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 Washington

BRIEF OF *AMICUS CURIAE* NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The **National Hispanic Christian Leadership Conference** ("NHCLC") exists to unify, serve, and represent the Hispanic Evangelical Community with the divine (vertical) and human (horizontal) elements of the Christian message via its 7 Directives of Life, Religious Liberty, and Biblical Justice. NHCLC is The Association of Latino Evangelicals, recognized and identified as America's largest and most influential Hispanic/Latino Christian organization with more than 40,000 certified member churches in the United States and chapters in Latin America. The NHCLC is committed to upholding the freedom of Christian individuals and ministries in the exercise of their religious beliefs.

SUMMARY OF ARGUMENT

This case is about the right of religious groups to pick their own players. The Constitution protects the rights of religious groups to hold their employees to standards that reflect their values. As this Court has extended the rights of LGBTQ+ persons, it has also emphasized that religious rights will continue to be

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* certify that both parties have consented to the filing of *amicus* briefs. Ten-day notice has been provided to counsel of record for all parties of intent to file under Rule 37.2.(a). Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

protected. To maintain constitutionally-mandated neutrality on this religious issue, courts should continue to recognize the longstanding coreligionist exception.

ARGUMENT

Matthew Woods applied for a job as a staff attorney at a legal aid clinic that is part of a Christian ministry known as Seattle's Union Gospel Mission. The Mission chose not to hire Woods because he voluntarily disclosed that he was in a sexual relationship that violated the Mission's religious-lifestyle requirements. In response, Woods sued the Mission.

The Mission argued that Washington's Law Against Discrimination did not apply because religious non-profits are exempt by statute. RCW 49.60.040(11). This "coreligionist exemption" protects constitutional religious freedom by avoiding state interference with religious autonomy and practice. Ockletree v. Franciscan Health Sys., 179 Wash. 2d 769, 783-85, 317 P.3d 1009, 1017-18 (2014).

The Washington high court held that the Mission's decision burdened Wood's fundamental rights to sexual orientation and to marry. Woods v. Seattle's Union Gospel Mission, 197 Wash. 2d 231, 243-44, 481 P.3d 1060, 1065-66 (2021). These fundamental rights were found in two of this Court's decisions. See Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015). The court ruled that the state's coreligionist exemption is unconstitutional as applied unless the position Woods sought qualified for the so-called ministerial exception. Woods, 197 Wash.2d at

246, 481 P.3d at 1067. See Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S.Ct. 2049 (2020). The court thus limited religious organizations' right to choose their staff to a narrow category of key ministerial employees. See id. at 2055.

In so doing, the Washington court gave protection from discrimination based on sexual orientation a higher priority than protection of religious organizations' First Amendment right to hire only those who share and live out their beliefs. The effect was to force the Mission, which is recognized by the IRS as the equivalent to a church, to hire an agent who is openly committed to opposing the Mission's religious purpose.

This Court has emphasized that extending protections to LGBTQ+ persons would not force religious organizations to stop teaching "the principles that are so fulfilling and so central to their lives and faith." Obergefell, 576 U.S. at 679-80. "The First Amendment ensures that religious organizations and persons are given proper protection." Id. The constitutional guarantee of free exercise of religion forbids states from imposing regulations that are hostile to the religious beliefs of religious ministries like the Mission and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of their religious beliefs and practices. Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n, 138 S.Ct. 1719, 1731 (2018). Government must be tolerant of religious beliefs, and even subtle departures from neutrality violate the Free Exercise Clause. Id. Even as this Court interpreted Title VII to protect sexual

orientation and transgender, this Court expressed "deep concern" about "preserving the promise of free exercise of religion enshrined in our Constitution." Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020). "[T]hat guarantee lies at the heart of our pluralistic society." Id. Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs . . . ." Fulton v. City of Philadelphia, Penn., 141 S.Ct. 1868, 1877 (2021).

Members of this Court predicted that Obergefell would be "used to vilify Americans who are unwilling to assent to the new orthodoxy." Obergefell, 576 U.S. at 741 (Alito, J., dissenting). This is concerning because from its inception, American has been a haven for religious liberty. Id. at 733 (Thomas, J., dissenting). Justices on this Court have described Obergefell's refusal to denigrate religious beliefs as a commitment. Fulton, 141 U.S. at 1925 (Alito, J., concurring). This Court should grant certiorari and rule in favor of the Mission because the lower courts have not heeded this commitment to religious liberty and have instead sought to limit it at every turn.

