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 a Writ of Certiorari
to the Supreme Court of Washington

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction over this case because (a) the petition is jurisdictionally out of time or (b) the state judgment below is not final for purposes of 28 U.S.C. § 1257(a).

2. Whether this Court should review petitioner's contention that the First Amendment mandates a "coreligionist" exemption to all state and federal anti-discrimination laws where that question was neither pressed nor passed upon below.

3. Whether the Free Exercise Clause requires exempting large religious employers from an anti-discrimination statute if the statute exempts all small employers.

4. Whether the Washington Supreme Court's decision violates the Free Exercise Clause based on purported hostility toward religion.

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JURISDICTION

The Court lacks jurisdiction over this case for two reasons. First, the petition was filed more than 150 days after the date of entry of the judgment below, in violation of 28 U.S.C. § 2101(c). *See infra* at 11-12. Second, the Washington Supreme Court's judgment is not final within the meaning of 28 U.S.C. § 1257(a). *See infra* at 20-22.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, section 11 of the Washington State Constitution provides in part:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

2. Article I, section 12 of the Washington State Constitution provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

STATEMENT OF THE CASE

A. Factual background

Respondent Matthew Woods is a legal aid attorney based in Seattle, Washington. SGDR App. 173.[1] He has built his career around serving disadvantaged members of the Western Washington community. *Id.* He is also a practicing Christian whose "worldview is shaped by the ministry of Jesus Christ." Pet. App. 189a. He attended an evangelical Christian college and participates in weekly Bible study. SGDR App. 164; Pet. App. 191a.

During his first year at the University of Washington School of Law, Woods began volunteering with Open Door Legal Services, a legal clinic operated by petitioner Seattle's Union Gospel Mission. SGDR App. 164. Woods volunteered with ODLS for more than three years as a law student, intern, and attorney. *Id.* at 164-65. He helped clients with a variety of legal problems, including family law and immigration issues, and represented them in administrative hearings. *Id.* at 165.

After graduating from law school, Woods clerked for the U.S. District Court for the Western District of Washington. SGDR App. 173. While he was clerking, ODLS opened a new position for a staff attorney. Pet. App. 174a. ODLS Director David Mace encouraged Woods and other former volunteers to apply. *Id.*

Having found that his volunteer work with ODLS was "in alignment with [his] faith," SGDR App. 166, Woods wanted to learn more about this full-time

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[1] SGDR refers to Woods's Statement of Grounds for Direct Review in the state supreme court.

opportunity. He arranged a meeting with Alissa Baier, a friend and ODLS staff attorney. *Id.* During the meeting he asked Baier about "SUGM's culture," including the organization's policy on bringing significant others to work functions. *Id.*

Woods is bisexual, Pet. App. 195a, a fact that had never previously been "implicated in [his] work" with ODLS, SGDR App. 166. As a volunteer, for example, he had signed a Statement of Faith, but it made no reference to sexual orientation. *Id.* at 165, 171. At their meeting, Baier said she did not think Woods's sexual orientation would be a problem, but noted that there "might be something in a handbook." *Id.* at 166-67. After meeting with Baier, Woods checked the staff attorney job description and SUGM's website but found nothing referring to sexual orientation. *Id.* at 165-66; *see also* Pet. App. 175a-80a (job posting); Pet. App. 153a-56a (website).

The following day, Baier sent Woods excerpts from SUGM's Employee Handbook, including a Statement of Faith different from the one Woods had signed as a volunteer and the ones he had seen in the job description and on SUGM's website. Pet. App. 181a-82a; *compare* Pet. App. 160a-61a (handbook) *with* SGDR App. 171 (volunteer statement) *and* Pet. App. 179a-80a (job posting) *and* Pet. App. 153a-56a (website). The Employee Handbook version included a prohibition on "homosexual behavior." Pet. App. 160a. Having located the handbook excerpts, Baier wrote Woods that she "recommend[ed] emailing or talking to [Mace] about your concerns." *Id.* 182a. She told Woods that "[w]e would love to have you here at ODLS, but [Mace] makes the final call." *Id.*

Woods followed Baier's advice and emailed Mace to ask whether his sexual orientation would affect his application for the permanent position. Pet. App. 185a. Acknowledging what he had recently learned, Woods explained that he was being "thoughtful and prayerful about applying because [he] loved the opportunities [he] had getting to be a part of serving the clients at ODLS." *Id.* Mace told Woods that, because SUGM's "code of conduct excludes homosexual behavior," Woods would not be able to apply for the staff attorney role. *Id.* 184a.

