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* KEVIN C. WALSH IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

The Supreme Court of Washington has transformed this Court's decisions in *Lawrence v. Texas,* 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), into cases establishing fundamental rights enforceable against private employers. This elimination of the state-action aspect of the rights recognized in *Lawrence* and *Obergefell* provides a template for unsettling legislative accommodations nationwide. Because neither *Lawrence* nor *Obergefell* recognized a fundamental right enforceable against private religious employers, this Court should grant the petition for certiorari and reverse.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than the *amicus* has made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for amicus curiae provided notice to counsel for the parties of the intention to file this brief on August 27, 2021, five days before the September 2 due date. Each consented although it was within ten days of the due date. Institutional affiliation of amicus curiae noted for identification purposes only.

Although the petition for certiorari identifies significant and unsettled questions of First Amendment law, this Court should correct the state court's erroneous expansion of *Lawrence* and *Obergefell* directly. The targeted approach in this amicus curiae brief makes it unnecessary to reach the questions presented in the petition. But it does so without prejudice to this Court's ability to identify and enforce petitioner's First Amendment rights if that later becomes necessary.

ARGUMENT

I. The Court should grant certiorari to reverse the state court's transformation of *Lawrence v. Texas* and *Obergefell v. Hodges* into cases establishing fundamental rights enforceable against private employers.

Matthew Woods brought this state-law action against Seattle's Union Gospel Mission alleging discrimination on the basis of sexual orientation in violation of a Washington employment-discrimination statute. Wa. Op. 2a. The Mission obtained summary judgment on the ground that it is not a covered "employer" under that state law. *Id.* at 3a. The statutory definition of "employer" includes a decades-old categorical exclusion of nonprofit religious employers like the Mission. *See* RCW 49.60.040(11) ("'Employer' includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.").

On appeal, the Supreme Court of Washington applied this Court's decisions in *Lawrence* and *Obergefell* to invest individual employment applicants like Mr. Woods with "fundamental rights to their sexual orientation and to marry whomever they choose." Wa. Op. 11a. The court then deployed these federal-law-based fundamental rights to invalidate under Washington's state constitution, as applied, Washington's longstanding statutory nonprofit-religious-employer exclusion. Wa. Op. 9a-21a. The court concluded that the categorical exclusion of nonprofit religious organizations from the statutory definition of "employer" must be limited to protect only those employment decisions implicating the fundamental rights to sexual orientation and to marry whomever one chooses that fall within the First Amendment's ministerial exception. *See* Wa. Op. at 20a-21a ("The ministerial exception … provides a fair and useful approach for determining whether application of RCW 49.60.040(11) unconstitutionally infringes on Woods' fundamental right to his sexual orientation and right to marry.").

The Supreme Court of Washington's decision was wrong because neither *Lawrence* nor *Obergefell* recognized a fundamental right enforceable against private parties. *See Lawrence*, 539 U.S. at 578 (stating that petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct *without intervention of the government*") (emphasis added); *Obergefell*, 576 U.S. at 680 (holding that "[t]he Constitution … does not permit *the State* to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex") (emphasis added). The rights identified in *Lawrence* and *Obergefell* are rooted in

the Fourteenth Amendment. Both decisions respect "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action." *United States v. Morrison*, 529 U.S. 598, 622 (2000); *see also, e.g.*, *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."); *United States v. Cruikshank*, 92 U.S. 542, 554 (1876) ("The fourteenth amendment … adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."). A private religious employer like the Mission has no governmental authority of the sort circumscribed by this Court's decisions in *Lawrence* and *Obergefell*. The Mission has no power to criminalize sexual activity or to decide what marriages the state will or will not recognize. As a matter of federal constitutional law, therefore, *Lawrence* and *Obergefell* are entirely inapt for the use to which the Supreme Court of Washington has put them.

The Supreme Court of Washington's transformation of these cases into sources of rights against private religious employers threatens to unsettle legislative accommodations of gay rights and religious freedom nationwide. This Court should grant review and reverse.

II. Neglect of the state-action requirement for the federal rights identified in *Lawrence* and *Obergefell* is a mistake of federal law and the judgment below does not rest on an adequate and independent state ground.

