

No. _____

In the Supreme Court of the United States

OLYMPUS SPA; MYOON WOON LEE; SUN LEE; JANE
DOE, PATRON; JANE DOES, EMPLOYEES 1-3,

PETITIONERS,

v.

ANDRETA ARMSTRONG, EXECUTIVE DIRECTOR OF THE
WASHINGTON STATE HUMAN RIGHTS COMMISSION;
MADISON IMIOLA,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Kevin T. Snider

Counsel of Record

Matthew B. McReynolds

PACIFIC JUSTICE INSTITUTE

P.O. Box 276600

Sacramento, CA 95827

(916) 857-6900

ksnider@pji.org

Joe Gomes

PACIFIC JUSTICE INSTITUTE

767 Kailua Rd. Ste. 202

Kailua, Hawaii 96734

John J. Bursch

Caroline C. Lindsay

Chloe K. Jones

ALLIANCE DEFENDING FREEDOM

440 First St. NW, Ste. 600

Washington, D.C. 20001

Tracy Tribbett

PACIFIC JUSTICE INSTITUTE

6406 Three Rivers Drive

Pasco, WA 99301

Sorin A. Leahu

PACIFIC JUSTICE INSTITUTE

310 Busse Highway #364

Park Ridge, IL 60068

QUESTIONS PRESENTED

Olympus Spa is a Christian, family-run, Korean bathhouse or *jjimjilbang*. It provides an intimate environment exclusively for women and girls. Its mission is to restore women’s physical and spiritual health through Korean customs that require complete nudity in communal areas and during full-body scrubs administered by female employees. The owners hold the religious conviction that men and women should not be unclothed together unless married to each other. So the Spa admits only female patrons.

A male who identifies as a woman sought to use the Spa’s communal area with nude female patrons as young as 13. The owners cited their female-only entrance policy and declined. But the State of Washington said that policy violated its public-accommodation law by excluding based on “gender expression or identity.” A sharply divided Ninth Circuit affirmed dismissal of the Spa’s lawsuit, holding the First Amendment did not protect the *jjimjilbang* from fines and prosecution, presenting two questions:

1. Whether applying Washington’s law to force a Christian, all-female *jjimjilbang* to admit males violates the Free Exercise Clause under *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), and *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025), or associational freedom under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

2. Whether a policy that differentiates based on anatomy discriminates “based on gender identity or transgender status.” *West Virginia v. B.P.J.*, 146 S. Ct. 2356, 2378 (2026) (citing *United States v. Skrmetti*, 605 U.S. 495, 517 (2025)).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Olympus Spa is an S Corporation owned by Sun and Myoon Woon Lee. Jane Doe is an individual patron of the Spa, and Jane Does 1–3 are individual employees of the Spa. In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures: None of the Petitioners issue stock, and none has a parent or publicly held company owning 10% or more of the corporation's stock. No Petitioner has a stock ticker symbol.

Respondents are Andreta Armstrong, in her official capacity as Executive Director of the Washington State Human Rights Commission, and Madison Imiola, in her official capacity as a Commission investigator.

STATEMENT OF RELATED CASES

Olympus Spa v. Armstrong, No. 22-CV-00340-BJR. U.S. District Court for the Western District of Washington. Judgment entered November 15, 2023.

Olympus Spa v. Armstrong, No. 23-4031. U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 25, 2025, and amended March 12, 2026.

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OPINIONS BELOW

The Ninth Circuit order amending its opinion filed May 29, 2025 (reported at 138 F.4th 1204) and denying rehearing and rehearing en banc is reported at 169 F.4th 817 and reproduced at App.1a–103a. The district court order dismissing the amended complaint with prejudice is reported at 2023 WL 7496382 and reproduced at App.104a–120a. The district court order dismissing the complaint with leave to amend is reported at 675 F.Supp.3d 1168 and reproduced at App.121a–174a.

JURISDICTION

The Ninth Circuit entered its judgment May 29, 2025. The order amending the opinion and denying rehearing and rehearing en banc was entered March 12, 2026. This Court extended the time to file a petition to August 9, 2026; this petition is timely filed. The Court has jurisdiction under 28 U.S.C. 1254(1). Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant statutes, regulations and related materials are reprinted at App.175a–197a.

INTRODUCTION

For over two decades, Sun Lee and his family have shared a piece of Korean heritage with the people of Washington State. They own Olympus Spa, which offers traditional *jjimjilbang* treatments rooted in centuries of Korean culture: communal steam rooms, warm soaking pools, and the ancient practice of *seshin*, a full-body scrub performed by employees called *ddemiri* in an open communal space where all patrons are fully nude. Because nudity is not incidental but central to the services the Spa provides, and because the Spa's owners hold sincere Christian convictions that men and women should not be unclothed together outside of marriage, Olympus Spa has always admitted only female patrons and hires only female employees.

That policy protected the privacy of women and girls for more than 20 years. Then, in 2020, a single complaint—from a person with no record of ever having visited the Spa—set Washington State's enforcement machinery in motion. Resolving that its views on gender identity must override a centuries-old cultural practice and deep religious conviction, the State turned its enforcement power against a Korean family's small business. The Washington State Human Rights Commission threatened to refer the Spa to the Attorney General for prosecution and gave the family ten days to change its policies or close. A family of Christian immigrants—who fled Korea hoping for greater religious freedom—now stand to lose their livelihood or the ability to practice their faith because the State of Washington insists on dictating that males who identify as women be admitted into a female-only nude spa.

The Ninth Circuit affirmed the dismissal of the Spa’s free-exercise claim by holding that the Washington Law Against Discrimination (WLAD) is neutral and generally applicable and that it survives rational-basis review. That holding defies *Tandon v. Newsom*, 593 U.S. 61 (2021). The WLAD is not generally applicable because it categorically exempts “any institute, bona fide club, or place of accommodation, which is by its nature distinctly private.” Wash. Rev. Code § 49.60.040(2). So a private athletic club, a fraternal lodge, or a members-only bathhouse may have the Spa’s exact policy under the WLAD. As four Ninth Circuit judges who voted for en banc review observed, this structural feature triggers strict scrutiny—a standard Washington cannot satisfy given that the State has no compelling interest in forcing a small, Christian spa to expose its female employees and nude female patrons to nude males. And as those same judges noted, the WLAD’s separate religious-institution exemptions likewise violate the neutrality principle under *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025).

The Ninth Circuit also failed to uphold this Court’s First Amendment association precedent. The Spa is a cultural institution—the only *jjimjilbang* in Washington—founded to transmit and preserve centuries-old Korean communal bathing traditions in an intimate, sex-separated setting, consistent with its owners’ cultural and religious heritage. Akin to *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Spa’s mission of spiritual renewal and cultural expression qualifies it as an expressive association, and the forced inclusion of nude males impairs the association’s mission.

Finally, Washington cannot nullify the Spa’s free-exercise and associational rights through an atextual reading of the WLAD. As Judge Collins explained in dissent from denial of rehearing en banc, the Spa’s entry policy does not turn on “gender identity”—it differentiates based only on *anatomy*. The Spa doesn’t care about a patron’s gender identity or expression. Under this Court’s decisions, such a policy classifies based on “biological sex”—not gender identity. *B.P.J.*, 146 S. Ct. at 2378 (citing *Skrimetti*, 605 U.S. at 517). And federal courts should not accept the construction of a state law that stretches the text beyond its terms to burden a federal constitutional right. *E.g.*, *Fulton v. City of Philadelphia*, 593 U.S. 522, 538–40 (2021). At a minimum, then, the Court should summarily reverse and hold that a classification based on biological sex is not discrimination based on gender identity or expression.

In sum, this case is an ideal vehicle for review. The questions are cleanly presented and preserved, and there are no factual disputes. The Ninth Circuit’s decision badly misreads this Court’s precedents. And in so doing, it deepens multiple conflicts and creates a constitutionally intolerable outcome. Certiorari is warranted.

STATEMENT OF THE CASE

I. Statutory background

Washington's Law Against Discrimination, Wash. Rev. Code § 49.60 *et seq.* (WLAD) prohibits denial of "the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." *Id.* § 49.60.030(1)(b). In addition to categories like race and sex, the WLAD was amended in 2006 to cover "sexual orientation," *id.* § 49.60.030(1), which Washington defined to include "gender expression or identity," *id.* § 49.60.040(29). The Washington Human Rights Commission enforces the WLAD. *Id.* § 49.60.120.

Although Washington claims a compelling interest in prohibiting discrimination wherever it occurs, the WLAD has two significant loopholes. First, the WLAD exempts from its protections "any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations." Wash. Rev. Code § 49.60.040(2). So, if a *jjimjilbang* operated as a private club or as part of an Asian-interest sorority rather than as a public business, it would be free to exclude male patrons, no questions asked.

Second, the WLAD exempts any "bona fide religious or sectarian institution" that operates or maintains "any educational facility, columbarium, crematory, mausoleum, or cemetery." *Ibid.* That means if a Christian university offered a Korean studies major that included a course teaching and practicing the traditions of a Korean, women-only, nude spa, that too would be outside the WLAD's scope.

The Commission has issued interpretive guidance that demonstrates the limitations of the WLAD’s religious exemptions: “a church or other religious entity in the activity of conducting worship services is not a place of public accommodation, and neither are religious educational institutions. However, other church-sponsored activities, such as a soup kitchen or public bake sale, might be considered a place of public accommodation.” *Guide to Sexual Orientation & Gender Identity & the Washington State Law Against Discrimination* at 8, Wash. State Hum. Rts. Comm’n (Nov. 19, 2024), perma.cc/AVW8-H2W5.

II. Factual background

A. Description of a *jjimjilbang*

Korean spas are unfamiliar to Americans. But they are not new, predating Washington’s public-accommodation law by many centuries. Someone who seeks this experience steps into a venue, called a *jjimjilbang*, that incorporates hundreds of years of cultural tradition reaching back to the Choson dynasty (1392–1910). This traditional Korean-spa therapy focuses on rejuvenating the body and spirit through treatments, massages, and full-body scrubs called *seshin*. App.31a–32a.

Culturally, a *jjimjilbang* is not an individual experience; it is shared with others. Following long-standing tradition, Korean spas require their patrons to be fully nude in communal saunas and bathhouses. App.105a–106a. Patrons undergo deep-tissue scrubbing of their entire bodies in an open area filled with other unclothed participants. App.31a–32a. Given this intimate environment, Korean spas separate patrons and employees by sex.

Unlike other spas, *jjimjilbang* patrons are not given robes or towels for covering up, nor is nudity optional. App.31a–32a. Patrons must remain fully nude to receive traditional Korean spa services like *seshin*. After soaking in a warm pool, a patron is scrubbed head to toe to promote spiritual renewal and holistic health. *Seshin* is performed by *ddemiri*—individuals who are trained in the Korean art of body scrubbing using traditional techniques. *Ddemiri* scrub patrons all over their bodies for prolonged periods and therefore must be the same sex as the patrons. App.32a, 127a. As Sun Lee, Olympus Spa’s president, explains, “the Korean body scrub has been always served by the same gender over hundreds of years. A service provider never serves a Korean body scrub to an opposite-sex customer.” Sun Lee Decl. at 4, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR, Dkt. No. 22-1 (hereinafter “Lee Decl.”). Mixing the sexes would transform a culturally authentic *jjimjilbang* into something else entirely and would violate the Spa’s religious beliefs. *Id.* at 3.

B. Olympus Spa’s mission

Sun Lee is a first-generation Korean American whose parents opened Olympus Spa after fleeing Korea to the United States in the hopes of a better life and greater religious freedom as Christians. The family yearned to preserve Korean tradition and culture—and to share their heritage with the larger community. App.32a.

The Lee family’s business has been a success. “Non-Koreans have flocked to Olympus Spa to learn and experience this Korean cultural tradition—an ode to America’s melting pot culture.” *Ibid.*

Olympus Spa is not just for adults. Girls as young as 13 visit the Spa for *seshin* and to enjoy the steam rooms. *Ibid.* For their protection, the Spa's entry policy ensures an intimate, safe, and private experience. Mr. Lee believes the Spa has a responsibility to safeguard young girls' privacy. App.33a.