Woods considered the ODLS staff attorney role "to be a dream job." Pet. App. 195a. Maintaining hope that his sexual orientation would not bar him from employment, he applied. His cover letter recognized that SUGM's existing policy "excluded [him] from employment," but expressed his hope that SUGM might nonetheless consider his application. *Id.* 195a-96a. He explained that "[a]s a Christian, [he] firmly believe[d] that a change in that policy would benefit the organization's mission to serve, rescue, and transform those in greatest need through the grace of Jesus Christ." *Id.* 195a. SUGM declined to change its policy and rejected Woods's application. *Id.* 4a.

B. Procedural background

1. Woods filed suit in state court in November 2017. Pet. App. 96a-103a. His complaint alleged that SUGM violated Washington's Law Against Discrimination by discriminating against him based on sexual orientation. *Id.* 101a-03a; *see also id.* 76a (excerpting WLAD).

Following a truncated discovery period, SUGM stipulated that Woods had established a prima facie

case of sexual orientation discrimination. Pet. App. 106a-07a. It then moved for summary judgment on the ground that WLAD completely exempted nonprofit religious organizations such as SUGM from the definition of "employer." Def. M.S.J. 17. Woods, in response, argued that applying the state statutory exemption to the facts of his case would violate the state constitution. *See* Pl. Opp. to M.S.J. 23-27.

The Washington Supreme Court had previously addressed the validity of the WLAD religious exemption under the state constitution in *Ockletree v. Franciscan Health System*, 317 P.3d 1009 (Wash. 2014). Ockletree was a security guard at a Catholic hospital who alleged unlawful termination based on race and disability. *Id.* at 1011 (Johnson, J.). Like SUGM, the hospital argued that it was categorically exempt from the WLAD discrimination prohibitions. *Id.*; Def. M.S.J. 17. Like Woods, Ockletree argued in part that exempting religious employers in his case violated his rights under the state constitution. *Ockletree*, 317 P.3d at 1011; *see* Pl. Opp. to M.S.J. 23-27.

The *Ockletree* court issued three opinions, dividing 4-4-1. Five Justices agreed that the WLAD religious exemption was facially constitutional. *Ockletree*, 317 P.3d at 1017 (Johnson, J.); *id.* at 1028 (Wiggins, J., concurring in part). A different five held that the exemption was unconstitutional as applied to Ockletree, but did not agree on why. *Id.* at 1020 (Stephens, J., dissenting); *id.* at 1028 (Wiggins, J., concurring in part). Writing for four Justices, Justice Stephens would have invalidated the religious exemption as applied "to WLAD claims based on discrimination that is unrelated to an employer's

religious purpose, practice, or activity." *Id.* at 1020 (Stephens, J., dissenting). Justice Wiggins reasoned instead that "the constitutionality of the exemption depend[ed] entirely on whether the employee's job responsibilities relate[d] to the organization's religious practices." *Id.* at 1028 (Wiggins, J., concurring in part).

Responding to SUGM's motion for summary judgment in this case, Woods urged the trial court to find that Justice Wiggins's concurrence established a "job duties" test that "would allow the court to undertake an objective examination of the job description at issue as well as the employee's responsibilities within the organization." Pet. App. 63a. Under that test, Woods argued, the WLAD religious exemption could not be applied to the staff attorney position in this case without violating the Washington constitution. Pl. Opp. to M.S.J. 24-25. In the context of that argument, SUGM argued that both the state constitution's religious freedom clause—article I, section 11—and the federal First Amendment prohibited using a "job duties" test. *See* Def. M.S.J. 28-31. SUGM argued that such a test would require intrusive discovery, entangle the courts in religious questions, and "risk chilling religious expression." *Id.* at 28 (typeface altered).