The Supreme Court of Washington's fundamental rights reasoning is so far removed from the logic of *Lawrence* and *Obergefell* that one might believe the basis of the decision to be some peculiar aspect of state constitutional law. But the federal-law basis of the Washington court's decision is obvious from the face of the court's opinion. State constitutional doctrine called for application of a two-part test, the first part of which required identification of a fundamental right. *See* Wa. Op. 9a. The Supreme Court of Washington relied on this Court's Fourteenth Amendment precedents to identify two fundamental rights. *See* Wa. Op. 9a ("Two of Woods' fundamental rights are present in the current case: the right to an individual's sexual orientation and the right to marry. *See Lawrence v. Texas* (2003); *Bowers v. Hardwick* (1986) (Stevens, J., dissenting), *overruled by Lawrence*; *Obergefell v. Hodges* (2015).") (internal citations omitted); *see also id.* at 11a ("As *Lawrence*, *Obergefell*, and Justice Stevens' dissent in *Bowers* contemplated, individuals possess the fundamental rights to their sexual orientation and to marry whomever they choose.").

The furthest that the majority opinion went toward sourcing these fundamental rights in state constitutional law rather than federal was to suggest in a footnote that "[t]he fundamental right to sexual orientation *does not appear to stem from just the federal constitution* but from our state constitution as

well." Wa. Op. 11a n.3 (emphasis added). This phrasing presupposes the court's prior and principal determination that this "fundamental right to sexual orientation" stems at least from the federal constitution. The statement suggests the possibility of an *additional state ground* for one of the two fundamental rights identified by the Supreme Court of Washington on the basis of federal constitutional law. As noted by the partial dissent, the majority's analysis says nothing about the other fundamental right assertedly at issue—the right to marry. *See* Wa. Op. at 40a n.5 (Stephens, J., dissenting in part) ("Importantly, the majority does not address *Andersen v. King County*, 158 Wn.2d 1, 30-31, 138 P.3d 963 (2006) (plurality opinion) (rejecting marriage equality as a fundamental right), *overruled by Obergefell v. Hodges*, 576 U.S. 644 … (2015).") The only grounds actually relied upon by the court majority for both of the fundamental rights it identified and enforced are federal, namely this Court's decisions in *Lawrence* and *Obergefell*.

To be clear, the Supreme Court of Washington's reliance on federal law came in the course of applying article 1, section 12 of the Washington state constitution. Both the statutory cause of action relied upon by Mr. Woods and his constitutional contention about its improperly narrow reach arose under state law. But the jurisdictional question at this juncture is not whether Mr. Woods's claim arose under federal law as a matter of 28 U.S.C. § 1331 or whether this case was removable under § 1332. The question is whether this court has appellate jurisdiction under 28 U.S.C. § 1257(a) to review the Supreme Court of Washington's application of *Lawrence v. Texas* and *Obergefell v. Hodges*. The answer is "yes." "[T]his

Court retains power to review the decision of a federal issue in a state cause of action." *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 816 (1986). In particular, this Court has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *Ohio v. Reiner*, 532 U.S. 17, 20 (2001); *see also* 28 U.S.C. § 1257(a) ("Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari … where any … right … is specially set up or claimed under the Constitution … of … the United States.").

The decision here is a textbook example of why "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984). It is precisely because elimination of the state-action aspect of the rights identified in *Lawrence* and *Obergefell* is an error of *federal* law that this case threatens to unsettle legislative accommodations of gay rights and religious freedom nationwide. The decision provides a blueprint to generate conflicts that many state legislatures have avoided or accommodated through statutory limitations on state anti-discrimination law. Whether any other state's analogue to Washington's article 1, section 12 incorporates federal constitutional law the same way that the court here has held that Washington's does would be a matter of that other state's constitutional law. But the Washington court's understanding of the content of federal constitutional law in *Lawrence* and *Obergefell* is a matter a federal constitutional law. *See*

Espinoza v. Montana Dept. of Revenue, 140 S.Ct. 2246, 2262 (2020) ("The final step in this line of reasoning eliminated the program …. But the Court's error of federal law occurred at the beginning."); *id.* ("Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.").