Mr. Lee explains that the Spa's "cultural heritage and ... beliefs are an integral part of who we are," and that preserving that culture matters because it "continues to be reduced and marginalized." Lee Decl. at 4. Because the Spa hosts the only Korean bathhouses in the State, opening its facilities to both sexes would mean that the family's "heritage and beliefs will be lost." *Ibid.* For hundreds of years, the Korean body scrub has been "served by the same gender"—"never ... to an opposite-sex customer." *Ibid.* To force the Spa to admit a male patron among its female patrons and employees, Mr. Lee says, discriminates against the family's very "ethnicity and creed." *Ibid.*

C. The Spa owners' religious beliefs

Beyond preserving privacy for female patrons and employees and preserving cultural heritage, the Spa's female-only entry policy reflects the owners' religious beliefs. The owners are "traditional theologically conservative Korean Christians." App.33a. They consider modesty between the sexes a central tenet of their religious beliefs. *Ibid.* And they hold the religious conviction that men and women should not be present together while unclothed unless married to one another. App.106a. "According to our religion," Mr. Lee testified, "man and woman are created differently. Our spa is designed specifically for women and our mission is to restore and rejuvenate women's physical health as well as spiritual health." Lee Decl. at 3.

It would violate the owners' faith to compel female employees to perform *seslin* on fully nude male patrons. App.33a. And the Spa's "employees aver that they 'will not perform services such as massages and body scrubs on naked men,'" even if those males identify as women. App.142a.

Recognizing that "[w]omen are in a vulnerable position when they are unclothed," the Spa's owners are also theologically compelled to maintain the space as a female-only space where women and girls "feel their privacy and rights are respected." App.63a. Thus, Olympus Spa does not admit males with male genitalia—no matter their gender identity—into its female-only, nude spaces.

D. The complainant

"I did it! I got the main naked lady spa in the area to change their policies and allow all self-identified women access regardless of surgery and genitals." App.65a. So exclaimed a social-media post of a male who identifies as a woman.

He accomplished this by filing a complaint with the Washington Human Rights Commission, claiming "I went to [the] spa for services." Wash. Hum. Rts. Comm'n Compl. at 2, 8, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR, Dkt. No. 22-2 (hereinafter "Comm'n Compl."). "[The] [o]wner denied me services and stated that transgender women without surgery are not welcome because it could make other customers and staff uncomfortable." *Ibid*. This complaint landed on the desk of Madison Imiola, a Commission investigator who sent the complaint to the Spa owners and demanded a written response. *Id.* at 7.

After receiving the Commission's order, Mr. Lee checked with management and found no record of a visit by the complainant during the month in question. App.133a. In written correspondence to the investigator, Mr. Lee explained the "cultural underpinnings" of the services offered at Olympus spa." App.131a. He further summarized a law permitting dress and grooming standards for businesses. *Ibid.* And he invoked state and local criminal laws such as public indecency and lewd conduct, emphasizing the concerns with an adult male exposing his genitalia to women and girls as young as 13. *Ibid.*

Mr. Lee also noted the female-only policy's exception for "postoperative [male-to-female] transsexuals"—males who have removed their genitalia. App.107a. The policy doesn't care about any prospective patron's identity, only anatomy.

Mr. Lee ended his response with a bit of exasperation: "[I]n the current environment of frequent and often brutal attacks on Asian Americans, this complaint feels like another attack on an Asian-owned business trying to offer and preserve a culturally genuine health therapy for women, in a safe setting." Comm'n Compl. at 12.

Mr. Lee's letter was not well received. The investigator concluded that the evidence "supports that your company's 'biological women' policy is not compliant with [the WLAD] ... which prohibits discrimination on the basis of gender identity in places of public accommodation." Comm'n Compl. at 15.

While acknowledging that the policy “focuses on the genitals of patrons,” the investigator insisted that the Spa was conditioning access to its “facilities based on [patrons’] gender identity.” App.132a. Allowing fully nude female patrons while excluding a nude male who identifies as a woman, the investigator reasoned, “is clearly discriminatory and violates the WLAD.” Comm’n Compl. at 16. Unless the Spa agreed to enter a settlement, the investigator threatened to “prepar[e] the case for referral to the Attorney General’s Office for prosecution.” App.35a.

Mr. Lee responded by reiterating that the Spa had no record or even recollection of the complainant coming to the Spa. Comm’n Compl. at 18. He offered that if the complainant “could give more information or the name(s) of who was spoken to we may be able to better assist in ensuring that no person, especially [the individual], feels discriminated against.” *Ibid.*

Again ignoring that the visit may never have happened, the investigator responded impatiently: the “time to ensure that [the complainant] does not feel discriminated against has passed[,]” because a complaint for discrimination has already been filed. App.35a. “Additionally,” the investigator added, the Commission “has already identified that Olympus Spa’s ‘biological women’ entry policy is not compliant” with the WLAD, “which prohibits discrimination on the basis of gender identity in places of public accommodation.” Comm’n Compl. at 20. The public-accommodation law “does not use genitals to define gender identity.” App.132a.

Betraying the disconnect between the WLAD's prohibitions and the Spa's policy, the investigator declared: "Olympus Spa's 'biological women' policy focuses on the genitals of patrons rather than allowing transgender women to access your facilities based on their gender identity." *Ibid.* Accordingly, the Commission brought a charge against the Spa because the Spa was in "active violation" of the WLAD for "maintaining a 'biological women only' entry policy," App.111a, which on its face discriminated against males who identify as women and desire to share a space with nude females as young as 13, App.116a. "[N]ow is the time," the investigator threatened, to enter into a settlement "within ten business days" or be referred for prosecution. Comm'n Compl. at 20.

Based on this warning—and left with no other option—Mr. Lee was compelled to sign a settlement agreeing to change the Spa's entry policy and notice and undergo anti-discrimination training in exchange for not being prosecuted. App.35a. But Mr. Lee insisted that the agreement include language that the Spa retained the right to challenge the WLAD as applied to the Spa's all-female-patron practices. App.6a.

That reservation-of-rights clause was crucial—the Spa may have to shut down if it must permanently allow males to share facilities with nude female patrons. The Spa has already had "numerous incidents where a male entered" the Spa dressed as a woman, undressed in the locker room, "and went into a pool area." Lee Decl. at 2. "Every time the incident occurred, it left so many customers in shock and with fear." *Ibid.* The women "cried with anger." *Ibid.*

Naturally, a male exposing himself to nude women and girls as young as 13 “can be a threat” to those females. *Ibid.* And the consequences to female patrons are substantial. When a person with male genitalia accessed the facility, women experienced “humiliation, trauma, and rage.” App.128a. The Spa had to refund money to the patrons—who “fled the scene and vowed never to return.” App.85a. These incidents “tremendously damaged [the Spa’s] reputation,” causing “loss in financial opportunities and extreme psychological, mental, and even physical pain.” Lee Decl. at 2. The Spa’s “employees and customers have made it clear that they will not return if naked individuals with male genitalia use the female-only spa.” App.35a. And admitting male patrons in the nude female spa violates the Spa’s religious beliefs. Lee Decl. at 4. Accordingly, the Spa sought relief from the federal courts.

E. Proceedings below

The Spa filed a First Amendment challenge to this application of the WLAD. Respondents moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). The district court held that the Spa had standing and denied the 12(b)(1) motion. But it granted the 12(b)(6) motion, concluding that the First Amendment did not protect the Spa.

A divided Ninth Circuit panel affirmed. The panel majority later issued an amended opinion, and the court denied rehearing en banc over the dissents of five judges. The panel majority rejected the Spa’s free-exercise claim because the WLAD is neutral and generally applicable and “imposes only incidental burdens on religious expression.” App.22a. And because the WLAD’s exceptions for private clubs do not

differentiate between secular and religious activities, the majority found *Tandon* distinguishable. App.22a.

Next, the majority rejected the Spa's claims to both intimate and expressive association. The majority first held that a for-profit business can never be an intimate association. App.24a–25a. Similarly, the Court held the Spa “is also not an expressive association,” but simply a business that “offer[s] a service for which patrons pay.” App. 27a–29a. The majority based its conclusion on the Spa's lack of “stable membership” or “expressive activity,” notwithstanding the considerable cultural expression and association that takes place in a *jjimjilbang*. App.27a–29a.

Judge Lee dissented, concluding that “Washington has now rolled back the clock in protecting women and girls by bizarrely citing the very law that safeguarded their rights for decades.” App.45a. “Now, women and girls as young as 13 years old must lay naked alongside individuals with exposed male genitalia” and female Spa employees must choose between their livelihood and providing “full-body deep-tissue massage[s] to naked” males. *Ibid.* “Asian Americans in Washington have historically lacked political clout,” App.46a, Judge Lee concluded, yet Washington “exerted the full force of state power to bully members of a politically weak minority group,” App.48a; accord App.46a–47a n.6.

Regarding the denial of en banc rehearing, Judge McKeown doubled down on her *Tandon* analysis in the panel-majority opinion. App.52a–56a. She also chastised the dissenters from the denial of en banc rehearing for invoking this Court's unanimous decision in *Catholic Charities*, which issued days after the original panel opinion. App.56a.

There were three separate dissents from denial of en banc rehearing. Judge Tung, joined by three additional active judges, would have held the WLAD's application to the Spa was subject to and failed strict scrutiny under *Tandon* because Washington allows private clubs to engage in the same activity as the Spa without threat of prosecution. App.89a–95a. He criticized the panel majority for claiming waiver when in fact the Spa raised the issue in its complaint, district-court briefing, and appellate briefing and observed that the panel “addressed the argument on the merits resulting in an erroneous holding that warrants review.” App.91a n.1.

Judge VanDyke wrote separately. He agreed that the WLAD is “underinclusive on its face’ and is not generally applicable” because of the statute’s exception for “private institutes, clubs, places of accommodation, and fraternal organizations.” App.72a. “And though the majority insists that private clubs can *never* be comparable to public accommodations,” he continued, “it is notable that they cannot cite a single case to support that extreme proposition.” *Ibid*. In addition, Judge VanDyke would have held the “WLAD’s express discrimination between religious practices is proscribed by the Supreme Court’s unanimous decision in *Catholic Charities*.” App.76a. After all, the WLAD “exempts only a small set of formal and orthodox religious practices while excluding” all the rest, including the Spa’s. App.78a.

Judge Collins would have reversed because the Spa’s policy does not implicate the WLAD. “[I]t is undisputed and indisputable that Olympus Spa does not care whether a potential patron has any particular real or perceived ‘gender identity,’ nor does it care

whether a patron’s gender identity does or does not match ‘the sex assigned to that person at birth.’” App.101a. Rather, “[t]he Spa cares only whether the person has male genitalia. That is not ‘discrimination because of’ ‘gender identity.’” *Ibid.* “Indeed, under the panel majority’s reading of WLAD, the Spa cannot ignore gender identity but instead *must take it into account*,” allowing only males *who identify as women* to access the Spa’s female-only areas. App.102a. “It is a little Orwellian,” Judge Collins observed, “to assert that a ‘law against discrimination’ based on a characteristic should be construed to *require* differential treatment based on that characteristic.” *Ibid.*

REASONS FOR GRANTING THE PETITION

“[T]he Ninth Circuit has relegated religious liberty to a second-class right. In case after case, [the] court has condoned governmental interference with the rights of the religious to practice their faith as they believe.” *Union Gospel Mission of Yakima v. Brown*, __ F.4th __, 2026 WL 1758172, at *1 (9th Cir. June 18, 2026) (Bumatay, J., dissenting from grant of rehearing en banc). As only one recent example, this Court had to correct summarily the Ninth Circuit’s holding that parents have no free-exercise right to know about and opt their children out of secret social gender transitions at public schools. See *Mirabelli v. Bonta*, 607 U.S. 492, 496–97 (2026) (per curiam).

The Ninth Circuit has an equally poor track record of protecting women-only spaces. Just this past Term, in *Hecox v. Little*, this Court had to correct the circuit’s refusal to uphold a state law that protected safety and fairness in women’s sports by ensuring that female athletes did not have to compete against males. 104 F.4th 1061 (9th Cir. 2024).

This case perpetuates both of those Ninth Circuit failings. Under this Court’s precedents, the Constitution protects the Spa owners’ religiously motivated desire to keep a male out of a space reserved for female patrons as young as 13 years old. The decision below conflicts with that precedent, and that alone warrants review.

So does the conflict deepened by the Ninth Circuit’s First Amendment association holding. In narrowing the right’s scope to exclude organizations providing services to the public—like the Spa—the Ninth Circuit joined the Washington Supreme Court in a split with the Second Circuit. And by second-guessing the Spa’s own understanding of its expression, the court defied this Court’s decision in *Boy Scouts of America v. Dale*.