The trial court concluded that SUGM's assertion that the staff attorney role included religious duties was sufficient to exempt the position from coverage under WLAD, "even if the court were to adopt Justice Wiggins' test." Pet. App. 63a; *see id.* 64a-65a. Accordingly, "setting aside" how to interpret the fractured *Ockletree* ruling, *id.* 63a, and without making its own findings of fact about the nature or

duties of the position, the trial court granted SUGM's motion for summary judgment, *see id.* 64a-67a.

2. a. Woods successfully petitioned the Washington Supreme Court for direct review, seeking clarification of the court's ruling in *Ockletree*. SGDR 13-14. He asked the court to decide "whether a person can legally be denied employment under Washington State law by a religious organization because of the person's sexual orientation, even when the employment focuses on providing secular legal services." Resp. W.S.C. Br. 1-2. Building on *Ockletree*, Woods argued that application of the WLAD religious exemption to his case would violate article I, section 12 of the state constitution—the state "privileges and immunities" clause. *Id.* at 28.

The Washington privileges and immunities clause states that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Wash. Const. art. I, § 12.[2] The state courts apply the clause using a two-part test, asking first whether a statute grants "a privilege or immunity implicating a fundamental right," and if so "whether

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[2] As the state supreme court explained below, Washington state courts have sometimes analyzed this clause as equivalent to the federal Equal Protection Clause. Pet. App. 9a. But in contrast to the federal provision's focus on preventing discrimination against disfavored groups, "[t]he purpose of article I, section 12 is to limit the type of favoritism that ran rampant during Washington State's territorial period." *Id.* 8a-9a. Because the "text and aims of the constitutional provisions differ[]," the "privileges and immunities clause can support an analysis independent of the Fourteenth Amendment." *Id.* 9a.

the distinction [is] based on reasonable grounds." Pet. App. 9a.

In its responsive briefing, SUGM likewise framed the question before the state supreme court as one of state law. It posed the issue as whether "article I, section 12 of the Washington Constitution require[s] a church to hire someone who would publicly reject the organization's sincerely-held religious beliefs." Petr. W.S.C. Br. 1.

Responding to these arguments, the state supreme court again held that the WLAD religious exemption was facially valid under the state constitution. Pet. App. 14a. It reasoned that, while the exemption granted religious organizations a privilege or immunity that implicated fundamental rights, the state legislature had "reasonable grounds" for distinguishing between religious and secular nonprofits in that way. *Id.* 12a.

The court then held that the religious exemption might be unconstitutional as applied to Woods and the ODLS staff attorney position at issue here. Pet. App. 14a. In other words, "whether reasonable grounds exist[ed] to support a constitutional application of [the exemption] *in this case*" remained an open question. *Id.* (emphasis added).

b. To establish a framework for answering that question—and in response to SUGM's argument that "all of its employees are expected to minister to their clients," Pet. App. 3a—the court "s[ought] guidance" from recent decisions of this Court on the First Amendment's "ministerial exception." *Id.* 14a-15a. This Court first recognized that exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012). Where applicable, the

exception allows religious employers to make employment decisions concerning "ministers" without regard for any anti-discrimination law that might otherwise apply. *Id.* at 188. The *Hosanna-Tabor* Court declined to "adopt a rigid formula for deciding when an employee qualifies as a minister," noting that proper classification depends on "all the circumstances of her employment." *Id.* at 190.

In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Court further explained that the ministerial exception applies to "certain key employees" who perform "vital religious duties." *Id.* at 2055, 2066. Determining which employees qualify as ministers requires an analysis of a "variety of factors." *Id.* at 2063. "What matters, at bottom, is what an employee does." *Id.* at 2064. Applying the ministerial exception thus "call[s] on courts to take all relevant circumstances into account and to determine whether each particular position implicate[s] the fundamental purpose of the exception." *Id.* at 2067.

The Washington Supreme Court sought to strike a "careful balance between the religious freedoms of the sectarian organization and the rights of individuals to be free from discrimination in employment." Pet. App. 19a. It reasoned that this Court had designed the ministerial exception to facilitate "the application of antidiscrimination laws in accord with the requirements of the First Amendment." *Id.* The court similarly determined that applying the ministerial exception in the state-law context could protect Woods's fundamental rights without violating the countervailing rights of religious employers. *See id.* 19a-20a.

