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 GOSPEL RESCUE MISSION FELLOWSHIP, MARKET STREET MISSION, CITY RESCUE MISSION OF LANSING, THE GOSPEL MISSION, AND SUNDAY BREAKFAST MISSION, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici on this brief are the Gospel Rescue Mission Fellowship ("GRMF"), an association of 16 Christian rescue mission programs in 14 states, including Market Street Mission in Morristown, NJ, City Rescue Mission of Lansing, MI, Gospel Mission in Sioux City, IA, and Sunday Breakfast Mission in Wilmington, DE. Each rescue mission provides food, clothing, shelter and other vital services for the poor. The Sunday Breakfast Mission also provides free legal services to the needy. GRMF rescue missions have been around a long time: City Rescue of Lansing began 110 years ago; Market Street Mission started in 1889 – 132 years ago; Gospel Mission has operated for 83 years; and Sunday Breakfast Mission, Delaware's oldest rescue mission, began 128 years ago. Collectively, the GRMF rescue missions serve thousands of this country's neediest people.

From their founding, like Petitioner Seattle's Union Gospel Mission ("SUGM"), these rescue missions have been distinctly religious organizations. Each is a 501(c)(3) not-for-profit organization. Most of the missions have between 25–100 employees and hundreds more volunteers. Each publicly expresses and subscribes to a "Statement of Faith"[2] 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 to fund the preparation or submission of this brief. Counsel were timely notified of this brief as Supreme Court Rule 37.2 requires, and all parties consented to its filing.

[2] https://tinyurl.com/3wusmfff.

"Biblical Code of Conduct"[3] that considers the Bible the inspired and inerrant Word of God, and the sole authority in matters of faith and practice. Each requires its employees to affirm that they share this faith and live their lives in accordance with that sincere belief.

The missions coordinate prayer and spiritual events for their employees and volunteers, who regularly pray with and for their mission clients. The Sunday Breakfast Mission, for example, equips its employees and volunteers with evangelism instruction to help them share their faith with mission clients. GRMF members are committed "to the preeminence of the gospel of Christ and bringing people to salvation," and believe that "[t]he gospel and biblical truth, presented with clarity and excellence, should permeate everything we do in our missions."[4]

Each of the *amici* has a vital interest in the outcome of this case. Since their inception, these religious organizations were free to hire only those who share their sincere religious beliefs. Losing the ability to pursue their missions with those of the same faith – or being compelled to employ those hostile to their faith and practice – not only threatens their religious freedom, but the continued existence of these highly beneficial charities.

Christian rescue missions that serve the poor by providing free legal services have yet another

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[3] https://tinyurl.com/c2hz88km.

[4] https://www.gospelrescuemissionfellowship.org/.

profound interest in this case. By suggesting that a lawyer cannot have a religious purpose or function, the Washington Supreme Court decision called into question the very ability of a Christian to be an ethical lawyer, forcing religious charities in Washington to employ lawyers who oppose their beliefs.

Nothing less than the constitutional free exercise and expressive association rights of these rescue missions and thousands like them are at stake by this decision below, which only this Court can rectify.

SUMMARY OF THE ARGUMENT

Religious freedom is the foundation of America. Religious organizations, which pursue their missions in accordance with – and in furtherance of – their faith, differ from secular employers in form and substance. Recognizing this, legislatures created exemptions to anti-discrimination laws, affirming their constitutional rights to hire those who share their faith ("coreligionists").[5]

The not-quite-ten-year-old ministerial exception was never intended to end religious organizations' constitutional rights to condition employment on an individual's adherence to the same faith in both belief and practice. The Washington Supreme Court inexplicably abandoned these rights, contrary to the U.S. Constitution and uniform federal case authority.

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[5] The term "coreligionist" carries with it a sterility that does not adequately capture the deep significance of what it means to work and pursue a spirit-led mission with those of shared faith.

The impact of the decision below cannot be overstated. It threatens the religious freedom of every religious charity, including the *amici* here. The court effectively said to every religious charity in Washington – we can compel you to hire people who reject the tenets of your faith. For Christian charities, who perform their missional work as fellow members of the body of Christ ("So we, being many, are one body in Christ, and every one members one of another." (Romans 12:5)), requiring them to fulfill that mission with those outside the faith destroys their ability to pursue their religious calling.