The Constitution protects the right of any organization to associate with those who share their aims. Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000). The freedom to associate implies a freedom not to associate. Id. at 648. Forced inclusion of members who affect a religious organization's core beliefs violates the First Amendment. Id. at 659. This principle "applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared

religious ideals." Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 200 (2012) (Thomas, J., concurring). If a religious group believes that the ability of an employee to perform key functions, such as serving as a messenger of its faith, has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove that employee from his or her position. Id. at 199 (Alito, J., concurring).

Religious autonomy is deeply woven into both federal and state law. This Court has repeatedly recognized the independence of religious organizations from secular control and manipulation. Hosanna-Tabor, 565 U.S. at 186; Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952); Watson v. Jones, 13 Wall. 679, 20 L.Ed. 666, 727 (1872). From its inception, this nation has acknowledged the power of religious organizations to decide for themselves matters of church government, faith, and doctrine without state interference. Id. For this reason, cases involving governmental interference with religious employment decisions are a recent phenomenon. Id. at 185. Title VII's coreligionist exemption protects the right of religious autonomy, as does similar provisions in the law of nearly every state. 42 U.S.C. 2000e-1; Pet.App.202a–51a.

In Hosanna-Tabor, this Court agreed with lower courts that constitutional religious protections require a "ministerial exception." 565 U.S. at 188. This Court explained the need for the exception in this way:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for

> failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.

Id. Teachers who are entrusted with responsibility to educate and form students in the faith qualify as ministers. Guadalupe, 140 S.Ct. at 2069.

Recognizing the importance of avoiding state interference with religious autonomy, federal and state laws observe a separate coreligionist exemption, which prevents state interference with employment decisions relating to religious beliefs and practices. Title VII protects religious organizations' ability to make faith-based employment decisions. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329 (1997). The purpose of this exemption is "to minimize governmental interference with the decision-making process in religions." Id. at 336. The Third Circuit stated it his way:

> Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organizations "religious activities."

Little v. Wuerl, 929 F.2d 944, 951 (3rd Cir. 1991). These principals are so well-established that other federal statutes and regulations and state

antidiscrimination laws follow them. See 6 A.L.R. Fed. 3d Art. 6 (Originally published in 2015); Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79324-01, 2020 WL 7227402 (F.R.) (Dec. 9, 2020); Ockletree, 179 Wash. 2d at 784-86, 317 P.3d at 1017-18.

This Court's creation of sexual orientation and transgender rights infuses these two exemptions with heightened significance. This is because LGBTQ+ activists consider religious views on morality to stand in the way of full public acceptance of their beliefs regarding sexual orientation and gender identity. See Romer v. Evans, 517 U.S. 620, 645-46 (1996) (Scalia, J., concurring); Chai R. Feldblum, Moral Conflict and Liberty: Gay Rights and Religion, 72 Brook. L. Rev. 61, 87 (2006) ("Given this reality, we are in a zero-sum game: a gain for one side necessarily entails a corresponding loss for the other side.").

Lower courts have interpreted Obergefell and Bostock to have established a superior fundamental right. In this case, the Washington high court paid lip service to Hosanna-Tabor and Guadalupe but ultimately ignored the reasons why the First Amendment required a religious exemption from religious non-discrimination laws. Woods demonstrated a conflict of interest vis-à-vis the Mission's religious beliefs. He applied for the position to protest the Mission's position on sexual morality. (Woods Pet. for Cert., p. 3.) His cover letter asked the Mission to change its religious practices. (Id.) Yet the court strained to effectively strike the coreligionist exemption from that state's employment discrimination

law. The court held that the statutory coreligionist exception is unconstitutional as applied unless the claim fell within the ministerial exception. Woods, 197 Wash. 2d at 246, 481 P.3d at 1067.

Other courts have held that the coreligionist exception does not apply when an employee characterizes a religiously-motivated decision as sex discrimination. Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1203-04 (S.D. Ind. 2020). Decisions such as these effectively offend the First Amendment by coercing religious organizations to hire and retain employees who are openly hostile to their core values.

The effect of decisions such as these is devastating to religious organizations. What the Washington court did to the Mission could be done to any house of worship or religious group such as NHCLC. Courts all across the land will rule that fundamental sexual orientation rights require religious organizations to hire and retain employees who are not only openly working to overthrow their core beliefs, but consider themselves to have a fundamental right to do so.