In particular, the court viewed the ministerial exception as a potential solution to SUGM's argument that Woods's proposed "job duties" test would be unduly intrusive in violation of the First Amendment. *See* Petr. W.S.C. Br. 22-24. It concluded that such a test could not violate the First Amendment if the inquiry involved was the same as that required by this Court's ministerial exception cases. Pet. App. 19a-20a.

Accordingly, the Washington Supreme Court held that "article 1, section 12 is not offended if WLAD's exception for religious organizations is applied concerning the claims of a 'minister.'" Pet. App. 19a-20a. In other words, as a matter of state constitutional law, the WLAD religious exemption could be applied at least in circumstances where the federal ministerial exception applied without violating Woods's rights under the state constitution.

After establishing the legal test to apply, the court recognized that whether the ODLS staff attorney position qualified as ministerial within the meaning of this Court's First Amendment cases was an "open factual question that the trial court did not decide." Pet. App. 21a. Noting that facts in the record pointed in both directions, the court remanded the case to the trial court to make the necessary findings of fact and consider application of the ministerial exception in the first instance. *Id.* 21a-22a.

c. Two sets of Justices wrote separately. First, a two-Justice concurrence agreed with the decision to remand because of outstanding "factual questions regarding the duties of the staff attorney." Pet. App. 25a (Yu, J., concurring). The concurrence also "offer[ed] guidance on the application of the 'ministerial exception.'" *Id.* 26a. It observed that some

factors weighed in favor of finding the ministerial exception applied, *id.* 27a-28a, while many did not, *id.* 28a. Second, a two-Justice partial dissent would have found the WLAD religious exemption facially unconstitutional under the state privileges and immunities clause. *Id.* 32a (Stephens, J., dissenting in part).

REASONS FOR DENYING THE WRIT

The Court cannot reach any question in this case, both because the petition is untimely and because the state judgment below is not final. Ignoring those threshold jurisdictional issues, petitioner asks the Court to consider whether the First Amendment mandates a categorical "coreligionist" exemption from laws prohibiting employment discrimination. But that question was neither presented to nor passed on by the Washington Supreme Court, and petitioner's alleged conflict on the issue is illusory. Petitioner's statutory exemption and "hostility" questions likewise do not warrant review.

I. The petition is untimely.

The petition in this case was filed more than 150 days after entry of the judgment below. It is therefore jurisdictionally out of time.

Section 2101(c) of Title 28 normally requires that a petition in a civil case be filed within 90 days of the entry of the judgment below, but permits extensions "not exceeding sixty days." 28 U.S.C. § 2101(c). This Court has long held that those time restrictions are both "mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990); *see also Bowles v. Russell*, 551 U.S. 205, 206 (2007) (the Court has "long

and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature"); *id.* at 211-12 (discussing certiorari jurisdiction).

The Washington Supreme Court entered its judgment on March 4, 2021. Pet. App. 1a. At that time, a standing order entered by this Court on March 19, 2020, automatically extended the certiorari filing deadline to the statutory maximum of 150 days. That made the petition in this case due on Sunday, August 1, 2021. *See United States v. Tinklenberg*, 563 U.S. 647, 662 (2011) (statutory time periods of more than seven days include weekends and holidays). According to the Court's docket, the petition was not filed until Monday, August 2.

The timeliness of the petition therefore depends on application of this Court's Rule 30.1, which allows a party to exclude the last day of a filing period if it falls on a weekend or holiday. But that court rule cannot be applied where, as here, it would extend the time for filing a petition beyond the maximum time authorized by Congress.

This Court has "no authority to extend the period for filing except as Congress permits." *Jenkins*, 495 U.S. at 45; *see also Bowles*, 551 U.S. at 206-08 (judge's statement to litigant about permissible filing date could not extend deadline beyond statutory limit). To the contrary, under the Rules Enabling Act, rules prescribed by this Court "shall be consistent with Acts of Congress." 28 U.S.C. § 2071(a). Accordingly, Rule 30.1 cannot be invoked to extend the time allowed for filing beyond the maximum authorized by Congress, and the Court lacks jurisdiction to review this case.