But the Spa also prevails for a more basic reason. Federal courts should not accept the construction of a state law that stretches the text beyond its terms to burden a federal constitutional right. *E.g.*, *Fulton v. City of Philadelphia*, 593 U.S. 522, 538–40 (2021). Yet that is precisely what the Ninth Circuit did here. A policy that classifies individuals based on anatomy does not discriminate “based on gender identity or transgender status.” *B.P.J.*, 146 S. Ct. at 2378 (citing *Skrmetti*, 605 U.S. at 517). Because the Spa’s entrance policy excludes patrons based solely on their anatomy, not their identity, it does not implicate the WLAD at all. The Court could summarily reverse on that basis.

I. The decision below flouts this Court’s Free Exercise jurisprudence and deepens confusion over general applicability by excusing exemptions that apply to both secular and religious conduct.

Five years ago, this Court drew a bright line: strict scrutiny applies “whenever [laws] treat *any* comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62. That rule resolves this case: the WLAD’s “exemptions permit secular private clubs to refuse service to a person who claims a sex different from his actual sex, while a business motivated by religion (such as the business here) and engaged in the same activity is subject to a penalty.” App.90a–91a (Tung, J., dissenting from denial of rehearing en banc).

Instead, the Ninth Circuit held that the WLAD’s private-club carveout “appl[ies] equally to secular and non-secular aggregations,” so “this is not a situation where a comparable secular activity is treated more favorably than religious exercise.” App.22a (citation modified). So if an *exemption* treats religious and non-religious actors the same, the entire law is generally applicable—no matter how the law treats comparable religious conduct *outside* the exemption.

That rule conflicts with *Tandon*, which instructed lower courts to ask the opposite question: whether shielded secular conduct is treated more favorably than comparable religious conduct *outside* the exemption (*i.e.*, religious conduct actually governed by the law). *Tandon*, 593 U.S. at 62. The government cannot legislate its way around *Tandon* by drawing an exemption’s borders to exclude the very comparison the Free Exercise Clause demands.

Applying the Ninth Circuit’s rule to the facts in *Tandon* illustrates the error. Because California’s household gathering limit in *Tandon* was facially neutral, *Tandon v. Newsom*, 517 F. Supp. 3d 922, 975 (N.D. Cal. 2021), the Ninth Circuit’s test here would have upheld that law. In fact, that is exactly what the Ninth Circuit did in *Tandon*: it reasoned that because “the gatherings restrictions apply equally to private religious and private secular gatherings,” there was no First Amendment violation. 992 F.3d 916, 922 (9th Cir. 2021). This Court rejected that approach, lamenting that it was “the *fifth time* the Court ha[d] summarily rejected the Ninth Circuit’s [free exercise] analysis.” *Tandon*, 593 U.S. at 64 (emphasis added). The Court instructed that “[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.” *Id.* at 62.

A sixth correction is now necessary. The correct inquiry is whether *any* secular conduct is exempt while comparable religious conduct is regulated. The answer here is yes. A private club may turn a patron away for any secular reason, while the *jjimjilbang* may not turn him away for a religious one. That a hypothetical private religious club could also claim the carveout changes nothing. “Where, as here, a comparable secular activity is treated more favorably than religious exercise, strict scrutiny applies.” App.92a (Tung, J. dissenting from denial of rehearing en banc).

The Ninth Circuit’s error is not isolated. Other lower courts are also misreading *Tandon* in the same way. Consider two examples involving the same state law. The District of Maryland recently considered the General Conference of Seventh-Day Adventists’ challenge to Maryland’s Fair Employment Practice Act (MFEPa), which prohibited the Conference from hiring only co-religionists. Like the Spa, the Conference invoked *Tandon*, pointing to the MFEPa’s private-club exception. The District Court rejected that argument with reasoning identical to the Ninth Circuit’s: the private-club exemption “applies regardless of whether the organization is religious or secular.” *General Conf. of Seventh-Day Adventists v. Horton*, 787 F. Supp. 3d 99, 120 (D. Md. 2025), appeal docketed, No. 25-1735 (4th Cir. argued Mar. 17, 2026) (citing *Kim v. Board of Educ. of Howard Cnty.*, 93 F.4th 733, 748 (4th Cir. 2024)). Like the Ninth Circuit, the court read the *Tandon* test to be satisfied whenever an *exemption* applies to both secular and religious conduct.

In another Maryland case, a federal district court adopted the same reasoning regarding the MFEPa’s small-employer exemption. There, the question was whether *Tandon* applied when Catholic Relief Services (CRS) sought a religious exemption from the MFEPa’s requirement to provide benefits in violation of CRS’s religious beliefs about marriage. The court rejected CRS’s argument because “a religious employer of fewer than 15 employees ... would be exempt from MFEPa in the same manner as would be a secular employer with fewer than 15 employees.” *Doe v. Catholic Relief Servs.*, 779 F. Supp. 3d 545, 565 (D. Md. 2025), appeal docketed, No. 25-1569 (4th Cir. argued Mar. 17, 2026).

So lower courts are routinely reading *Tandon* out of existence when facing these kinds of exemptions. The result is that Washington can force a Christian Korean bathhouse to admit male patrons in the communal area with nude female patrons as young as 13 and compel its female employees to provide full-body massages to exposed nude males.

While the panel’s analysis turned on the private-club exemption’s facial neutrality, the en banc court fractured over the antecedent question—whether a private club could be a *Tandon* comparator at all. Under this Court’s test, whether two activities are comparable “must be judged against the asserted government interest that justifies the regulation at issue.” 593 U.S. at 62. A law is not generally applicable if, measured against that interest, it treats any secular conduct more favorably than comparable religious exercise. *Ibid.* Nevertheless, seven Ninth Circuit judges asserted that the Spa need not be compared to private clubs because the private-club exemption applied “equally to secular and non-secular aggregations.” App.22a. Four dissenting judges recognized that “[w]here, as here, a comparable secular activity is treated more favorably than religious exercise, strict scrutiny applies.” App.92a (Tung, J., dissenting from denial of rehearing en banc).

Tandon already rejected a similar public/private distinction. There, the Court reversed the Ninth Circuit for “erroneously reject[ing]” a set of “comparators simply because this Court’s previous decisions involved public buildings as opposed to private buildings.” 593 U.S. at 64. The Court directed lower courts to consider “the asserted government interest,” *not* the actor’s public or private character. *Id.* at 62, 64.

Measured against Washington’s proclaimed interest, the private-club carveout is at least relevant. The WLAD declares that discrimination against “*any* of its inhabitants” is “a matter of state concern” because “such discrimination ... menaces the institutions and foundation of a free democratic state.” Wash. Rev. Code §§ 49.60.010, 49.60.040(29) (emphasis added). “That asserted interest is categorically expressed without qualification for where the discrimination occurs.” App.93a (Tung, J., dissenting from denial of rehearing en banc). A private club and a *jjimjilbang* that both prohibit males who identify as women from being in the same room as nude women and girls have the same effect on that interest. See *Fulton*, 593 U.S. at 534 (no general applicability where a law “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way”). Yet the State exempts the secular club and prosecutes the Christian small business.

The problem is that a state “could always say that its statutory exceptions are what delineate the ‘asserted government interest,’ so that any activity falling outside those exceptions would never be ‘comparable.’” App.94a (Tung, J., dissenting from denial of rehearing en banc). And that loophole is particularly threatening because lower courts often defer to governments in framing their asserted interests. See *Spivack v. City of Philadelphia*, 109 F.4th 158, 175 (3d Cir. 2024) (reading *Tandon* to compel “deference to how the government characterizes its own interests”); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1178 n.5 (9th Cir. 2021) (adopting school district’s broad formulation of its interest to find its vaccine policy generally applicable).

Compounding the problem, the Ninth Circuit also failed to apply this Court’s intervening decision in *Catholic Charities*. There, this Court unanimously confirmed that the First Amendment treats “any state-sponsored denominational preference”—such as differentiating between entities based on how they practice their faith—as suspect. 605 U.S. at 241; see *Larson v. Valente*, 456 U.S. 228, 244–46 (1982).

The WLAD draws just such a line, exempting only some religious entities from its public-accommodation regime—entities that appear more formally religious than the Spa. Beyond private clubs, the WLAD exempts “any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.” Wash. Rev. Code § 49.60.040(2). The Commission’s own guidance confirms that “worship services” and religious “educational institutions” fall outside the WLAD, while “other church-sponsored activities, such as a soup kitchen or public bake sale,” may not. App.75a (VanDyke, J., dissenting from denial of rehearing en banc).

To shelter the formal worshiper while penalizing the informal one prefers one religion over another. “[S]uch arbitrary line-drawing, which protects only certain religious exercises” does not cure a law’s lack of general applicability; it confirms it. App.95a (Tung, J., dissenting from denial of rehearing en banc). The WLAD thus “single[s] out” some religious exercise for unequal treatment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993).

The question recurs far beyond the Spa. The Ninth Circuit acknowledges that religious-institution carve-outs are “very common” in public-accommoda-

tion laws. App.52a. Yet it now treats such carve-outs as reinforcing neutrality. See, *e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1085 (9th Cir. 2022). That is the opposite of what *Catholic Charities* holds. And only this Court can correct the error.

Nor does the Spa’s commercial character make a difference; the entities in *Catholic Charities* also performed services that “could be provided by organizations of either religious or secular motivations,” yet the denominational preference still triggered strict scrutiny. 605 U.S. at 246 (citation modified). Yet again, this Court needs to course-correct the Ninth Circuit.¹

Correcting the Ninth Circuit’s error here does not create an automatic religious exemption to the WLAD. Washington is always free to amend its law to eliminate exceptions that treat secular conduct better than indistinguishable religious conduct, like the private-club exemption does. Washington can also try to show that the private-club exemption covers conduct that is *not* comparable to the activity in which the Spa engages. See *Tandon*, 593 U.S. at 62 (strict scrutiny only triggered by “comparable secular activity”). Finally, Washington can attempt to satisfy strict scrutiny. But Washington should not be relieved of its burden of proof simply because the private-club exemption applies to secular and religious clubs alike, as the Ninth Circuit held. The Court can correct the Ninth Circuit’s doctrinal error without unsettling public-accommodation law more broadly.

¹ If the Ninth Circuit is right, then the Court should reexamine its precedents. See *Fulton*, 593 U.S. at 543 (Barrett, J., concurring); *id.* at 545 (Alito, J., concurring).

II. The Ninth Circuit’s dismissal of the Spa’s First Amendment associational claim contravenes this Court’s precedent and deepens an entrenched conflict.

The Ninth Circuit’s expressive-association holding also conflicts with this Court’s precedents. The court declared that the *jjimjilbang* could not be an association because it is a business open to the public and because its practice of ancient Korean rituals aimed at spiritual renewal are “commercial services” that “hardly contain[] even a ‘kernel of expression.’” App.28a–29a (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)). That’s wrong for two reasons. First, it contravenes *Boy Scouts of America v. Dale*, 530 U.S. 640, which says courts must defer to a group’s account of its own expression. Second, it joins the Washington Supreme Court in erroneously limiting associational freedom to membership organizations formed for an expressive purpose, deepening a split with the Second Circuit. Certiorari is necessary to resolve this conflict.

A. The decision below cannot be reconciled with this Court’s precedent.

The Constitution protects the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). “According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity.” *Ibid.* That right is not reserved for advocacy groups—it belongs to any organization engaging in “activities protected by the First Amendment.” *Id.* at 618. So an organization that uses communal activities to “transmit ... a

system of values”—even indirectly or “by example”—“engages in expressive activity.” *Dale*, 530 U.S. at 649–50.

That describes Olympus Spa. Its mission is to help its patrons achieve spiritual renewal and to pass on Korean cultural values and traditions through the practice of centuries-old rituals. That its patrons pay a fee for those rituals does not diminish their expressive nature or spiritual benefits. The Boy Scouts, too, charge a fee, *Scouting Costs 101*, ScoutSmarts, perma.cc/LA5F-SBTK (estimating costs of \$250 to \$600 per year)—more than the Spa’s all-day pass, *Day Pass Menu*, Olympus Spa, perma.cc/X8SK-GEX6 (\$53). And neither the corporate form nor a profit motive strips expression of First Amendment protection. *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023); *Pacific Gas & Elec. Co. v. Public Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986).