Religious organizations, by their nature, are organized around core religious beliefs. Many believe that faith requires faithful action. What religious employers expect from their employees is loyalty to their cause, and a passion for furthering their missions. It is not unreasonable for religious employers to expect their employees to strive for consistency in thought, word, and deed.

Because sexual orientation is a moral issue for many religious groups, discrimination against sexual orientation is a religious issue, not a gender issue. To refuse to accept this is to place government in the position of dismantling religious organizations and forcing them out of existence. The Free Exercise Clause therefore demands accommodation for religious beliefs that recognizes sexual orientation discrimination as a form of religious discrimination. It is this concern that undergirds the argument for a coreligionist exception.

It is axiomatic that any team must have the ability to pick its players. Kelsey v. Distler, 141 A.D. 78, 81, 125 N.Y.S. 602, 605 (App. Div. 1910) (recognizing that "the principals had a right to select their own agents"). It is even more readily apparent that a team required to accept members of the opposing team will not succeed. The reason is simple—the opposing team's members have a conflict of interest. Such a requirement could force litigants to accept counsel chosen by their opponents. As Abraham Lincoln said, "A house divided against itself cannot stand." The purpose of the coreligionist exemption is to protect religious organizations from these dangers.

The Washington court's ruling portends the establishment of a new civil orthodoxy. The Woods court recognized that the long-standing statutory exemption was facially constitutional. 197 Wash. 2d at 245-46, 451 P.3d at 1067. However, it ruled the exemption could be unconstitutional as applied. As applied to what? There was nothing unusual about the factual circumstances or the way the law was applied.

The court ruled that way because of the fundamental rights Woods asserted—rights recently created by this Court. It is recognized on all sides that LGBTQ+ persons disagree with many religious groups on the issue of sexual orientation. By straining to find grounds to overturn a longstanding and well-recognized statute, the court aligned the state against religion on a disputed religious issue. Some have even characterized acceptance of sexual-orientation dogma as a religion. Ryan Daniels, The Gay Religion, 19 S. Cal. Interdisc. L.J. 129 (Fall 2009).

This violates nearly every First Amendment standard. The First Amendment forbids laws "respecting an establishment of religion, or prohibiting the free exercise thereof."

The Establishment Clause prohibits laws whose purpose or effect either advances or inhibits religion, or foster excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). An Establishment Clause violation occurs when a law has the primary effect of inhibiting religion. McDaniel v. Paty, 435 U.S. 618, 636 (1978). The First Amendment forbids an official purpose to disapprove of a particular religion or religion in general. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). Coercing individuals or organizations to abandon their moral beliefs on pain of violating state or federal law amounts to a governmental endorsement of a position on religion. Id. at 532. Government may not prefer those who believe in no religion over those who believe. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

The Free Exercise Clause never permits targeting of religious beliefs. Lukumi, 508 U.S. at 533. The government may neither compel nor punish religious beliefs. Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872, 877 (1990). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." Lukumi, 508 U.S. at 533.

The First Amendment prevents states from imposing regulations that are hostile to the religious beliefs of religious ministries like the Mission and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of their religious beliefs and practices. Masterpiece, 138 S.Ct. at 1731. The lack of robust protections for religious freedom on this issue would unconstitutionally violate the requirement of governmental neutrality by forcing religious organizations to hire employees who have conflicts of interest on core components of their organizational missions. Dale, 530 U.S. at 647-48; Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (holding that the Constitution mandates accommodation and forbids governmental hostility toward religion).

Failure to safeguard religious liberty can have disastrous consequences. In Minersville School District v. Gobitis, this Court rejected a religious-freedom challenge to a mandate to recite the Pledge of Allegiance. 310 U.S. 586 (1940). The Gobitis children refused the recite the Pledge in obedience to a Jehovah's Witness teaching that it was a form of idolatry. Brett G. Scharffs, Echoes from the Past: What We Can Learn About Unity, Belonging and

Respecting Differences from the Flag Salute Cases, 25 BYU J. Pub. L. 361, 363-64 (2011). At that time, United States involvement in World War II loomed on the horizon. Id. at 366. Seeking to avoid stigmatizing legislative attempts to rally patriotism, this Court held that religious scruples could be overridden. Gobitis, 310 U.S. at 597-98.