No tortured interpretation of the Constitution can justify this result. *Amici* here urge this Court to grant review and preserve their First Amendment rights to hire coreligionists.

ARGUMENT

I. Statutory religious exemptions preserve the inviolable First Amendment rights of religious organizations to employ only "coreligionists".

Employment discrimination statutes, a relatively modern development, have constitutional limits and legislatures drafted exemptions accordingly. Since a religious organization's existence depends upon its ability to associate with (employ) those who not only share the same faith, but prove their true conviction in it by the way they live, exemptions preserve religious organizations' First Amendment rights to

require such faith adherence as an essential job qualification.[6]

Such religion-based selectivity is integral to religious freedom. "[O]ur whole constitutional history . . . supports the conclusion that religious liberty is an independent liberty, that its recognition may either require or permit preferential treatment on religious grounds in some instances . . ." *City of Boerne v. Flores*, 521 U.S. 507, 563 (1997) (citation omitted).

A. Title VII's religious exemption preserves religious organizations' constitutional rights to condition employment on faith adherence.

The employment discrimination prohibitions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., ("Title VII"), first applied "solely to private sector employers" – with Congress extending its reach in 1972 to state and local governments. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 24 (2018). Consistent with its Commerce Clause authority, Congress defined "employer" as one "engaged in an industry affecting commerce"[7]. *Id.*

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[6] For example, a Bible-believing Christian organization compelled to hire people outside the faith violates God's command to avoid partnerships with unbelievers: "Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? And what communion hath light with darkness?" (2 Corinthians 6:14).

[7] "Industry affecting commerce" is defined as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within

(quoting Title VII, 78 Stat. 252). In 1964, Congress pointedly preserved religious organizations' rights to hire based on religion where their work concerned religious activities:

> **(a) Inapplicability of subchapter to . . .employees of religious entities**
> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to ***the employment of individuals of a particular religion to perform work connected with*** the carrying on by such corporation, association, educational institution, or society of ***its religious activities*** . . . .

Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified at 42 U.S.C. 2000e-1 as amended) (emphasis added).

In 1972, Congress amended this provision, removing the word "religious" before "activities", broadening the exemption to cover all employees. Senator Ervin's remarks illuminate the constitutional concerns necessitating this expansion:

> I submit, without fear of successful contradiction, that if Congress were to enact the bill and thereby say that the [EEOC] can control the employment practices of all religious groups in the United States in respect to what persons

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the meaning of the Labor-Management Reporting and Disclosure Act of 1959." 42 U.S.C. § 2000e(h).

> may be employed by them, other than those who are engaged strictly in preaching and activities of that kind, ***that is not keeping the hands of the state off religion***.

118 Cong. Rec. at 1977-1981 (remarks of Sen. Ervin) (1972 amendment) (emphasis added).

> Congress intended to exclude religious employers from the provisions prohibiting religious discrimination and the exemption "was redrafted to apply the bulk of Title VII's provisions to religious employers but still permitted them to employ individuals of a particular religion."

Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, 450 F.3d 130, 140 (3d Cir. 2006) (citing 1964 Legis. Hist. at 3001, 3004, 3050)).

This Court accordingly observed that Title VII "exempts religious organizations from [its] prohibition against discrimination in employment ***on the basis of religion***." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (1987) (emphasis added).

In fact, this Court has long understood religion's "exalted" role and the constitutional mandate for government neutrality in this arena. "The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these

interests, lying outside the true and legitimate province of government." *Abington School Dist. v. Schempp*, 374 U.S. 203, 215, n.7 (1963).

EEOC Guidance reinforces this view. Questions about a job applicant's religion are problematic under federal law "**unless the religion is a bona fide occupational qualification**." *EEOC Guidance*, *Pre-Employment Inquiries and Religious Affiliation or Beliefs* (emphasis added):[8]

> Religious corporations . . . are exempt from the federal laws that EEOC enforces when it comes to the employment of individuals based on their particular religion. In other words, an employer whose purpose and character is primarily religious is permitted to lean towards hiring persons of the same religion.

Id. Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief.…"42 U.S.C. § 2000e(j).

In short, Congress recognized from the beginning that religious organizations must be exempted from Title VII to address religious liberty concerns. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (acknowledging importance of "preserving the promise of Free Exercise of religion enshrined in our Constitution").

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[8] https://tinyurl.com/hmdcbbkt.