II. Petitioner's "coreligionist" question is not properly presented in this case.

A. The question was not pressed or passed upon below.

1. Petitioner principally asks the Court to address whether the First Amendment guarantees religious organizations a right to hire only "coreligionists." Pet. i. But petitioner never presented that question to the state courts, and it cannot raise the issue for the first time in this Court. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 219 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.").

a. In the trial court, petitioner moved for summary judgment on the ground that the state statutory exemption for religious organizations insulated it from liability. Def. M.S.J. 18. It raised the First Amendment only in anticipation of Woods's response that, for state constitutional reasons, the exemption should be limited to jobs relating to an organization's religious practices. *Id.* at 28-31. Petitioner argued that both the state constitution's religious freedom clause and the First Amendment prohibited the use of a "job duties" test because it would require intrusive discovery, entangle courts in religious questions, and "risk chilling religious expression." *Id.* at 28 (typeface altered). In that context, petitioner relied on the majority and concurring opinions in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). *Id.* at 336; *see also id.* at 343-44 (Brennan, J., concurring); Def.

M.S.J. 30-31. But it made no argument for a coreligionist exemption of the sort it now advances. *See* Def. M.S.J. 28-31.

In response to petitioner's motion for summary judgment, Woods argued that the state statutory exemption could be reconciled with both the state constitution and the First Amendment by applying the federal ministerial exception—and that, so construed, whatever factual development was necessary could not violate the First Amendment. Pl. Opp. to M.S.J. 21-23. Petitioner then contended that the ministerial exception was "simply a constitutional floor." Def. M.S.J. Reply 5. Relying on *Amos*, petitioner observed that "legislatures may grant exemptions *beyond what the Constitution requires*." *Id.* (emphasis added) (citing *Amos*, 483 U.S. at 335-39). And it argued that the WLAD exemption did just that. *Id.*

Thus, petitioner did not argue in the trial court, as it does now, Pet. 26, that the "constitutional bedrock" of the First Amendment requires a broad coreligionist exemption. Rather, it indicated that a state exemption broader than the ministerial exception would go beyond the requirements of the First Amendment. Def. M.S.J. Reply 5.

b. At the Washington Supreme Court, petitioner again framed the issue before that court as a state-law question under "article I, section 12 of the Washington Constitution." Petr. W.S.C. Br. 1. To the extent it invoked the First Amendment, it largely repeated its argument that a factual inquiry into the nature of employee roles using Woods's proposed "job duties" test would be unconstitutionally invasive. *Id.* at 22-27; *see also id.* at 42-46 (addressing permissible relief). Woods in turn repeated his argument that the court

should reconcile the state constitutional rights to religious freedom and freedom from discrimination by construing the state statutory exemption to be consistent with the "fact-based analysis of religious versus secular job duties" already required by the federal ministerial exception. *See* Pet. App. 87a; *see also, e.g.*, Resp. W.S.C. Br. 26-27. Thus, nothing about the arguments made below fairly posed for the state court the constitutional coreligionist question that petitioner now seeks to present.

2. Nor did the state supreme court pass on that question. Petitioner contends that the court's decision was "clear and uncomplicated: the First Amendment, in the employment context, requires nothing more than the ministerial exception." Pet. 39. That is not correct. The court held only that, as a matter of state constitutional law, the statutory religious exemption from state anti-discrimination law could be applied at least in circumstances where an employee's role was ministerial. Pet. App. 19a-20a. It did not hold that the First Amendment requires "nothing more."

The court's opinion focuses on the state constitution, not the First Amendment. The court first held that the WLAD statutory religious exemption does not facially violate the privileges and immunities clause of the state constitution. Pet. App. 14a. It then considered whether the exemption is unconstitutional as applied to Woods. *Id.* In that context, the court "s[ought] guidance" from this Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*. *Id.* 14a-15a. It concluded that "the need for a careful balance between the religious freedoms of the sectarian organization and the rights of individuals to be free from discrimination in employment" was best

addressed by using the federal ministerial exception to guide application of the state-law exemption. *Id.* 19a-20a; *see also id.* 14a-15a. The state privileges-and-immunities protection against discrimination could properly give way "if WLAD's exception for religious organizations [was] applied concerning the claims of a 'minister.'" *Id.* 19a-20a. The court remanded the case to the state trial court for consideration of the "material question of fact . . . whether the SUGM staff attorneys qualify as ministers." *Id.* 22a.