The Ninth Circuit disagreed. Brushing aside Olympus Spa’s mission and centuries-old Korean tradition, the court likened the *jjimjilbang* to an everyday “commercial gym or massage establishment.” App.28a. It summarily declared that *seshin* and the Spa’s other ancient rituals lack “even a kernel of expression” and are “not ... designed to ‘transmit ... a system of values,’” dismissing the *jjimjilbang*’s stated mission of promoting women’s health and spiritual renewal as bearing “at best a tenuous relationship to ... beliefs.” App.28a–29a.

This judicial second-guessing of Olympus Spa’s self-understanding conflicts with *Dale*. There, this Court instructed courts to “give deference to an association’s assertions regarding the nature of its expression” and “what would impair its expression.”

530 U.S. at 653. It's not for the Ninth Circuit to decide that a Korean bathhouse's ancient rituals carry too little meaning to count; the Spa's reasonable explanation of its spiritual and expressive purpose controls.

The Spa's website explains that the organization promotes women's "physical" and "spiritual health." *About Us*, Olympus Spa, perma.cc/VC75-AV8K. It does so through energy rooms, saunas, and whirlpools, plus a reading room, meditation room, and tea ceremony classes. *Ibid.* All spaces require nudity. And as Mr. Lee elaborates: "According to our religion, man and woman are created differently." Lee Decl. at 3. "Women are in a vulnerable position when they are unclothed and/or having treatment while unclothed and we seek to ensure that they feel their privacy and rights are respected. This is a biblical principle from 1 Peter 3:7, 1 Timothy 3:1–7, 1 Timothy 5:2, Phillipians [*sic*] 4:3, Genesis 1:27, Proverbs 31:17, Philipians [*sic*] 2:3 and more." *Id.* at 4. The Spa's values about males and females are particularly important because, as a place of physical and spiritual renewal, the Spa is also "a healing place for victims of sexual assault, especially by men." *Id.* at 3.

The Spa also promotes a message of "protect[ing] the weak and defenseless." *Id.* at 4. It does this by protecting female minors' "well-being mentally and physically" from "either half or fully undressed males approaching them." *Ibid.* That belief flows "from both a cultural and creed based stance." *Ibid.*

Like in *Dale*, the Spa's inculcation of values that lead to physical and spiritual wellness is "expressive activity." 530 U.S. at 649–50. And the forced inclusion of nude males in the Spa's activities would "significantly burden" the Spa's desire to protect and promote

women and girls. See *id.* at 653. In *Dale*'s words, the presence of a male in the Spa's nude, female-only community would send "a distinctly different message" than the presence of a nude female. *Id.* at 656.

Indeed, the Boy Scouts' protected expression—routine wilderness activities—are no more inherently communicative than *seshin*, meditation rooms, and cultural classes. Yet this Court found the Boy Scouts' activities expressive because they were the means through which the organization transmitted its values. Just as the Boy Scouts sought to communicate its values of being "morally straight," *id.* at 649–50, Olympus Spa seeks to share and demonstrate fidelity to Korean tradition and the benefits of communal spiritual renewal while inculcating women's physical and spiritual health. The distinguishing feature in *Dale* was the transmission of values, not the medium—and certainly not the absence of payment. Accord *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (First Amendment protected club's service activities perpetuating its values of "humanitarian service, high ethical standards," and "good will").

Here there is a synergy of beliefs between Christian convictions and the Korean *jjimjilbang* as to males and females. These beliefs are expressed to the public through the Spa's website, which stated that "biological women are welcome." App.5a, 107a, 127a. As explained in the pleadings, this language conveys to the public the viewpoint that "biological women are females and distinct from males." Am. Compl. at 19, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR, Dkt. No. 24-1. Sun Lee elaborates that "[a]ccording to our religion, man and woman are created differently.

Our spa is designed specifically for women and our mission is to restore and rejuvenate women's physical health as well as spiritual health." Lee Decl. at 3. Turning to culture, he writes that the "Korean traditional Spa means it provides female separately at their comforts [*sic*]." Therefore, "anyone who enters our spa *understands* that we operate our spa in Korean style" *Id.* at 4 (emphasis added).

Despite this, the Ninth Circuit discerned no kernel of expression in the Spa's operation. App.28a–29a. But Washington's investigator was not so confused. She viewed the website's statement—"biological women are welcome," App.5a—as a clear message about the nature of the Spa's association. Indeed, the clarity of the Spa's message was evidenced by the fact that the investigator gave the Spa the option of self-censorship or prosecution. App.35a.

Contrast *City of Dallas v. Stanglin*, 490 U.S. 19. The dance hall there was considered a mere "social association" because its dancing was purely "recreational." *Id.* at 25. Although the dance hall was a business, not a formal membership organization, that was not determinative. Contra App.28a–29a. Rather, it was the business's failure to articulate any values it sought to instill in its patrons. *Ibid.*

As the State's sole *jjimjilbang*, forcing Olympus Spa to accommodate nude male patrons "significant[ly]" affects the Spa's transmission of its values and poses an existential threat to its existence. *Dale*, 530 U.S. at 648. Without this Court's intervention, Olympus Spa will be forced to close, and this vital aspect of Koren culture will cease to be shared in the Evergreen State. Such an extreme impact on its association cannot be justified.

B. The decision below deepens a conflict over whether the associational right applies beyond membership groups formed for an expressive purpose.

The Ninth Circuit’s decision also conflicts with its sister circuit’s application of this Court’s precedents. The question dividing the lower courts is clean and recurring: whether the freedom of First Amendment association is confined to private membership groups formed for an expressive purpose and excludes entities that exist to provide services to the public. The Second Circuit says no. The Washington Supreme Court says yes, joined now by the Ninth Circuit, cementing a 2–1 divide.

Start with the Second Circuit. In *New Hope Family Services, Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020), that court considered the associational claim of an adoption agency challenging a public-accommodation law that required the agency to work with same-sex and unmarried couples, contrary to the group’s expression of its religious values regarding marriage and family. The state argued that the claim failed as a matter of law because the agency is not a membership organization and its primary purpose is providing adoption services to the public, not religious expression. The Second Circuit disagreed, holding that the expressive-association right is not limited to membership organizations “expressly constituted for that purpose,” as *Dale* requires only that an organization “engage in some form of expression.” *Id.* at 178–79 & n.31.

Because the agency purported to convey “a system of values about life, marriage, family and sexuality” through the services it provided to the public, it was

recognized as an expressive association—even though its services were not in themselves inherently expressive. *Id.* at 178. And because the law would make “associat[ing] with [the agency] ‘less attractive’ for those who would otherwise” seek to participate in the agency’s expression, including its employees, the Court sustained the agency’s claim that the law significantly impaired its expression. *Id.* at 179 (citing *Rumsfeld v. FAIR*, 547 U.S. 47, 68–69 (2006)).

The Washington Supreme Court has held the opposite. In *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), the court rejected an expressive-association claim brought by a floral artist challenging the WLAD. In so doing, the court limited the freedom of expressive association to “private organizations, defined by particular goals and ideologies.” *Id.* at 1236. Distinguishing a “business’ customer service” from protected expression, the court categorically rejected that a “commercial enterprise, open to the general public” could bring an expressive-association claim. *Id.* at 1235–36. See also *Matter of Gifford v. McCarthy*, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016) (holding that a wedding business was not an expressive association because it was organized for “the purpose of making a profit through service contracts with customers,” not for “specific expressive purposes”) (citation modified).

The Ninth Circuit deepened the split here. The court rejected Olympus Spa’s First Amendment association claim because the Spa is not a membership organization but is a service provider like New Hope. App.28a–29a.

In reaching this conclusion, the Ninth Circuit embraced the same categorical divide—between a service provider and a membership organization—as the Washington Supreme Court. *Ibid.* Both decisions conflict with the Second Circuit’s *New Hope* decision.

This 2–1 conflict is entrenched and will not be resolved without this Court’s intervention. In fact, the Second Circuit recently reaffirmed its position in *Slattery v. Hochul*, 61 F.4th 278 (2d Cir. 2023). There, it applied *New Hope*’s reasoning to sustain the expressive-association claim of a pregnancy resource center—an organization that transmits its values and beliefs about the sanctity of human life through its provision of prenatal services to the public. *Id.* at 290. Only this Court can resolve the split. It should grant the petition and do so.

III. The Spa does not discriminate based on gender identity or expression.

Per this Court’s decision in *Skrmetti*, the Spa should also prevail for a more fundamental reason: it does not discriminate based on gender identity or expression. As Judge Collins explained in his dissent from the denial of rehearing en banc below, “the Spa’s policy is that no person with male genitalia is allowed into the Spa, precisely due to its all-nude environment,” though the Spa will admit “post-operative transgender women.” App.99a. Given this fact, it is impossible to say that the Spa’s anatomy-based policy discriminates because of gender identity or expression, as this Court has now held repeatedly. *Skrmetti*, 605 U.S. at 517; *B.P.J.*, 146 S. Ct. at 2378 (“[T]he laws do not classify based on gender identity or transgender status”; “[t]he laws classify on the basis of biological sex.”).

A federal court owes no deference to a State’s construction of a law when that reading stretches the text beyond its terms to burden a federal constitutional right. This Court has repeatedly said so. In *Fulton*, the Court declined to accept the City’s view that a religious foster-care agency was a “public accommodation” subject to its antidiscrimination ordinance; it construed the ordinance’s reach for itself, explaining that although courts “ordinarily defer to lower court constructions of state statutes,” they “do not invariably do so,” and that “[d]eference would be inappropriate here.” 593 U.S. at 538–40.

Moore v. Harper states the principle in general terms: federal courts, while “mindful of the general rule of accepting state court interpretations of state law,” must “temper[] such deference when required by [their] duty to safeguard limits imposed by the Federal Constitution,” lest a State “read state law in such a manner as to circumvent federal constitutional provisions.” 600 U.S. 1, 35–36 (2023). A State “may not sidestep” a constitutional guarantee “by disavowing” the meaning of its own enactments, and a reviewing court remains “bound to decide for [itself]” what the law in fact reaches. *Id.* at 35. That’s why this Court in *Chiles v. Salazar* reaffirmed that constitutional protections “cannot be renamed away or their protections nullified by ‘mere labels’” and refused to credit Colorado’s atextual, after-the-fact reading of its counseling-censorship statute. *Chiles v. Salazar*, 146 S. Ct. 1010, 1023–26 (2026) (citation omitted).

Those principles resolve this case. Washington’s officials construe the WLAD’s reference to “gender expression or identity”—language that appears only within the statutory definition of “sexual orientation,”

Wash. Rev. Code § 49.60.040(29)—to reach Olympus Spa’s anatomy-based entry policy, then invoke that construction to violate religious liberty and freedom of expression that the First Amendment protects. Under this Court’s precedent, that self-serving reading is owed no deference.

The Spa does not care about a prospective patron’s gender identity or expression. “[T]he *only* factor at play is the possession of male genitalia”; “there is no sense in which a person’s ‘transgender’ status can be said to be a ‘substantial factor’ in Olympus Spa’s admissions policy.” App.100a (Collins, J., dissenting from denial of rehearing en banc).

The panel majority wrongly assumed that the Spa’s policy “denies entry to preoperative transgender women whose ‘gender identity’ or ‘appearance,’ as defined in WLAD, differ from *the physical traits* associated with postoperative or cisgender women.” App.10a (emphasis added). But the WLAD says nothing about a patron’s “physical traits.” See Wash. Rev. Code § 49.60.040(29). And the majority’s logic conflicts directly with this Court’s admonition that laws which classify based on biological sex “do not classify based on gender identity or transgender status.” *B.P.J.*, 146 S. Ct. at 2378; accord *Skrmetti*, 605 U.S. at 517–19 (same as applied to a law that classified based on age, sex, and medical diagnoses).

Perversely, “under the panel majority’s reading of WLAD, the Spa cannot ignore gender identity but instead *must take it into account*.” App.102a (Collins, J., dissenting from denial of rehearing en banc). Summarily reversing for this reason would resolve this dispute.