B. ADA's religious exemptions reaffirm the inviolable constitutional rights of religious organizations.

In 1990, Congress passed the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq.*, ("ADA"), prohibiting employment discrimination against qualified individuals with disabilities. Congress again recognized that a religious organization's right to hire coreligionists remains paramount. The ADA "[does] not prohibit a religious corporation . . . or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 12113(d)(1). And "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. § 12113(d)(2).

The ADA's legislative history recognizes that shared faith – and life lived in accordance with it – is a legitimate job qualification for employment by a religious organization. "The Senate bill specifies that a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization." *Americans with Disabilities Act of 1989; Report of the Senate Committee on Labor and Human Resources, to Accompany S. 933; S. Rept. 101-116*; August 2 (Legislative Day, January 3), 1989 at p. 61.

During passage of the ADA, Senator Durenberger emphasized why religious liberties compelled exemptions:

> I would hope that in developing this legislation that we are sensitive to avoid concerns that this act could broaden the interpretation of civil rights to unintended groups, and to allow the U.S. Government to impose undue restrictions on the rights of religious and other private institutions. While I am a strong advocate of civil rights, I am also dedicated to protecting the rights of private institutions and by no means want to see legislation enacted that would restrict religious liberty of private institutions or forces them to compromise their values or morals.[9]

These exemptions make clear that Congress did not intend to usurp the right of a religious organization to hire coreligionists. Stated differently, a religious organization may require an individual to share the same faith as its members – in effect "discriminate" (*i.e.* distinguish or differentiate) in favor of coreligionists – without violating anti-discrimination laws.

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[9] *Disability Law in the United States: A Legislative History of the ADA of 1990*, Public Law 101-336 (1989) (Remarks of Sen. Durenberger (S 4995)).

C. Washington's WLAD exemption affirms the inviolable constitutional rights of religious organizations.

Washington in 1949 passed its own "Law Against Discrimination in Employment," RCWA § 49.60 *et seq,* ("WLAD"). The legislature declared that "[t]he opportunity to obtain employment without discrimination because of race, creed, color or national origin is hereby recognized as and declared to be a civil right." (Session Law, Section 2). However, the legislature recognized this declaration of a new statutory right would implicate religious organizations' constitutional rights to freely carry out their religious missions and must be limited accordingly.

Washington's high court acknowledged in the decision below that its WLAD "was modeled" on New York's own "Law Against Discrimination," passed in 1945. NY's law "excluded religious nonprofit associations from the definition of 'employer'"— and "strictly defined" the term "**to avoid constitutional inhibitions**." *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060, 1064 n. 1 (citations omitted) (emphasis added).

Thus, the WLAD's definition of "employer" excludes "any religious or sectarian organization not organized for private profit." RCWA § 49.60.040(11). The Washington State Human Rights Commission

therefore explains to the public that its jurisdiction "does not include religious organizations."[10]

Although the WLAD has been amended since 1949, adding sex, marital status, age, disability, and sexual orientation as prohibited bases for discrimination, the statutory language always expressly exempted religious organizations.

It has been observed "that the legislature made a reasonable policy choice to avoid the potential pitfalls of attempting to reconcile Washington's growing list of protected categories (arguably, many of which with a religious aspect) with the multitude of religious belief systems." *Ockletree v. Franciscan Health System*, 317 P.3d 1009, 1018 (Wash. 2014). Further, "any decision striking down religious exemptions would amount to hostility toward religion." *Grant v. Spellman*, 664 P. 2d 1227, 1232 (Wash. 1983) (Williams, C.J., concurring specially).

II. The Washington Supreme Court erroneously limited the First Amendment to the ministerial exception.

The Washington Supreme Court effectively eliminated the WLAD religious non-profit exemption by ruling that it would be unconstitutional "as applied" if Woods' prospective job did not meet the ministerial exception. The court did not explain why religious non-profits' First Amendment rights were so limited, nor discuss any Free Exercise or Establishment Clause jurisprudence respecting

[10] https://www.hum.wa.gov/employment

religious non-profits' constitutional right to limit hiring to coreligionists, whether ministerial or not. Nor did the court address their federal expressive associational rights.

The Washington Supreme Court's flawed analysis ignored SUGM's separate and additional First Amendment rights. By erroneously focusing only on the ministerial exception, and directing the trial court to focus exclusively on that issue on remand, any subsequent state court proceeding will be adrift absent this Court's clear articulation of the *other* inviolable federal constitutional protections for religious non-profits.