The Washington Supreme Court did not consider or address whether the First Amendment mandates a separate coreligionist exemption. Indeed, the word "coreligionist" never appears in the court's opinion.[3]

3. The coreligionist claim that petitioner now advances is a sweeping one. Petitioner asks this Court to hold that the First Amendment guarantees petitioner (and any other religious organization) the ability to decline to hire "any representative," Pet. 24, without regard to state or federal anti-discrimination laws, so long as the decision is based on the organization's own "assessment of who is a coreligionist," *id.* at 25. *See also, e.g.*, *id.* at 38. Petitioner is, of course, entitled to advocate for that

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[3] While the question is not properly presented now, the decision below does not foreclose petitioner from seeking to raise its coreligionist claim on remand. Washington law "allow[s] trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal." *State v. Kilgore*, 216 P.3d 393, 398 (Wash. 2009). If the state courts are willing to exercise that discretion, the issue can be addressed on remand. If necessary, petitioner can then present all of its First Amendment claims for review at one time, once the state proceedings have concluded.

position in any appropriate way. But if this Court is to consider a federal constitutional contention of that importance in a case involving the application of a state statute, there must be "no doubt from the record" that the issue was first presented clearly and fairly before the state courts. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

That did not happen here. If petitioner wanted to ask the Washington Supreme Court to hold that the First Amendment allows it to hire, for any position, only persons it deems coreligionists, it would not have been hard to make that argument clearly. Petitioner did not make the argument at all—which explains why the state court did not address it. At a minimum, "[w]hen the highest state court is silent on a federal question," this Court "assume[s] that the issue was not properly presented." *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). And petitioner cannot overcome that presumption here.

To properly respect principles of federalism and state autonomy, this Court must ensure "that state courts [are] given the first opportunity to consider the applicability of state statutes in light of a constitutional challenge." *Cardinale*, 394 U.S. at 439; *Webb*, 451 U.S. at 499 ("Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law."). That has not happened here.

B. There is no circuit conflict.

Petitioner further argues that the decision below creates a conflict with federal decisions that "recognize the coreligionist doctrine and its constitutional

moorings." Pet. 26. But even if the question were properly presented in this case, that conflict claim would fail. None of petitioner's cases holds that the First Amendment requires a coreligionist exemption.

1. Petitioner's cases do not decide any First Amendment issue. Every case petitioner cites uses the canon of constitutional avoidance to interpret Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* For example, as petitioner itself notes, Pet. 28, the Fourth Circuit employed the canon to "*avoid* reaching [defendant's] First Amendment argument," *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 195 (4th Cir. 2011) (emphasis added).[4]

Constitutional avoidance "is not a method of adjudicating constitutional questions by other means."

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[4] *See also Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130, 138 (3d Cir. 2006) (using canon "to avoid addressing constitutional questions absent clear legislative intent to apply the statute in a way that raises a significant risk of infringing constitutional rights"); *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (reading Title VII religious exemption broadly to avoid "the constitutional concerns that would be raised by a contrary interpretation"); *E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (interpreting Title VII religious exemption to avoid deciding First Amendment question); *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 624-25 (6th Cir. 2000) (relying on precedent that, in turn, relied on constitutional avoidance to interpret Title VII); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 728 (9th Cir. 2011) (O'Scannlain, J., concurring) (per curiam) ("[T]he canon of constitutional avoidance counsels against the Employees' stringent interpretation of [Title VII religious exemption]."); *Killinger v. Samford Univ.*, 113 F.3d 196, 201 (11th Cir. 1997) ("[S]uch a construction [of Title VII religious exemption] allows us to avoid the First Amendment concerns which always tower over us when we face a case that is about religion.").

