U.S. —, 141 S. Ct. 1294, 1296 (2021) (per curiam; citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, — U.S. —, 141 S. Ct. 63, 67-68 (2020) (per curiam)). "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 141 S. Ct. at 1296 (citing Kavanaugh, J., concurring in *Roman Catholic*

Wn.2d 1, 18-20, 929 P.2d 396, 407-08 (1997) (declining to recognize tort claim for wrongful transfer in violation of public policy). Moreover, administrative investigation and enforcement, injunctive relief, and fee shifting are not available for the common-law claim. *Roberts*, 140 Wash. 2d at 76-77.

Diocese, 141 S. Ct. at 73). Once a state creates a favored class, the state must justify why religious organizations are excluded from the favored class. *Roman Catholic Diocese*, 141 S. Ct. at 73-74 (Kavanaugh, J.).

"Whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon,* 141 S. Ct. at 1296. "Comparability is concerned with the risks various activities pose[.]" *Id*. "A government cannot put limits on religious conduct if it 'fail[s] to prohibit nonreligious conduct that endangers' the government's interests 'in a similar or greater degree.'" *South Bay,* 141 S. Ct. at 720 (Kagan, J.; quoting *Lukumi*, 508 U.S. at 543). Thus, in *Tandon* the Court enjoined enforcement of California's COVID 19-related restrictions on at-home religious activities pending review because "California treats some comparable secular activities more favorably than at-home religious exercise" in the absence of evidence that these comparable activities "pose[d] a lesser risk of transmission." 141 S. Ct. at 1297. Similarly, in *Lukumi*, the Court held local ordinances prohibiting animal sacrifice unconstitutional because concerns about animal suffering and mistreatment and improper disposal of remains were equally implicated by hunting, slaughter of animals for food, eradication of pests, and euthanasia of animals, which were not prohibited. 508 U.S. at 535-38.

In an analogous way, the WLAD's exemption of small employers implicates concerns about discrimination to an equal or greater extent than nonprofit religious employers. The purpose of the WLAD is to eliminate and prevent discrimination in

employment and other contexts based on sexual orientation and other protected classifications. Wash. Rev. Code §§ 49.60.010, .030(1)(a) & .180. This purpose does not hinge upon the size of an employer. The small employer exemption was not enacted because small employers are less likely to engage in discrimination. Rather, it was enacted for the purpose of relieving small businesses of the burden of compliance with the WLAD, investigative and enforcement actions by the Human Rights Commission, and private lawsuits by employees. *Griffin,* 130 Wash. 2d at 68. A large percentage of Washington businesses are considered small businesses within the meaning of the WLAD, and they employ a significant number of employees in the state. *Id.* (noting "75 percent of business establishments in Washington have fewer than nine employees" and "they employ only about 17.5 percent of the private employee work force").

There is no reason to believe that nonprofit religious organizations are more likely to engage in discrimination than small employers. To paraphrase *Tandon,* the State of Washington cannot assume the worst when people go to work for a nonprofit religious organization but assume the best when they go to work for a small employer. 141 S. Ct. at 1297. Moreover, there is no reason to believe that nonprofit religious employers comprise a larger number of employers or that that they employ a larger number of employees than small businesses. Nor is there any other justification for exempting small employers from the burden imposed by the WLAD while at the same time imposing that burden on nonprofit religious employers. As a result, the WLAD is not

neutral because it treats small employers more favorably than nonprofit religious employers.

II. The WLAD's exemption of small employers establishes that there is no compelling interest in denying the same exemption to nonprofit religious employers.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi,* 508 U.S. at 546. "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Id.* "At a minimum, [the First] Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." *Roman Catholic Diocese,* 141 S. Ct. at 69 (Gorsuch, J., concurring; citing *Lukumi*, 508 U.S. at 546).

In determining whether the state has a compelling interest, the Court does not focus on the state's interest in enforcing discrimination laws at a high level of generality. *Fulton v. City of Philadelphia,* — U.S. —, 141 S. Ct. 1868, 1881 (2021). Instead, the Court focuses on the asserted harm from exempting religious organizations from such laws. *Id.* The state's interest denying an exemption to religious organizations cannot be considered compelling when the state provides other exemptions from those laws. *Id.* at 1881-82. In this case, the exemption of small employers from employment discrimination claims under WLAD confirms that the State of Washington

does not have a compelling interest in denying the same exemption to nonprofit religious organizations.

CONCLUSION

This Court should accept review and resolve this case in accordance with the analysis set forth in this brief.

Respectfully submitted,

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