This Court's intervention is needed to prevent the unconstitutional disregard of religious non-profits' First Amendment rights in Washington state and beyond, not to mention years of wasteful and costly litigation. If the ministerial exemption is "all there is" to the First Amendment, then many religious non-profits that provide critical social services as part of their religious missions will curtail or cease their services before another case comes before this Court.

A. The First Amendment is not limited to the ministerial exception.

The Free Exercise Clause prevents the government, whether state or federal, from "interfering with the freedom of religious groups to select their own." *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 184 (2012). It also guarantees religious organizations the right "to establish their own rules and regulations

for internal discipline and government," and "protects a religious group's right to shape its own faith and mission through its appointments." *Id*. at 187-188.

These Free Exercise protections apply to non-profit religious organizations' employment decisions based on religion **regardless** of any ministerial exception applicability. And they certainly apply where a prospective employee of a religious organization openly admits that he rejects the faith of his would-be employer.

Allowing those who oppose a religious organization's beliefs and practices to nevertheless insist upon employment by that organization, whose very mission and purpose the organization in good faith deems religious, would destroy the organization's ability to do its work. If any number of court-defined "non-ministerial employees" could speak or act in opposition to a religious organization's sincerely held beliefs and practices, and at the same time demand to be employed by it, religious organizations would be forced to shut down all of their religiously-motivated social services programs – to the great detriment of all who benefit from these programs.

The unbroken history of Congress and the states exempting religious organizations from employment discrimination laws is grounded squarely on constitutional concerns. The Washington court's truncated construction of the First Amendment warrants this Court's review.

1. *Amos* endorses constitutional autonomy in hiring for religious non-profits.

This Court has ruled that Title VII's Sec. 702 exemption did not violate the Establishment Clause. *Amos*, *supra*, 483 U.S. at 339-40. *Amos* concerned the claims of a building engineer for a gym run by the Mormon church, as well as claims by a truck driver for the church's Welfare Services Department. *Id.* at 330, n. 13. This Court observed that the statutory exemption properly "limit[ed] governmental interference with the exercise of religion," and furthered the Establishment Clause's non-entanglement aims by "avoid[ing] the kind of intrusive inquiry into religious belief" conducted by the District Court. *Id.* at 339.

In part that was because Congress amended the Sec. 702 exemption in 1972 to allow religious organizations to hire coreligionists in connection with ***all*** their activities, not just those deemed "religious." This Court noted that Congress' 1972 expansion properly "lift[ed] a regulation that burdens the exercise of religion," and Congress' elimination of burdensome, metaphysical inquiries in every case about whether the employee's duties were "religious" or not was "entitled to deference, not suspicion." *Id.* at 338.

The *Amos* Court explained that it was not deciding whether the Free Exercise Clause *required* the Sec. 702 exception. *Id.* at 339 n. 17. The Court "assumed for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more." *Id.* at 336. That

baseline assumption – that a religious organization must be free to hire only coreligionists in furtherance of its *religious* activities – is precisely the situation here. SUGM, like the *amici*, develop and operate their rescue missions for religious purposes and pursue their missional work with those who share the same faith and practice.

But the *Amos* Court also questioned whether that baseline sufficiently satisfied the Free Exercise Clause, suggesting that Congress needed to expand Sec. 702 in 1972 to prevent a Free Exercise violation:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336.[11]

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[11] To illustrate this predicament, the Court noted that the District Court deemed the truck driver job for the church's workshop program "religious", but not the building engineer job for the church's gym program – a distinction which the Court said was "rather fine" *Id*. at 336, n. 14.

Justice Brennan in his notable concurring opinion sharpened the point even further: "A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity," particularly with respect to nonprofit activities which are plausibly "infused with a religious purpose." *Id*. at 344.

> [U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.

Id.

Justice Brennan concluded by asserting that "a categorical exemption" of religious non-profits (who employ individuals to carry out *all* their activities) as provided in amended Sec. 702, was a necessary constitutional preservation of "a religious community's self-definition" and a bulwark against "chilling the exercise of religion." *Id*. at 345.