Clark v. Martinez, 543 U.S. 371, 381 (2005). When a court relies on the avoidance canon, it does not "vindicate the constitutional rights of others," but rather vindicates their "statutory rights." *Id.* at 382. Petitioner's cases, by definition, cannot establish that the Constitution requires a coreligionist exemption.

2. Even if constructions of federal statutes under the avoidance canon could amount to constitutional holdings, petitioner's cases still could not establish a conflict here because Title VII is different from the state law at issue.[5] WLAD is not "Washington's Title VII analogue," Pet. 3; *see id.* at 25, except in the sense that both statutes prohibit various kinds of discrimination. Beyond that, their religious exemptions (and other provisions) have different texts and histories. WLAD predates Title VII by fifteen years, and was modeled on New York's Law Against Discrimination. *See* Pet App. 5a n.1. Federal courts' use of constitutional avoidance to interpret Title VII thus cannot conflict with the Washington Supreme Court's interpretation of a state statute in light of the state constitution.

3. Finally, petitioner argues that the situation here is similar to the legal landscape at the time this Court decided to grant review in *Hosanna-Tabor*. Pet. 4. There, however, the Court was building on lower-court decisions that had squarely faced the First Amendment issue and "uniformly recognized" the

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[5] All of petitioner's cases involve interpretation of Title VII. *Curay-Cramer*, 450 F.3d at 134, 137; *Little*, 929 F.2d at 945; *Kennedy*, 657 F.3d at 190; *Mississippi Coll.*, 626 F.2d at 480-81; *Hall*, 215 F.3d at 624; *Spencer*, 633 F.3d at 725 (O'Scannlain, J., concurring); *Killinger*, 113 F.3d at 197. Some of the suits alleged violations of additional federal statutes as well.

existence of a constitutional ministerial exception. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 & n.2 (2012).[6] The relevant issues had been thoroughly explored in the lower courts for nearly 50 years, *id.* at 188, providing ample context for this Court's consideration. Here, there is no comparable foundation for review. Rather, this Court would be the first to adopt petitioner's constitutional coreligionist exemption.

III. The only federal question arguably addressed below—the ministerial exception—has not resulted in a final judgment.

To the extent the Washington Supreme Court addressed a federal issue, it was to direct the state trial court to apply the federal ministerial exception to the facts of this case. Because of that remand, there is not yet a final state judgment. And in the absence of a final judgment, this Court lacks jurisdiction to review any issue in this case.[7]

This Court's jurisdiction to review state court decisions on federal questions is limited to the review of "[f]inal judgments or decrees." 28 U.S.C. § 1257(a). Under this "firm final judgment rule," the state court's

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[6] Ten state courts of last resort had also recognized a constitutionally required ministerial exception. *See* Brief for Petitioner at 16 & n.9, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553).

[7] Arguably, the state supreme court used federal law only to inform its holding about the proper application of the state constitution. On the other hand, the state holding can be viewed as "interwoven with," rather than clearly independent of, federal law. *Michigan v. Long*, 463 U.S. 1032, 1032-33 (1983). The question is not dispositive here because, as explained in the text, even if the court addressed a federal issue, its judgment is not final for purposes of 28 U.S.C. § 1257(a).

decision must have "effectively determined the entire litigation." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81, 84 (1997); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975). The judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market St. Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 551 (1945). Adherence to this rule is "an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

The Washington Supreme Court has not issued a judgment or decree finally resolving any federal issue. The court remanded this case for the trial court to determine, in the first instance, "whether the SUGM staff attorneys qualify as ministers." Pet. App. 22a. That order is "interlocutory [and] intermediate"—not "an effective determination of the litigation." *Market St. Ry. Co.*, 324 U.S. at 551.

The Court has sometimes exercised jurisdiction where state courts have "finally determined the federal issue present in a particular case," even though other aspects of the case will require further proceedings. *Cox*, 420 U.S. at 477. Those exceptions to the finality rule generally apply where at least one federal issue has been finally determined, no other federal issue remains to be decided, or deferring review could prevent the Court from ever reaching an important question. *See id.* at 477-79. Here, no federal issue has yet been "finally determined," *id.* at 477; the whole purpose of the state remand is to apply the federal ministerial exception; and there is no prospect that this Court would be precluded from reviewing any

properly presented federal question should it wish to do so once there is a final state judgment.