One might analogize this Court's review of the Washington court's error in expanding *Lawrence* and *Obergefell* to this Court's review of Congress's understanding of this Court's precedent in enacting Section 5 legislation. If Congress were to enact federal legislation prohibiting *private discrimination* on the basis of sexual orientation as a means of *enforcing* the rights identified in *Lawrence* and *Obergefell*, such legislation would not be congruent and proportional because the rights identified in *Lawrence* and *Obergefell* are rights against certain state action, not private discrimination. *Cf. United States v. Morrison*, 529 U.S. 598, 626 (2000) (holding the private-remedy provision of the Violence Against Women Act outside of Congress's Section 5 enforcement power because "it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias"). Washington had no obligation to incorporate *Lawrence* and *Obergefell* into state constitutional law. Having done so, though, its erroneous expansion is not insulated from review.

In his partial dissent from the Washington court's decision, Justice Stephens criticized the majority's reliance on federal constitutional law for the identification of the fundamental rights to sexual

orientation and to marry whomever one chooses. Wa. Op. 40a (Stephens, J., dissenting in part). After explaining that the majority "locates these rights exclusively in federal due process cases," Justice Stephens wrote that "[t]he majority's analysis is plainly built on the wrong constitutional foundation." *Id.* The validity of this criticism as a matter of state constitutional law is not properly before this Court. But its predicate puts the majority's erroneous expansion of *Lawrence* and *Obergefell* squarely at issue here. Whether or not the Washington majority should have done what it did as a matter of Washington state constitutional law, Justice Stephens is right that the court majority recognized "marriage and the right to live free from discrimination … as fundamental rights under federal constitutional principles." *Id.* at 40a n.4. That is to say, whether state constitutional law should incorporate federal constitutional law is a question of state constitutional law. But having decided that article I, section 12 protects fundamental rights as set forth in *Lawrence* and *Obergefell*, the correctness of the Washington court's understanding of the nature and scope of those rights is a matter of federal constitutional law. The Supreme Court of Washington could have relied only on its own constitutional law, as Justice Stephens argued it should have done in his partial dissent. But it chose instead to advance under the cover of this Court's precedents. That is why its decision cannot escape this Court's review.

Although relying on *Lawrence* and *Obergefell* to supply the rights at issue in this case, *see* Wa. Op. at 11a, the court at one point describes the fundamental rights at issue in this case as "fundamental rights of state citizenship." Wa. Op.

14a. This description does not alter the federal-law basis of the fundamental rights identified. The court is simply using this language to describe how the fundamental rights it finds in *Lawrence* and *Obergefell* satisfy the first part of the two-part doctrinal test implementing article 1, section 12 of the Washington constitution. *See* Wa. Op. 14a ("Woods has identified fundamental rights of state citizenship: the right to one's sexual orientation as manifested in a decision to marry. The first requirement of our article I, section 12 analysis is therefore satisfied."); *see also* Wa. Op. at 12a ("Though this case also implicates the fundamental right to marry whomever one chooses, it is not limited to this context. Also implicated is the concomitant fundamental right to sexual orientation. *Woods has invoked these fundamental rights*, satisfying the first prong of the article I, section 12 test.") (emphasis added).

Even if there were any lingering ambiguity about whether the Washington court's judgment rests on federal law, that would only trigger the presumption of *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983):

> When … a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it do so.

The judgement here was to reverse the grant of summary judgment in favor of the Mission and remand for consideration of the ministerial exception. The court's determination that categorical exclusion of nonprofit religious employers from the state anti-discrimination law is unconstitutional depends on the Washington court's improper expansion of *Lawrence* and *Obergefell*. The opinion for the court contains no "plain statement … that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan*, 463 U.S. at 1041. Nor does "the state court decision indicat[e] clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds." *Id.* Rather, this is a case in which "[t]he decision at issue 'fairly appears … to be interwoven with the federal law,' and no adequate and independent state ground is clear from the face of the opinion." *Ohio v. Reiner*, 532 U.S. 17, 20 (2001), quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

CONCLUSION

The Supreme Court of Washington has transformed this Court's decisions about limits on certain state action in *Lawrence v. Texas* and *Obergefell v. Hodges* into decisions establishing "fundamental rights" enforceable against private religious employers. Because neither *Lawrence* nor *Obergefell* recognized a fundamental right enforceable against private religious employers, this Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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