None of the Free Exercise and Establishment Clause interests that Sec. 702 embodies, and that *Amos* discussed throughout, were considered in the decision below. Instead, the Washington court leaped inexplicably to the conclusion that the Free Exercise Clause is limited to the ministerial exception. In

doing so, the court completely overlooked the constitutional rights of non-profit religious organizations to make faith adherence a *bona fide* job requirement.

This Court never indicated in *Hosanna-Tabor* or *Our Lady of Guadalupe School v. Morrissey-Berru et al.*, 1405 S.Ct. 2049 (2020), that the First Amendment was so constrained. Notably, the Court did not need to reach the issue presented here in those cases because the religious employers either had no religious objections to the teachers' employment or their positions were deemed ministerial. Nevertheless, those cases expounded firmly rooted constitutional principles that apply with equal weight to non-ministerial employees carrying out a religious organization's activities – regardless of the specific duties associated with any particular job.

The Religion Clauses do not permit government interference with "a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor* at 188-189. "[This Court's] opinion in *Watson* 'radiates … a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* at 186 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N.A.*, 344 U.S. 94, 116 (1952)). The First Amendment provides religious organizations with "autonomy with respect to internal management decisions," and "independence. . . in matters of 'faith and doctrine' is closely linked to independence in what we have

termed 'matters of church government.'" *Our Lady of Guadalupe*, 1405 S.Ct. at 2060 (quoting *Hosanna-Tabor,* 565 U.S. at 186).

The Washington Court ignored these principles, limiting the First Amendment to purely "ministerial" employees. In doing so, the court failed to consider the Free Exercise, Establishment, and expressive association violations that necessarily arise when government has the authority to compel a religious organization to hire employees – ministerial or not – who oppose the organization's faith in word and deed.

The Washington Court further erred by purporting to weigh the right of same-sex couples to marry under the U.S. Constitution against a state statutory religious organization exemption. But that is a false conflict. This case is about whether a state statutory private employment cause of action vitiates religious organizations' federal constitutional rights to carry out their missions with those who believe and live the same faith. There is no federal constitutional right to private employment based on one's marital preference or other protected status.[12] Any balancing of statutory private employment rights – state or federal – must give way to federal constitutional rights under the Supremacy Clause. U.S. Const., Art. VI, cl. 2.

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[12] *Great American Fed. S. L. Assn. v. Novotny*, 442 U.S. 366, 380-81 (1979) ("the Constitution [does not] create any right to be free of gender-based discrimination perpetuated solely through private action.") Nor did the Washington Supreme Court identify any federal (or state) constitutional right to private employment.

Employment discrimination statutes, relatively recent creations, were never meant to override the historic panoply of First Amendment rights of religious organizations to hire those with the same religious beliefs.

2. Federal appellate decisions uphold constitutional autonomy for religious non-profits to employ only coreligionists.

Circuit courts of appeal have explicitly upheld the First Amendment rights of religious organizations to hire only those of shared faith and practice – a body of law that the Washington Supreme Court entirely overlooked.

The Third Circuit in *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991), held that the First Amendment prohibited the application of Title VII to a Catholic school's termination of a schoolteacher whose remarriage violated Catholic doctrine. Even though the plaintiff was not a "minister", the Appeals Court observed that "attempting to forbid religious discrimination against non-minister employees where the position has any religious significance is uniformly recognized as constitutionally suspect if not forbidden." *Id.* at 948.

Fifteen years later, in *Curay-Cramer*, *supra*, 450 U.S. 130 (3rd Cir. 2006), the Third Circuit amplified the constitutional basis for denying the pregnancy and sex discrimination claims of a Catholic teacher who, contrary to the Catholic faith, signed a public statement supporting abortion and volunteered at

Planned Parenthood. Without any "ministerial" analysis but denying her claims nonetheless, the Court stated that "the Religion Clauses were designed 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other,'" *Id.* at 139 (quotation omitted), and "a religious institution's ability to 'create and maintain communities composed solely of individuals faithful to their doctrinal practices' will be jeopardized by [claims] of gender discrimination." *Id.* at 141 (quoting *Little* at 951).

Notably, the religious employer in *Curay-Cramer* based the challenged employment action on a religious reason, the validity of which the plaintiff questioned.[13] The Court stated that, whether styled as religious or sex discrimination, "serious constitutional questions are raised." *Id.* at 139.