IV. This case is an ideal vehicle to resolve these important conflicts of authority.

Like its recent decisions in *Mirabelli* and *Hecox*, the Ninth Circuit’s opinion below is egregiously wrong and continues “an alarming trend” of that court’s disregard of this Court’s precedents. See *Yakima*, 2026 WL 1758172, at *1 (Bumatay, J., dissenting from grant of rehearing en banc). “[T]he Ninth Circuit has made clear that it will subordinate religious liberty ... whenever its judges decide that the right simply isn’t worth it.” *Ibid.* As Judge Tung put it here, while the WLAD “purports to protect any Washington resident from so-called gender-identity ‘discrimination,’ the State’s prohibition exempts some secular organizations and certain religious ones—it just does not exempt the small business in its exercise of its religious beliefs here. How is that at all a ‘neutral law of general applicability?’” App.89a (quoting *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990)). It’s not.

It cannot be that Washington can force Christian, Korean business owners to allow nude males to share facilities with nude female patrons as young as 13 and require female employees to provide full-body scrubs to nude men. This Court’s precedents demand a different result. And even more fundamentally, the Ninth Circuit’s ruling defies this Court’s recent holdings about the difference between sex and gender identity/expression. It is simply not true that classifying based on anatomy is discrimination based on gender identity or expression.

The Court should grant the petition or summarily reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John C. Bursch
 Caroline C. Lindsay
 Chloe K. Jones
 ALLIANCE DEFENDING
 FREEDOM
 440 First St. NW
 Suite 600
 Washington, D.C. 20001
 Sorin A. Leahu
 PACIFIC JUSTICE
 INSTITUTE
 310 Busse Highway
 #364
 Park Ridge, IL 60068

Kevin T. Snider
Counsel of Record
 Matthew B. McReynolds
 PACIFIC JUSTICE
 INSTITUTE
 P.O. Box 276600
 Sacramento, CA 95827
 (916) 857-6900
 ksnider@pji.org

Tracy Tribbett
 PACIFIC JUSTICE
 INSTITUTE
 6406 Three Rivers Dr.
 Pasco, WA 99301

Joe Gomes
 PACIFIC JUSTICE
 INSTITUTE
 767 Kailua Rd. Ste 202
 Kailua, Hawaii 96734

Counsel for Petitioners

AUGUST 2026

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**APPENDIX A — ORDER AND AMENDED
OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT,
FILED MARCH 12, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-4031
D.C. No. 2:22-cv-00340-BJR

OLYMPUS SPA; MYOON WOON LEE;
SUN LEE; JANE DOE, PATRON;
JANE DOES, EMPLOYEES 1-3,

Plaintiffs-Appellants,

v.

ANDRETA ARMSTRONG, EXECUTIVE
DIRECTOR OF THE WASHINGTON STATE
HUMAN RIGHTS COMMISSION;
MADISON IMIOLA,

Defendants-Appellees.

Filed May 29, 2025
Amended March 12, 2026

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

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Argued and Submitted November 18, 2024
Seattle, Washington

Before: M. Margaret McKeown, Ronald M. Gould, and
Kenneth K. Lee, Circuit Judges.

Order;
Opinion by Judge McKeown;
Dissent by Judge Lee;
Statement Respecting the Denial of
Rehearing En Banc by Judge McKeown;
Additional Statement Respecting the
Denial of Rehearing En Banc by Judge McKeown;
Statement Respecting the Denial of
Rehearing En Banc by Judge Owens;
Dissent from Denial of Rehearing
En Banc by Judge VanDyke;
Dissent from Denial of Rehearing
En Banc by Judge Tung;
Dissent from Denial of Rehearing
En Banc by Judge Collins

ORDER

The opinion filed May 29, 2025, and reported at 138 F.4th 1204 is hereby amended. The dissent is unchanged. The amended opinion will be filed concurrently with this order.

Judge McKeown and Judge Gould voted to deny appellants' petition for panel rehearing. Judge Lee voted to grant the petition for panel rehearing. Judge Gould

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and Judge Lee vote to deny the petition for rehearing en banc, and Judge McKeown so recommended.

The full court has been advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40.

Accordingly, the petitions for panel rehearing and rehearing en banc, Dkt. No. 56, are **DENIED**.

OPINION

McKEOWN, Circuit Judge:

This appeal stems from the application of the Washington Law Against Discrimination (“WLAD”) in connection with the entrance policy of two Korean spas (collectively “Olympus Spa” or “the Spa”). Washington’s Human Rights Commission (“HRC”) initiated an enforcement action against the Spa based on the Spa’s policy of granting entry to only “[b]iological women” and excluding, in addition to men, preoperative transgender women who have not yet received gender confirmation surgery affecting their genitalia. The HRC alleged that the entrance policy violated WLAD, a state public accommodations law that prohibits public facilities from discrimination on the basis of sexual orientation. Under Washington law, “sexual orientation” is defined to include “heterosexuality, homosexuality, bisexuality, and gender expression or identity.” Wash. Rev. Code §§ 49.60.030(1)(b), 49.60.040(27).

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Notably, the Spa did not challenge this definition or the language of the statute. The Spa did not argue that the statute was vague or that the Spa's conduct did not fit within the statute's definition of discrimination on the basis of gender expression or identity. Nor did the Spa challenge the implementing regulations or the HRC's related policies, either in this lawsuit or during the HRC's enforcement action against it.

Although the enforcement action is grounded in state law, the Spa sued state officials (the Executive Director and Civil Rights Investigator for the HRC) on First Amendment grounds, claiming that WLAD, as enforced against the Spa's entrance policy, violates its rights to the freedom of speech, religion, and association. Because the enforcement action did not violate the Spa's First Amendment rights, we affirm the district court's dismissal of the Spa's complaint.

The dissent endeavors to make this case about anything but the Spa's First Amendment claims, instead offering a political screed against the HRC's enforcement of the statute, which relies on an unargued—and unfounded—interpretation of WLAD's plain language. But this case has nothing to with President Trump or discrimination against Asian Americans. The Spa simply did not challenge the statute itself, and it is not our role to rewrite the statute.

We are not unmindful of the concerns and beliefs raised by the Spa. Indeed, the Spa may have other avenues to challenge the enforcement action. But whatever

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recourse it may have, that relief cannot come from the First Amendment.

Background

In 2020, the HRC, the agency tasked with enforcing WLAD, received a complaint from a transgender woman. The complaint alleged that Olympus Spa “denied [her] services and stated that transgender women without surgery are not welcome because it could make other customers and staff uncomfortable.” Specifically, the Spa excluded preoperative transgender women who have not yet received gender confirmation surgery affecting their genitalia.

Acting on this complaint, the HRC served a Notice of Complaint of Discrimination to the Spa, noting that the complainant alleged she experienced discrimination based on her sexual orientation. The Spa, in response to the HRC’s notice, denied that its “biological women”-only policy violated WLAD and suggested that because the Spa requires nudity for certain procedures and in certain areas, “it is essential for the safety, legal protection and well-being of our customers and employees that we maintain adherence to this adaptation of a females-only rule.” The Spa also added an “OLYMPUS Spa Entry Policy” segment to its website. The policy states, “Biological women are welcome. It is the policy of Olympus Spa not to discriminate on the basis of race, color, national origin, sex, age or disability in its programs or activities, as required by applicable laws and regulations.”

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Following the Spa's response, the HRC informed the Spa that its entrance policy continued to violate WLAD by denying transgender women access to the Spa's facilities based on their gender identity. Although the Spa contended that its entrance policy was based only on genitalia, the HRC explained that the policy "denie[d] services to transgender women who have not had surgery specifically because their physical appearance is not 'consistent' with the traditional understanding of biological women." The letter also offered the Spa an opportunity to enter into a pre-finding settlement agreement, allowing the Spa to modify its policies and practices to comply with WLAD. During the investigation of the complaint, and before execution of the settlement, the Spa had already "adopted new language on its website reflecting a non-discriminatory policy" that "affirms equal access, services and treatment for all customers . . . without regard to protected class, such as sexual orientation or gender identity."

The parties signed a pre-finding settlement agreement on October 28, 2021. The agreement required the Spa to comply with WLAD. It also required that the Spa remove the "biological women" entrance policy language on its website. Finally, the agreement reserved the Spa's right to bring a constitutional challenge against the agreement, the operative statutes, implementing regulations, and related HRC policies. This lawsuit followed.

Following an amended complaint, the district court dismissed the case with prejudice under Rule 12(b)(6). The Spa's free speech claim failed because the alleged

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“compelled speech”—the alterations to the Spa’s written entrance policy—was incidental to the Spa’s conduct. For the Spa’s free exercise claim, the district court held that WLAD was a neutral, generally applicable law and survived rational basis review. Finally, the district court determined that the relationship between the Spa and its customers was not an intimate association giving rise to First Amendment freedom of association protection.

Recent years have seen a spate of challenges arising from enforcement actions under state public accommodations laws that burden constitutional rights. Courts have repeatedly recognized that where public accommodations laws impermissibly burden constitutional rights, public accommodations laws must give way. *See, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570, 143 S.Ct. 2298, 216 L.Ed.2d 1131 (2023) (enforcement action under public accommodations law unconstitutionally interfered with website designer’s free expression); *Masterpiece Cakeshop v. Colorado C.R. Comm’n*, 584 U.S. 617, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018) (enforcement action under public accommodations law was not neutral with respect to religion); *Fulton v. City of Philadelphia*, 593 U.S. 522, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (city policies were not generally applicable with respect to religion); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (application of public accommodations law interfered with expressive association); *Green v. Miss U.S. of Am., LLC*, 52 F.4th 773 (9th Cir. 2022) (application of public accommodations law would interfere with beauty pageant’s free speech).

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But this is not such a case. Because the HRC’s action under WLAD does not impermissibly burden the Spa’s First Amendment rights to free speech, free exercise, or free association, we affirm the district court’s dismissal of the Spa’s complaint.

Analysis**I. Statutory Text**

WLAD is a wide-reaching law that prohibits discrimination in a variety of areas, including employment, real estate, public accommodations, credit, and insurance. The public accommodations section covers discrimination in the “right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.” Wash. Rev. Code § 49.60.030(1)(b). WLAD proscribes discrimination based not only on race but also categories including “age, sex, sexual orientation, and disability.” *Ockletree v. Franciscan Health Sys.*, 179 Wash.2d 769, 317 P.3d 1009, 1012 (2014).

WLAD recognizes:

- (1) The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person

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with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.

Wash. Rev. Code. § 49.60.030(1)(b). In 2006, WLAD was amended to proscribe discrimination based on “sexual orientation,” defined to mean:

heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, “gender expression or identity” means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

Id. § 49.60.040(29); 2006 Wash. Sess. Laws 12–25. The HRC is tasked with enforcing WLAD. Wash. Rev. Code §§ 49.60.040(3), 49.60.120. WLAD’s governing regulations permit the maintenance of certain “gender-segregated facilities,” such as “restrooms, locker rooms, dressing rooms,” and similar spaces, so long as the facility does not remove or otherwise take action against a person for

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reasons “[]related to their gender expression or gender identity.” WASH. ADMIN. CODE § 162-32-060(1)–(2).

The Spa does not dispute that WLAD’s proscription of discrimination on the basis of sexual orientation applies to its conduct here. Nor could it. Whether WLAD proscribes the Spa’s conduct here is a question of state law, and the answer is clear. WLAD prohibits discrimination based on sexual orientation, which expressly includes “gender expression or identity,” including having a particular “gender identity, self-image, appearance, behavior, or expression.” Wash. Rev. Code § 49.60.040(29). The Washington legislature chose to adopt this formulation of the statute almost 20 years ago. The Spa’s entrance policy denies entry to preoperative transgender women whose “gender identity” or “appearance,” as defined in WLAD, differ from the physical traits associated with postoperative or cisgender women. The statutory language is undoubtedly expansive, and its definition of sexual orientation is bespoke. But it is also unambiguous, and it applies to the Spa’s entrance policy. *See Washington v. Armendariz*, 160 Wash.2d 106, 156 P.3d 201, 203 (2007) (“If the plain language of the statute is unambiguous, then this court’s inquiry is at an end.”).

The dissent, skipping over plain meaning, claims WLAD does not apply to the Spa’s conduct and urges us to read the phrase “gender expression or identity” in context. That invented context ignores the plain reading of the statute. Despite the Washington legislature’s passage and framing of the statute in which “gender expression or identity” is part of the definition of “sexual orientation,”

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the dissent would limit WLAD's prohibition on gender-identity discrimination only to instances "where gender identity serves as a proxy for sexual orientation." That is, the dissent cabins the definition of an individual's orientation to mean only heterosexual, homosexual, or bisexual. *Contra* Wash. Rev. Code § 49.060.040(29).