Petitioner makes no effort to establish that the decision below is final or to fit its case into any exception from the final judgment rule. *See* S. Ct. R. 14.1(g)(i). The closest it comes may be its argument that the state supreme court "has already signaled to its lower courts that lawyers cannot be ministers," Pet. 16, perhaps suggesting that "the outcome of further proceedings [is] preordained," *Cox*, 420 U.S. at 479. *See also* Pet. 34 n.6. That would be a curious finality argument for petitioner to make, because the petition does not seek review of any question relating to the ministerial exception. In any event, the allegation is unfounded. The majority and concurring opinions below both note that there are relevant factors pointing in both directions in this case. *See* Pet. App. 21a (on the one hand, "staff attorneys are expected to share their faith with clients"; on the other, no evidence in the summary judgment record indicates they are "expected to nurture . . . development in the Christian faith" in a manner similar to teachers in religious schools); *id.* 27a-28a (Yu, J., concurring).

Under these circumstances, there is no basis for departing from the normal rule that this Court may review state judgments only where they represent "the final word of a final court." *Jefferson*, 522 U.S. at 81 (quoting *Market St. Ry. Co.*, 324 U.S. at 551).

IV. Petitioner's other questions do not warrant review.

1. Petitioner argues briefly that WLAD violates the Free Exercise Clause because it provides an "outright exemption" to small employers but only a

"partial exemption" to religious employers. Pet. 30. That argument was never pressed or passed upon below, and it cannot be raised for the first time in this Court.

The argument also lacks merit. Government regulations trigger strict scrutiny under the Free Exercise Clause when "they treat any *comparable* secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis altered). Here, the WLAD definition of employer covers only organizations that employ "eight or more persons." Pet. App. 76a. Small religious employers and small secular employers are treated identically: They are both categorically exempt from the statute.

Petitioner argues that because WLAD exempts all small employers, the Free Exercise Clause requires extending that categorical exemption to all religious employers, including large ones. *See* Pet. 30-31. That is a remarkable contention. Its logic would apply not only to the WLAD small-employer exemption but to routine exemptions in countless other areas, from labor to the environment to zoning. But a legislature does not violate the Constitution just by limiting the coverage of government regulations in ways unrelated to religion.

2. Petitioner finally suggests that the Washington Supreme Court showed "clear and impermissible hostility toward religion." Pet. 32. It relies on *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), which vacated a decision of the Colorado Civil Rights Commission where, for example, a commissioner described religion as "despicable" and compared invocations of religious

beliefs to defenses of slavery and the Holocaust. *Id.* at 1729.

It is unclear whether or how the reasoning of *Masterpiece Cakeshop* could be extended from an administrative agency to a state court of last resort. But this Court need not consider that question, because this case involves nothing comparable to *Masterpiece Cakeshop*. The Washington Supreme Court expressly recognized petitioner's "right to exercise its religious beliefs," and agreed that the selection of ministers is "central to this freedom." Pet. App. 20a. The court's opinion cannot fairly be viewed as hostile to religion.

Petitioner also contends that the decision in this case "sharply conflicts" with the Washington Supreme Court's previous decision in *Ockletree v. Franciscan Health System*, 317 P.3d 1009 (Wash. 2014), and speculates that "[t]he only explanation" is hostility towards petitioner's religious beliefs. Pet. 32-33. But the decision below was a natural evolution from *Ockletree*. As Woods explained below, the court's "fractured 4-4-1 decision in [*Ockletree*] le[ft] many [] questions unclear." Resp. W.S.C. Br. 14. There is no basis for concluding that the Washington Supreme Court was motivated by anything more than the need to clarify state law about a frequently-invoked state statute.

Finally, petitioner suggests that the very act of invalidating a state statutory provision on state constitutional grounds "smacks of animosity." Pet. 34 (internal quotation marks omitted). But this Court's decision in *Masterpiece Cakeshop* cannot be read to support the assertion that a state supreme court

displays impermissible "animosity" simply by ruling against a religious organization in a particular case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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