The Fourth Circuit, in *Kennedy v. St. Joseph's Ministries*, *Inc.*, 657 F.3d 189 (4th Cir. 2011), noted the ministerial exception did not apply to a nursing assistant's claims. *Id.* at 192 n.7. The Court still denied the claims and acknowledged that Section 702 preserves the right of religious organizations to employ only co-religionists so that such organizations can "create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a

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[13] Respondent disputes that SUGM's legal and other service ministries are religious, and contends that the SUGM staff attorney role is "wholly unrelated to any religious practice or activity." Cplt. §§ 7, 10 (Pet. App. at 97a-98a).

direct role in the organization's 'religious activities.'" *Id.* at 194 (quoting *Little*, 929 F. 2d at 951).

The Fifth Circuit also upheld constitutional limits on government regulation of coreligionists. In a case involving a "non-minister" religious college employee, the Court held that if the college presented "convincing evidence" of a religious reason for its action, Section 702 must be interpreted to preclude the EEOC from *even investigating further* "to determine whether the religious discrimination was a pretext for some other form of discrimination." *EEOC v. Mississippi College*, 626 F. 2d 477, 485 (5th Cir. 1980). The Court reasoned that this statutory construction was "required to avoid the conflicts that would result" with respect to "the rights guaranteed by the religion clauses in the first amendment…."*Id.*

The Sixth Circuit likewise expressly recognized the constitutional rights of religious organizations. In a case involving a lesbian "non-ministerial" Student Services Specialist at a religious college, where the employee's views were contrary to the college's religious convictions regarding sexual behaviors, the Court denied plaintiff's claim "[i]n recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions." *Hall v. Baptist Memorial Health Care Corp.*, 215 F. 3d 618, 623 (6th Cir. 2000). **The First Amendment does not permit courts "to dictate to religious institutions how to carry out their religious mission or how to enforce their religious practices**." *Id.* at 626 (emphasis added).

The Washington Supreme Court ignored all of these cases, and others like them. A state court's blatant disregard of federal constitutional interests necessitates action by this Court. If not checked, other states might similarly "adjust" their state laws and constitutions in derogation of the U.S. Constitution.

B. Compelling religious organizations to employ individuals who oppose their religious tenets reflects hostility to religion and subverts their fundamental religious and expressive purposes.

The Washington Supreme Court's decision not only devastates religious nonprofits there, but grimly foreshadows what other states may be emboldened to attempt without this Court's intervention. Religious organizations in this country historically hire only those whose religious beliefs and practices conform to the organization's. Christian religious bodies, including *amici*, operate like spiritual families, collectively sharing Christ and following Christ in all that they do. There is no secular agenda alongside the sacred agenda. All activities, whether running soup kitchens, collecting clothing, housing the homeless, typing letters, preparing budgets, making repairs, drafting communications, and picking up and distributing food, are part of the organization's religious mission. Compelling such organizations to hire people who do not share the same beliefs (and even openly dispute them) violates their religious liberty.

Herein lies the critical importance of the SUGM case. If the Washington Supreme Court's decision stands, SUGM faces a Hobson's choice: hire "non-ministerial" employees who reject the mission's faith and seek to change it, thereby compromising its God-ordained calling, or shut down completely. This is the antithesis of "the Religion Clauses guarantee[ing] religious organizations autonomy in matters of internal governance." *Hosanna-Tabor*, 565 U.S. at 196-97 (Thomas, J., concurring).

The decision below, no matter how parsed, subverts a religious charity's autonomy to express its sincerely held religious beliefs and empowers the state (or court) to mandate that it employ someone who expressly rejects its faith. This Court has long disapproved of such intrusive judicial intervention.

> All who unite themselves to such a [religious] body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Watson v. Jones, 13 Wall. 679, 728-29 (1872).

Other constitutional protections warrant consideration. Religious organizations enjoy First Amendment freedoms of expressive association that, along with the Religion Clauses, allow them to choose coreligionists as employees. As stated in *Boy Scouts*

of America v. Dale, 530 U.S. 640, 648 (2000): "Forcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." *See Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (religious groups are especially "dedicated to collective expression and propagation of shared religious ideals").

Put simply, the Washington Supreme Court's decision seeks to launch an unprecedented "new era" where courts unconstitutionally decide whether a religious organization has the authority to require its members to adhere to its Statement of Faith. The decision below will harm every religious organization of whatever denomination or creed in their right to limit hiring of non-ministerial employees to coreligionists.