Notably, the Spa did not make this argument. Its challenge was under the First Amendment, not under the statute. The dissent reaches well beyond the pleadings and the briefings to conjure an argument that is not, in fact, before the court. And tellingly, the dissent never engages with the Spa's First Amendment claims.

The dissent's reading ignores the plain language of the statute: Sexual orientation includes "heterosexuality, homosexuality, bisexuality, *and gender expression or identity.*" *Id.* (emphasis added). Washington chose an expansive definition of sexual orientation, and it is not our province to rewrite the statute.

The dissent points to Title VII, "common sense," the canon of *noscitur a sociis*, and provisions in the HRC's regulations to justify departing from our straightforward construction of WLAD's text. All are unavailing. The dissent's invocation of Title VII's proscription on discrimination based on national origin to support its reading is far afield and simply has no application to the Spa's case. In *Raad*, we noted that accents could be "inextricably intertwined" with national origin, and therefore discrimination based on accents could be tantamount to discrimination based on national origin.

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Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1195 (9th Cir. 2003), *opinion amended on denial of reh'g*, 2003 WL 21027351 (9th Cir. May 8, 2003). Here, in contrast, gender identity is not “inextricably intertwined” with sexual orientation or a proxy for sexual orientation. WLAD defines gender identity as one form of sexual orientation. The Spa’s conduct discriminates based on gender identity; therefore, under state law, it discriminates based on sexual orientation and falls within WLAD’s ambit. The same would have been true had the Spa singled out heterosexual, homosexual, or bisexual individuals instead.

The dissent cites no authority for the proposition that common sense alone can justify departure from a statute’s plain text. Nor could it. The “decision to . . . rewrite the statute falls within the legislative, not the judicial, prerogative.” *Xi v. INS*, 298 F.3d 832, 839 (9th Cir. 2002).

The canon of *noscitur a sociis*, even if it applied in the absence of textual ambiguity, does not favor the dissent’s preferred interpretation. That canon requires us to read each item in the list in “refer[ence] to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.” *Meresse v. Stelma*, 100 Wash.App. 857, 999 P.2d 1267, 1273 n.10 (2000) (internal quotations and citations omitted). But the dissent’s reading would diminish gender identity’s role, compared to heterosexuality, homosexuality, and bisexuality, in constituting a revised definition of sexual orientation.

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Finally, the dissent's notion that the WLAD should conform to the HRC's regulations has it exactly backwards. The unambiguous statute is the statute and it, not the regulations, controls.

II. Free Speech

Because the HRC's enforcement actions fall within the express scope of WLAD, we turn to the Spa's First Amendment claims. The Spa contends that the HRC's required changes to the Spa's published admissions policy violate its right to free speech. Specifically, the HRC required the Spa to adopt new language "affirm[ing] equal access, service, and treatment for all customers 'without regard to . . . sexual orientation or gender identity.'"

It has been long recognized that the government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). However, not all state actions burdening speech are automatically subject to strict scrutiny under the First Amendment. Indeed, the First Amendment does not protect "an apparently limitless variety of conduct . . . whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Notably, "government regulations that have 'only an incidental effect on protected speech'" are instead subject to intermediate scrutiny as articulated in *O'Brien*. *Green*, 52 F.4th at 790 (quoting *Dale*, 530 U.S. at 659, 120 S.Ct. 2446).

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In particular, compelled changes in conduct—which might incidentally compel changes in speech—are not reviewed as content-based speech restrictions. Rather, “our cases have held that the government may sometimes ‘requir[e] the dissemination of purely factual and uncontroversial information,’ particularly in the context of ‘commercial advertising.’” *303 Creative*, 600 U.S. at 596, 143 S.Ct. 2298 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)). And disseminating purely factual information, even if it “includes elements of speech,” is a “far cry from . . . compelled speech.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR)*, 547 U.S. 47, 61–62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (requiring emails and notices with the time and location of recruitment meetings). For instance, a law that “prohibit[s] employers from discriminating in hiring on the basis of race . . . will require an employer to take down a sign reading ‘White Applicants Only,’” but that requirement “hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *Id.* at 62, 126 S.Ct. 1297.

Here, “[a]ny First Amendment interest which might be served” by permitting the Spa to advertise its entrance policy “is altogether absent when the [practice] itself is illegal and the restriction . . . is incidental to a valid limitation on economic activity.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 389, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). As in *Pittsburgh Press*, because the Spa’s *practice* of denying admission to preoperative transgender women is unlawful under

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WLAD, limitations on the entrance policy advertising that practice do not trigger First Amendment scrutiny.

Although the Spa’s alterations to its admissions practices necessitated alterations to its written policy, the HRC merely required the Spa to change its published entrance policy so that it accurately described those new, WLAD-compliant practices. The mandated alterations were “plainly incidental to the [challenged law’s] regulation of conduct, and ‘it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.’” *FAIR*, 547 U.S. at 62, 126 S.Ct. 1297 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949)).

The HRC’s objection to the entrance policy was not based on “disagreement with the message it conveys” but rather with the practice it described—a practice that was unlawful under WLAD. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The HRC did not require the Spa to modify any language from its website expressing, or withholding, its religious, social, or political viewpoints.¹ Nor—contrary to the

1. The Spa alleged that the HRC “required that Olympus Spa remove language from its website that has a viewpoint that ‘biological women’ are females and distinct from males.” But the Spa has not pointed to any specific statements that were on the website before the enforcement action and removed during its pendency, beyond the statement that “[b]iological women are welcome” to enter the Spa. As alleged, the HRC’s action went no

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Spa’s representations in its opening brief on appeal—did it “require” or “compel” the Spa to adopt any particular views.

Consequently, the appropriate standard of review is at most intermediate, not strict, scrutiny. *See Green*, 52 F.4th at 790. Under *O’Brien*, a government regulation will survive intermediate scrutiny if: (1) it “furthers an important or substantial governmental interest;” (2) “the governmental interest is unrelated to the suppression of free expression;” and (3) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. Albertini*, 472 U.S. 675, 687–88, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (quoting *O’Brien*, 391 U.S. at 377, 88 S.Ct. 1673). For the first *O’Brien* factor, WLAD furthers an “important or substantial government interest”—in fact, the government’s interest in protecting against “acts of invidious discrimination in the distribution of publicly available goods [and] services” has been described as “compelling.” *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). In an as-applied challenge under intermediate scrutiny, the state needs to further establish a “reasonable fit” between its substantial interests and the action at issue. *Pena v. Lindley*, 898 F.3d 969, 982 (9th Cir. 2018). Upon receiving a complaint regarding the Spa’s discriminatory conduct, the HRC determined that there was “reasonable cause

further than requiring that the Spa’s entrance policy comply with WLAD and that the Spa’s website accurately convey that policy. The action did not otherwise infringe on the Spa’s freedom to publish its views on the nature of gender.

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for believing” that the Spa was engaged in an “unfair practice” in violation of WLAD, as it is statutorily authorized to do. Wash. Code. Rev. § 49.60.240. The Spa has not disputed that it discriminated against would-be patrons based on gender-related appearance. The HRC’s action easily clears the bar of “reasonable fit.”

As to *O’Brien*’s second factor, neither party suggests that the eradication of such discriminatory action is related to the suppression of free expression. The Spa does not directly address *O’Brien*’s third factor—that the restriction be “no greater than essential”—and instead argues that Washington State’s restrictions are underinclusive. See *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 774, 138 S.Ct. 2361, 201 L.Ed.2d 835 (2018). But, whether assessed under *O’Brien* or *Becerra*, the restrictions pass muster: they are “sufficiently drawn to achieve,” *id.* at 773, 138 S.Ct. 2361, and are “no greater than . . . essential” to further, *O’Brien*, 391 U.S. at 377, 88 S.Ct. 1673, the state’s anti-discrimination interests in this context. The Spa’s arguments to the contrary are unavailing. The Spa points out that WLAD does not otherwise ban discriminatory descriptions of biological women in public discourse, and that the Spa excludes fewer categories of persons than the Miss USA pageant in *Green*. Neither argument holds water. WLAD does not police public discourse generally because it regulates conduct, not speech. And *Green* is inapposite. Unlike the entrance policy, which is, at most, only incidentally expressive, the beauty pageant in *Green* was deemed purely expressive activity akin to the parade in *Hurley*. *Green*, 52 F.4th at 780. The court in *Green* considered

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a different statute, applied to categorically different activity, under a different level of scrutiny, and thus does not bear on the over-or under-inclusiveness of the restriction in this case.

We conclude that WLAD imposes an “incidental restriction . . . no greater than is essential” to eliminate discriminatory conduct. *Albertini*, 472 U.S. at 687–88, 105 S.Ct. 2897. WLAD prohibits the precise discriminatory practices that “legitimately concern[]” the State and “abridges no more speech . . . than is necessary to accomplish that purpose.” *Jaycees*, 468 U.S. at 629, 104 S.Ct. 3244 (citing *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). The Washington law does not impermissibly burden the Spa’s free speech.

III. Free Exercise

We next turn to the Spa’s claim that WLAD violates its right to free exercise by requiring the Spa “to renounce its [Christian] faith by its deeds” by permitting “the mixing of nude persons of the opposite sex who are not married to one another.”

The First Amendment’s Free Exercise Clause guarantees “the right to believe and profess whatever religious doctrine one desires,” and proscribes “governmental regulation of religious *beliefs* as such.” *Emp. Div. Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (emphasis in original) (internal citations omitted). The government may not “compel affirmation of religious belief [or] punish the

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expression of religious doctrines.” *Id.* (internal citations omitted). The Spa is hard pressed to identify how WLAD regulates its beliefs.

We recognize that “laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable,” and will instead be subject to rational basis review. *Fulton*, 593 U.S. at 533, 141 S.Ct. 1868 (citing *Smith*, 494 U.S. at 878–82, 110 S.Ct. 1595).

We first conclude that the Spa’s religious expression is only incidentally burdened. Though we recognize that the Spa’s desire to perform acts that contravene WLAD’s mandate is motivated in part by religious belief, the HRC’s action under WLAD does not prohibit the Spa from expressing its religious beliefs.

WLAD is both neutral and generally applicable. The statute is neutral because its object, text, legislative history, and real-world operation are neutral with respect to religious exercise. *Tingley v. Ferguson*, 47 F.4th 1055, 1085–87 (9th Cir. 2022), *cert. denied*, — U.S. —, 144 S.Ct. 33, 217 L.Ed.2d 251 (2023). Nothing in the statute “prohibits religious conduct while permitting secular conduct.” *Id.* at 1088 (citation omitted); *see also Fulton*, 593 U.S. at 534–35, 141 S.Ct. 1868 (same); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–43, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Not surprisingly, the Spa does not identify anything in the circumstances of WLAD’s historical background,

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precipitating events, or legislative history that would undermine WLAD's facial neutrality. *See Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217. The law's stated purpose, which is to prevent discrimination and enable individuals to seek recourse for discriminatory treatment, makes no mention of religion or religious activities. Wash. Rev. Code § 49.60.010. Nor is there any suggestion that Washington undertakes enforcement actions "in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 U.S. at 533, 141 S.Ct. 1868.

This case stands in contrast to *Masterpiece Cakeshop*, where the Court held that evidence of "clear and impermissible hostility toward the sincere religious beliefs" indicated that the law was not neutral. *Masterpiece Cakeshop*, 584 U.S. at 634, 138 S.Ct. 1719. The record here does not support a similar conclusion. On appeal, the Spa identifies no evidence of "clear and impermissible hostility." In the first amended complaint, the Spa claimed that the investigator's use of the term "cisgender women" was "pejorative for *female*" and evidence of animus. The Spa also claims that "WLAD is being used in an inquisitorial manner, not neutrally" because the HRC never investigated whether the complainant had genuinely attempted to visit the Spa. Neither of these allegations establish a record of hostility towards the Spa's exercise of religion. In fact, the HRC never identified or referred to the Spa's religion throughout the enforcement actions.