Great human suffering followed. A legendary wave of anti-Witness persecution swept the country immediately after the decision. Scharffs, infra, at 371. Within a week, hundreds of instances of vigilantism were reported. Id. at 371-72. This included mob beatings, burnings of Kingdom Halls, and attacks on private residences. Id. at 372. Some Jehovah's Witness believers were arbitrarily imprisoned by authorities who were complicit in the violence. Id.

"The number of attacks was so serious that the chief of the civil rights section of the Department of Justice, Victor W. Rotnem, published an article to draw attention to the problem." T. Jeremy Gunn, Religious Freedom and Laïcité: A Comparison of the United States and France, 2004 B.Y.U. L. Rev. 419, 491 (2004). By the end of the year, Department of Justice filings showed 335 separate instances of violence targeting 1,500 Witnesses. Austin Vining, How One Religious Group Shaped Free Speech Jurisprudence in the Early 20th Century, Journalism History (Apr. 23, 2019), https://journalism-history.org/2019/04/23/jehovahs-witnesses-and-the-first-amendment/ (citing Marley Cole, Jehovah's Witnesses: The New World Society 111 (1955) (quoting Jehovah's Witnesses General Counsel Hayden Covington)). In Wyoming, some Jehovah's

Witnesses were tarred and feathered. Paul Finkelman, Civil Rights in Historical Context: In Defense of Brown, 118 Harv. L. Rev. 973, 997 (2005). "In Nebraska, a Jehovah's Witness was pulled from his house and castrated." Gunn, infra, p. 491.

In addition to the violence, many states stiffened their laws compelling participation in patriotic observances. Scharffs, infra, at 374. West Virginia passed a law that was aimed directly at Jehovah's Witness children. Id. at 375. Thus, the unintended result of Gobitis was not only persecution, but also enhanced legal targeting.

Only three years after the Gobitis decision, this Court reversed courses and ruled in favor of religious freedom. In so doing, this Court emphasized that the freedoms guaranteed in the Bill of rights are intended to place certain rights beyond the reach of the law:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). This Court held that the "freedoms of speech and of press, or assembly, and of worship may not be infringed [except] to prevent grave and

immediate danger to interests which the state may lawfully protect." Barnette, 319 U.S. at 639.

This Court explained that governmental attempts to compel unity often backfire:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 641. This Court concluded by affirming that moral orthodoxy may not be mandated by the state:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

Barnette is directly on point in this matter. Courts have staked out a moral position on sexual orientation, arguably taking sides in the "culture war." See Romer,

517 U.S. at 652 (Scalia, J., dissenting). The tide is running so high that the Washington court considered the Mission's mere choice not to hire Woods to violate his fundamental right to sexual orientation and right to marry. Woods, 197 Wash. 2d. at 243-44, 481 P.3d at 1066. Precisely because of the current rush to compel uniformity of sentiment, the purpose of constitutional religious protection is at its zenith.

As recognized on both sides of the dispute, the battle over sexual orientation discrimination, at least with respect to the moral acceptance of sexual orientation, is a "zero-sum game." Fulton, 141 S.Ct. at 1925. Because a direct conflict between church and state exists on the issue of sexual orientation, constitutional concerns exist that are not present in mere gender-discrimination claims. The lack of robust protections for religious freedom on this issue would unconstitutionally violate the requirements of religious autonomy and governmental neutrality by forcing religious organizations to hire employees who have conflicts of interest on core components of their organizational missions.

The Obergefell court commitment was that the First Amendment ensures that religious organizations are given proper protection even as LGBTQ+ rights are recognized. Obergefell, 576 U.S. at 679-80. The Woods holding demonstrates that lower courts are not keeping that commitment. They have read Obergefell and Bostock to require the dismantling of religious organizations.

Although the interests of religion and LGBTQ+ persons directly conflict on the moral issue, the

practical resolution need not amount to a zero-sum game. This Court can recognize rights of sexual orientation without running roughshod over religious rights. In fact, the Constitution compels this result. Many religious groups coexist in this nation, and they have done so from its inception. Having granted broad protections of LGBTQ+ rights, the Constitution requires correspondingly broad protections for religious organizations. At a minimum, the longstanding coreligionist exemption must continue to have vital force in employment discrimination cases.

CONCLUSION

For the reasons set forth above, *amicus* requests that this Court grant *certiorari* and rule that the Missions' right to refuse to employ Woods and to hire a coreligionist is constitutionally protected.

Respectfully submitted,

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