- The imam must hire a Zionist, not a fellow Muslim, as an administrative assistant.
- The Salvation Army must hire an atheist, instead of a fellow Christian, for an accounting manager job responsible for church funds and budgeting for church buildings.
- The Orthodox Jewish synagogue must consider an applicant who rejects the Torah as a receptionist greeting Orthodox congregants.
- A Catholic nursing home must hire a woman who disavows the church's position on sex roles in church leadership.
- A church that affirms gay marriage could not refuse employment to a Christian who believes marriage is a sacred covenant between one man and one woman and gay marriage a sin.

The havoc and frustration this would create for every "non-ministerial" job in every religious organization in Washington and potentially elsewhere threatens the cessation of thousands of programs and ministries that are helping millions of needy people every day.[14]

Judge Kleinfeld aptly described the threat to religious liberty in his concurring opinion in *Spencer v. World Vision, Inc.*, 633 F.3d 723, 742 (9th Cir. 2011) (per curiam):

> If the government coerced staffing of religious institutions by persons who rejected or even were hostile to the religions the institutions were intended to advance, then the shield against discrimination would destroy the freedom of Americans to practice their religions.

III. The First Amendment prohibits intrusive judicial scrutiny beyond the sincerity of a religious charity's religious beliefs about who is a coreligionist.

In matters of religion, the First Amendment limits courts and other government officials to ascertaining only the sincerity of one's religious belief. *See United States v. Seeger*, 380 U.S. 163, 184-185 (1965)(Courts are "not free to reject beliefs because

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[14] Looking at major religions alone, there are 143,530 religious non-profit organizations in the United States. GuideStar Directory of Charities and Non-profit Organizations (2021). https://tinyurl.com/faaava48.

they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed … are sincerely held …")(quoting *United States v. Ballard*, 322 U.S. 78, 86 (1944)).

"In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs." *Ballard* at 87. *See also Thomas v. Review Bd. of the Ind. Emp't Sec. Div.,* 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation" and "[t]he narrow function of a reviewing court . . . is to determine whether . . . petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."). *Cf. Boy Scouts of America et al. v. Dale*, 530 U.S. 640, 649-51 (2000) (like religious beliefs, an organization's expressed values may only be tested by their sincerity).

Applying these principles to the coreligionist exception, a court or government agency may only ascertain the sincerity of a religious organization's view about whether an employee or applicant shares the same religious beliefs and practices.[15] Once the sincerity of that view is established, the inquiry ends. No further probing into how "religious" the job is or whether the individual really does adhere to those

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[15] The coreligionist exception is more limited than the ministerial exception. The latter precludes government intrusion into a religious organization's hiring of "ministers," regardless of the reasons. The coreligionist exception, however, requires the religious organization to have a sincere belief that the individual does not align with the organization's religious tenets.

beliefs and practices is permitted. Such inquiries would cause the court or agency to be an arbiter of religiosity, which the Constitution clearly forbids.

The Washington Supreme Court's decision jeopardizes these well-accepted principles. The majority, for example, exceeded its authority when opining that because SUGM employees attend churches, SUGM "is [not] a church or religious entity principally responsible for the spiritual lives of its members." *Woods*, 481 P.3d at 1069-1070. This is despite the trial court's (and Respondent's) acknowledgement that all SUGM employees – regardless of job duty and including the staff attorneys – are expected to evangelize and share the Gospel with others.[16] The Court also speculated that "SUGM employment alone does not appear to be sufficient religious affiliation." *Id.*

Unless this Court corrects the state court's departure from established constitutional jurisprudence, and confirms that inquiry about the coreligionist exception on remand is constitutionally limited to the sincerity of SUGM's view that the position for which Respondent applied must be held by someone who shares SUGM's religious tenets, the remand proceedings will trample on SUGM's First Amendment rights.

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[16] Jesus commands his followers in "The Great Commission" "to go and make disciples of all nations . . . teaching them to obey everything I have commanded you." (Matthew 28:16-20).

CONCLUSION

If not checked by this Court, SUGM will be dragged through years of costly litigation and distracted from its mission to serve the poor and share the Gospel, if not forced to close because its religious mission has been dismantled by the state. A more flagrant deprivation of religious liberty is difficult to conceive. *Amici* respectfully submit that certiorari is warranted.

Respectfully submitted,

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