WLAD is also generally applicable. WLAD offers no "formal mechanism for granting" individualized exceptions, and its nondiscrimination provisions apply to

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religious and secular conduct alike. *See Tingley*, 47 F.4th at 1088 (citing *Fulton*, 593 U.S. at 537, 141 S.Ct. 1868). The statute does not “refer[] to a religious practice,” and the practices it proscribes possess “a secular meaning discern[i]ble from the language or context.” *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. WLAD is not underinclusive because it imposes the same requirements on religious and non-religious organizations alike, and its broad scope is commensurate with the anti-discrimination interests that the statute advances. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1236 (9th Cir. 2020).

The Spa contends, for the first time in its reply, that WLAD is not generally applicable because it carves out private clubs. We are not required to address this argument, as it was waived after the opportunity to raise it in the district court and in the Spa’s opening brief. But even absent waiver, the carveout for private clubs is not a “mechanism for individualized exemptions” that “invites the government to consider the particular reasons for a person’s conduct.” *Fulton*, 593 U.S. at 523, 141 S.Ct. 1868 (cleaned up); *see also Tingley*, 47 F.4th at 1088. WLAD’s carveouts apply to categories of businesses rather than individuals or individual businesses. These exclusions are mandatory, not discretionary, and require no consideration of the “particular reasons” for a business’s conduct. This mandatory language stands in contrast to *Fulton*, where the challenged foster care contract provision included “a formal system of entirely discretionary exceptions” which the Commissioner could grant “in his/her sole discretion.” 593 U.S. at 535–36, 141 S.Ct. 1868.

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Notably, the Washington law also makes no distinction between secular and non-secular activities, as in *Tandon v. Newsom*, 593 U.S. 61, 62, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam). WLAD’s bar on discrimination in places of public accommodation and its exemption for private clubs apply equally to secular and non-secular aggregations. So even assuming the Spa is a religious institution, this is not a situation where a “comparable secular activity [is treated] more favorably than religious exercise.” *Tandon*, 593 U.S. at 62, 141 S.Ct. 1294.

Because WLAD, even in a charitable reading, imposes only incidental burdens on religious expression and is neutral and generally applicable, WLAD’s application to the Spa is subject to rational basis review and will be upheld “if it is rationally related to a legitimate government purpose.” *Parents for Privacy*, 949 F.3d at 1238; *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir. 2009). Rational basis review is “highly deferential” to the government. *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000), *cert. denied*, *Hancock v. United States*, 532 U.S. 989, 121 S.Ct. 1641, 149 L.Ed.2d 500 (2001).

Our precedent squarely forecloses the Spa’s claim that WLAD, as applied, fails rational basis review. As we held in *Parents for Privacy*, “eliminating discrimination on the basis of sex and transgender status” is a legitimate government purpose, and public accommodations laws like WLAD have been deemed “rationally related” to the elimination of discrimination. 949 F.3d at 1238; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (public

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accommodations law rationally related to elimination of discrimination based on race). The HRC has met its burden to “establish[] on the record a rational basis” for its action under WLAD. *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991), amended (May 8, 1992). And the Spa has not shown that the HRC’s action is “arbitrary or irrational.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). We conclude that the enforcement action did not contravene the free exercise clause.

The Spa falls back on several cases which, it contends, show that even neutral and generally applicable laws can fail rational basis review. But those cases are unhelpful, as none involve the application of rational basis review to neutral and generally applicable laws challenged on the relevant grounds. The *Dale* case addresses the freedom of association, not expression. And both *Fulton* and *Masterpiece Cakeshop* involved laws that the Court held were either not neutral or not generally applicable and therefore cannot be invoked to guide our application of the rational basis test.

Finally, contrary to the Spa’s arguments, the ministerial exception at issue in *Hosanna-Tabor* and *Our Lady of Guadalupe* has no applicability here. Courts have recognized a narrow exception, “grounded in the First Amendment, that precludes application of [antidiscrimination laws] to claims concerning the employment relationship between a religious institution and its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 132 S.Ct. 694,

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181 L.Ed.2d 650 (2012); *see Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 757, 140 S.Ct. 2049, 207 L.Ed.2d 870 (2020) (extending the exception to teachers at private religious schools, or other employees of religious institutions who act as “teachers of religion”). But the Spa is not a religious institution, the complainant is not a minister or religious instructor, and the proprietor-customer relationship is not an employment relationship.

IV. Free Association

We turn to the Spa’s final First Amendment claim: that the HRC’s enforcement of WLAD interferes with both the intimate and expressive association between women at the Spa.

The Constitution protects the freedom of association as “a fundamental element of personal liberty” and “an indispensable means of preserving other individual liberties.” *Jaycees*, 468 U.S. at 618, 104 S.Ct. 3244. That right protects both “intimate association,” that is, the “choices to enter into and maintain certain intimate human relationships,” and “expressive association,” which is “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Id.* at 617–18, 104 S.Ct. 3244. These are fundamental and important rights but none of them are implicated here.

To begin, the Spa is not an intimate association. The bottom line is that payment of the entrance fee is the

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price of admission. And any woman, except a transgender woman who has not yet received gender confirmation surgery affecting her genitalia, who can pay the fee can be admitted. Intimate associations are “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.” *Id.* at 620, 104 S.Ct. 3244. Business enterprises serving the general public typically lack these qualities. *Id.*; see also *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (law firm); *City of Dallas v. Stanglin*, 490 U.S. 19, 24, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (dance hall open to teenagers).

The Spa’s customers and employees do not share “deep attachments and commitments.” *Jaycees*, 468 U.S. at 620, 104 S.Ct. 3244. Although the Spa might not be a “*large* business enterprise,” it is nevertheless a business, open to all women except preoperative transgender women. *Id.* (emphasis added). Other than its exclusion of preoperative transgender women, the Spa exhibits no selectivity, let alone a “high degree of selectivity,” in admission. *Id.* Patrons “are not members of any organized association; they are patrons of the same business establishment.” *Stanglin*, 490 U.S. at 24, 109 S.Ct. 1591. Like the dance hall in *Stanglin*, the Spa admits “all [women] who are willing to pay.” *Id.* at 25, 109 S.Ct. 1591.

The Spa offers no facts suggesting it is an intimate association. Although, as the Spa notes, in contrast with nonprofit membership corporation Jaycees’ sizable national membership, the Spa is a local business with two

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locations, the Spa's comparatively smaller size and local presence does not convert it to an intimate association, particularly compared to intimate family, romantic, or roommate relationships that ordinarily constitute intimate associations. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 12, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) (noting that protection for private associations has previously been denied for associations with "as few as 20 members").

The Spa further argues that its entrance policy is selective because only women "willing to undergo certain traditional Korean services" while nude will visit the Spa. But this argument conflates self-selection, based on a customer's individual preference, with the "high degree of selectivity" required by *Jaycees*.

Finally, the Spa notes that women might feel physically vulnerable while at the Spa. Without a doubt, nude spas raise unique privacy concerns absent in most other public spaces, but nudity alone does not transform a public place of business into an intimate association. The Spa analogizes the relationship between spa patrons to the intimate roommate relationship, pointing to language in *Roommate.com* observing that "a girl may not want to walk around in her towel in front of a boy." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012). Although "modesty or security concerns," which could drive the selection of one's roommate, may also influence a patron's decision to visit the Spa, the similarities stop there. *Id.* The roommate relationship is "selective" and "implicates significant

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privacy and safety considerations” because the choice of roommate necessarily “intrudes into the home.” *Id.* In contrast, patrons purchase commercial services at the Spa without regard to the identities of other patrons and do not themselves control admission to the Spa. Because “much of the activity central to the formation and maintenance of [the Spa] involves the participation of strangers,” *Jaycees*, 468 U.S. at 621, 104 S.Ct. 3244, *Roommate.com* is inapposite. And to the extent the Spa seeks to invoke the privacy rights of its patrons, it has not made such a claim under the First Amendment or otherwise.

The Spa is also not an expressive association because the Spa and its patrons do not engage in expressive activity. The freedom of association includes “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Dale*, 530 U.S. at 647, 120 S.Ct. 2446 (quoting *Jaycees*, 468 U.S. at 622, 104 S.Ct. 3244). State actions burden the freedom of expressive association through intruding “into the internal structure or affairs of an association” by “[f]orcing a group to accept certain members,” which “may impair the ability of the group to express those views, and only those views, that it intends to express.” *Id.* at 648, 120 S.Ct. 2446 (quoting *Jaycees*, 468 U.S. at 623, 104 S.Ct. 3244). While expressive association does not protect only “advocacy groups,” “a group must engage in some form of expression, whether it be public or private.” *Id.*

The Spa’s effort to transform the act of visiting a spa into the sharing of “ideals and beliefs” within an

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expressive association would stretch the freedom of association beyond all existing bounds. The Spa alleges its “mission is to restore and rejuvenate women’s physical health as well as spiritual health,” and that its services are more expressive than traditional commercial activities because the services “are very interactive and hands on as well as lengthy.” That broad description would turn virtually every commercial gym or massage establishment into an expressive association.

These facts do not establish the Spa as an expressive association. Like the dance hall in *Stanglin*, patrons of the spa “are not members of any organized association” to begin with; “they are patrons of the same business establishment.” *Stanglin*, 490 U.S. at 24, 109 S.Ct. 1591. And the act of giving or receiving a Korean massage hardly contains even a “kernel of expression,” let alone a quantity “sufficient to bring the activity within the protection of the First Amendment.” *Id.* at 25, 109 S.Ct. 1591.

In contrast, in *Dale*, the Court concluded that the Boy Scouts engaged in expressive activity because it is “an association that seeks to transmit . . . a system of values.” 530 U.S. at 650, 120 S.Ct. 2446. The Court placed special emphasis on the Boy Scouts’ mission statement, which offered a “positive moral code for living,” and noted that the Boy Scouts “instill[ed] these values” “both expressly and by example.” *Dale*, 530 U.S. at 649–50, 120 S.Ct. 2446. Although the Spa does provide a mission statement—“to restore and rejuvenate women’s physical health as well as spiritual health”—this statement bears at best a

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tenuous relationship to moral, political, or social beliefs. Significantly, the Boy Scouts offered consistent instruction and engagement with a stable membership, in “activities like camping, archery, and fishing” designed to “inculcate [youth members] with the Boy Scouts’ values.” *Id.* at 649–50, 120 S.Ct. 2446. In contrast, the Spa’s commercial services are not similarly designed to “transmit . . . a system of values.” *Id.* at 650, 120 S.Ct. 2446. Rather, they offer a service for which patrons pay. Consequently, unlike the Boy Scouts, in the absence of a cognizable association, the Spa cannot prevail on its First Amendment freedom of association claim.

Conclusion

The HRC’s enforcement action against Olympus Spa was a straightforward application of Washington’s statutory scheme—WLAD—which prohibits discrimination on the basis of gender expression or identity in places of public accommodation. As applied, the statute does not abridge the Spa’s rights to free speech, free exercise, or free association. We affirm the district court’s dismissal of the complaint.

AFFIRMED.

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LEE, Circuit Judge, dissenting:

Korean spas are not like spas at the Four Seasons or Ritz Carlton with their soothing ambient music and lavender aroma in private lounges. Steeped in centuries-old tradition, Korean spas require their patrons to be fully naked, as they sit in communal saunas and undergo deep-tissue scrubbing of their entire bodies in an open area filled with other unclothed patrons. Given this intimate environment, Korean spas separate patrons as well as employees by their sex.

The State of Washington, however, threatened prosecution against Olympus Spa, a female-only Korean spa, because it denied entry to a pre-operative transgender female—*i.e.*, a biological male who identifies as female but has not undergone sex-reassignment surgery. Now, under edict from the state, women—and even girls as young as 13 years old—must be nude alongside patrons with exposed male genitalia as they receive treatment. And female spa employees must provide full-body massages to naked pre-operative transgender women with intact male sexual organs.

This is not what Washington state law requires. While the Washington Law Against Discrimination (WLAD) forbids discrimination based on (among other things) sex and sexual orientation, its text and structure make clear that it does not cover transgender status. Washington has perversely distorted a law that was enacted to safeguard women's rights to strip women of protections. The women and girls of Washington state deserve better.

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Olympus Spa—an immigrant-founded business run by a Korean family—also deserves better. The Spa’s owners pleaded with the Washington Human Rights Commission that they wanted to provide privacy to women and girls, some of whom had complained years ago about seeing a naked person with male genitalia there. They also begged the government not to force them to violate their Christian belief in modesty between men and women. Those pleas fell on deaf ears. One would think that the Washington Human Rights Commission would be sympathetic to the Spa’s owners—members of a racial minority group who want to share their cultural heritage and provide a safe space for women and girls. Instead, it threatened prosecution for defying the state’s contorted reading of its anti-discrimination law.

I respectfully dissent.

BACKGROUND**A. Olympus Spa provides traditional Korean spa services rooted in hundreds of years of tradition.**

Korean spas provide services incorporating hundreds of years of Korean cultural tradition going back to the Choson dynasty (1392–1910). Traditional Korean spa therapy focuses on rejuvenating the body and mind through treatments, massages, and full-body scrubs in communal bathhouses and steam rooms called *jjimjilbang*.

Korean spas are uniquely intimate environments: Patrons must be nude in the communal bathhouse and sauna areas, and unlike other spas, patrons are not given robes or towels for covering up. Patrons must also remain

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fully nude to receive traditional Korean spa services like *seshin*, a traditional Korean body scrub of the entire body. After soaking in a warm pool, customers are scrubbed head-to-toe to promote holistic health and to exfoliate the skin. *Seshin* is performed by *ddemiri*, individuals who are trained in the Korean art of body scrub using traditional techniques. *Ddemiri* intimately touch patrons for prolonged periods as they scrub them all over their bodies. And all of this occurs in a large communal area, where all the patrons must be naked. Given the intimate nature, Korean spas not surprisingly separate male and female customers.

Olympus Spa is one such Korean spa in the state of Washington. For two decades, this family-owned business has provided Korean spa treatments to people from all walks of life: Non-Koreans have flocked to Olympus Spa to learn and experience this Korean cultural tradition—an ode to America’s melting pot culture. The president of the Spa, Sun Lee, is a first-generation Korean American. Lee’s parents opened the Spa after fleeing Korea to the United States in the hopes of a better life and greater religious freedom as Christians. The family hoped to preserve Korean tradition and culture—and to share their heritage with the larger community.

Today, Olympus Spa provides an intimate space for females to enjoy the benefits of Korean spa treatments. Women of all ages, including girls as young as 13 years old, visit the Spa for traditional services like *seshin* and to enjoy the steam rooms.

The Spa limits entry to biological women and post-operative transgender women (*i.e.*, people who were

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born biological males but underwent sex-reassignment operations). The Spa will treat biological women and post-operative transgender women of any sexual orientation, race, religion, or any other protected status. To put it plainly, Olympus Spa—a female-only spa—provides services to anyone without male genitalia.

As Sun Lee explained, the Spa’s entry policy creates an intimate, safe, and private *jjimjilbang* for women to receive traditional Korean spa services. Because Korean tradition mandates sex-segregated facilities, the Spa considers this policy necessary to remain true to its cultural heritage. And given that the Spa provides services to girls as young as thirteen, Sun Lee believes the Spa has a responsibility to safeguard the privacy of those minors.

The entry policy also reflects the owners’ religious beliefs. Describing themselves as “traditional theologically conservative Korean Christians,” they consider modesty between males and females as a central tenet. They also believe that it would violate their faith to compel their female employees to give full-body massages to individuals with exposed male genitalia.

The Spa has maintained its entry policy for over twenty years without complaint. But when one person complained about the policy in early 2020, the government pounced.

B. The state finds that Olympus Spa’s entry policy violates WLAD.

In late 2020, Olympus Spa received a notice from the Washington State Human Rights Commission explaining that someone had filed a complaint against the Spa

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for violating Section 49.60 of WLAD. A pre-operative transgender woman claimed to have been denied entry into Olympus Spa in January 2020.

The Washington State Human Rights Commission warned Olympus Spa that it was investigating a discrimination claim and demanded a response in writing. Sun Lee wrote a letter, explaining that Korean *jjimjilbangs* require nudity and that, as a female-only spa, it aims to ensure the safety and privacy of its customers. Sun Lee also explained that the Spa allows post-operative transgender women to enjoy its services.

A Civil Rights Investigator from the Washington Human Rights Commission wrote back, accusing Olympus Spa of violating Washington's anti-discrimination law because "cisgender women are allowed to be fully nude in the spa while transgender women who have not had surgery are prohibited from even entering the spa." The Civil Rights Investigator then pressured Olympus Spa to settle within ten days—or else she would prepare the case "for referral to the Attorney General's Office for prosecution."

Sun Lee responded, stating the Spa has no record of the complainant ever visiting the Spa. Sun Lee asked the Commission for more information so that the Spa may "ensur[e] that no person, especially [the complainant], feels discriminated against," and emphasized that the Spa has "had many guests who identify differently over the years and have never had an issue."

The Commission's Civil Rights Investigator refused to provide any further information, declaring that the

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“time to ensure that [the complainant] does not feel discriminated against has passed.” She expressed little interest in discovering whether the complainant ever visited the Spa. She again threatened prosecution, warning that if the Spa did not acquiesce, then she would “proceed accordingly by preparing the case for referral to the Attorney General’s Office for prosecution.”

Given the state’s unyielding position and threat of prosecution, Sun Lee said that the Spa would like to settle the matter, even though “we have told you that we have never had [the complainant] on the premises, nor denied entry.” The Spa’s owners agreed to change their entry policy and undergo training in exchange for not being prosecuted. The settlement agreement preserved the Spa’s right to challenge the constitutionality of WLAD as applied here, and Olympus Spa ultimately sued. The Spa fears that it will have to close its doors if it must permanently change its entry policy. Its employees and customers have made it clear that they will not return if naked individuals with male genitalia use the female-only spa.

C. Olympus Spa challenges the state’s enforcement of WLAD in court.

Olympus Spa sued the state. Among other claims, the Spa alleged that the state’s enforcement of WLAD violates its rights under the First Amendment—the right to free exercise, free speech, and free association. The district court granted the state’s motion to dismiss, determining that the state’s enforcement of WLAD against Olympus Spa’s entry policy did not violate the First Amendment. This appeal followed.

*Appendix A***DISCUSSION****A. Washington’s anti-discrimination statute does not cover transgender status.**

Washington state contends that Olympus Spa’s entry policy violates WLAD’s prohibition against discrimination based on “gender expression or identity.”

But that is not what WLAD says.¹ WLAD states that Washington’s citizens have the “right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service

1. The majority opinion states that the dissent is “conjur[ing] a statutory interpretation] argument that is not, in fact, before the court.” **Maj. Op. 9.** But the Supreme Court has held that courts can address a threshold statutory interpretation question because “to determine whether a statute is constitutional fairly includes the question of what that statute says.” *Rumsfeld v. Forum for Acad. and Institutional Rts., Inc.*, 547 U.S. 47, 56, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (rejecting the government’s argument that the statutory “question is not before the Court because it was neither included in the questions presented nor raised by FAIR.”). Indeed, by addressing the statutory question, we can avoid thorny constitutional issues. *See Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (“Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.”) (citation omitted). And because I believe that WLAD does not apply here, I would not consider the Spa’s constitutional challenges to WLAD.

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animal by a person with a disability.” Wash. Rev. Code § 49.60.030(1). Nowhere in that statutory provision does it mention “gender expression or identity” as a protected class.

The state plucks the term “gender expression or identity” out of context from the statutory definition of “sexual orientation” and claims that it is a standalone status protected under the law. *See* Wash. Rev. Code § 49.60.040(29). But as explained below, gender identity is protected only if it serves as a proxy for sexual orientation. Simply put, transgender status is different from sexual orientation—and WLAD protects only the latter, not the former.

The state’s contorted reading of WLAD violates basic canons of statutory construction. “Context matters.” *Wright v. Jeckle*, 158 Wash.2d 375, 144 P.3d 301, 304 (2006) (citation omitted). It is a “fundamental canon of statutory construction” that courts must construe the words of a statute “in their context and with a view to their place in the overall statutory scheme.” *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 721, 142 S.Ct. 2587, 213 L.Ed.2d 896 (2022) (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)). This well-known principle—known as the “whole-text canon”—“calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). We must follow this mandate to read statutory provisions in context. *See Sturgeon v. Frost*, 577 U.S. 424,

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438, 136 S.Ct. 1061, 194 L.Ed.2d 108 (2016) (reversing this court’s interpretation of a statutory provision for failing to read it in the “context of the statute as a whole”); *see also Nissen v. Pierce Cnty.*, 183 Wash.2d 863, 357 P.3d 45, 52 (2015) (“We cannot interpret statutory terms oblivious to the context in which they are used.”).

We thus must read “gender expression or identity” in context as part of the definition of “sexual orientation.” In 2006, the Washington legislature added “sexual orientation” to WLAD as a protected class. S.H.B. No. 2661, 59th Leg., Reg. Sess. (Wash. 2006). From then on, Washington forbade discrimination on the basis of “race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or . . . disability.” Wash. Rev. Code § 49.60.030(1). The legislature, however, did not include “gender expression or identity” as an independently protected class. The legislature also chose not to include “gender expression or identity” within the definition of “sex.” “Sex” remained defined as “gender.” *Id.* § 49.60.040(28). Rather, the legislature included “gender expression or identity” only in the definition of “sexual orientation.” *Id.* § 49.60.040(29).

So why include “gender expression or identity” in the definition of “sexual orientation”? It guards against discrimination where gender identity serves as a proxy for sexual orientation. For instance, suppose a transgender woman (*i.e.*, a biological male who identifies as a female) is in a relationship with a biological male. An employer who harbors anti-gay views fires the transgender woman but claims that he did not discriminate based on sexual

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orientation because the transgender woman is in a relationship with a man. By including “gender expression and identity” in the definition of sexual orientation, the law tells businesses that such gamesmanship will not fly. It, however, does not create a separate and standalone protected class for gender identity or transgender status.

We simply cannot take words out of a definition to expand the statutory scope of anti-discrimination law. Consider the following example. Title VII of the Civil Rights Act prohibits employers from discriminating based on “national origin,” 42 U.S.C. § 2000e-2(a)(1), and courts have interpreted discrimination based on “national origin” to include discrimination based on a person’s accent. *See, e.g., Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1192–95 (9th Cir. 2003). For instance, an employer may have discriminated on the basis of national origin if he refuses to hire someone because she has a Lebanese accent. *See id.* at 1195. In other words, an accent can serve as a proxy for national origin. But Title VII does not prohibit discrimination based on an accent independent of national origin. So it would likely not cover a national origin discrimination claim by an American-born Lebanese woman based on her Midwest twang because that accent has nothing to do with her national origin. Similarly here, WLAD does not protect individuals from discrimination based on gender identity when it does not implicate sexual orientation. And this case has nothing to do with sexual orientation.

The majority opinion ignores this statutory structure and context, and instead claims that the “plain meaning”

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of the statute bars discrimination based on “gender expression or identity” simply because those words appear somewhere in the text. **Maj. Op. at 8.** Instead of considering what “gender identity” means within the bounds of sexual orientation, the majority opinion does the opposite and concludes that the state adopted an “expansive” definition that treats gender identity as “one form of sexual orientation.” **Maj. Op. 10.**

But such a reading defies common sense, statutory rules of construction, and the state’s own reading of the statute. First, common sense: Someone’s gender identity is different from his or her sexual orientation. A transgender woman has transgender status regardless of whether she is attracted to men or women. And the facts here further underscore that gender identity is not a form of sexual orientation: The Spa admits lesbians and bisexuals, and only bars entry to people with male genitalia to protect the privacy of women and girls.

Our rules of statutory construction also undermine the majority opinion’s reading. The Associated-Words Canon—*noscitur a sociis*—states that a series of words “associated in a context suggest[] that the words have something in common” and thus “bear on one another’s meaning.” Scalia & Garner, *supra* at 195. Here, sexual orientation is defined as “heterosexuality, homosexuality, bisexuality, and gender expression or identity.” Wash. Rev. Code § 49.60.040(29). Thus, we should read “gender expression or identity” in context of the other three terms—*i.e.*, the statute bars discrimination based on gender identity when it is a proxy for sexual orientation,

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not as a standalone category divorced from sexual orientation.

Finally, the Washington Human Rights Commission itself treats “gender identity” as a standalone status, not as a form of sexual orientation. For example, one of its regulations states that “[h]arassment based on an individual’s sexual orientation or gender expression or gender identity is prohibited.” WASH. ADMIN. CODE § 162-32-040(1). If the Commission agreed with the majority’s reading, there would be no need to reference gender identity separately because it would already be included in the definition of sexual orientation.²

In sum, “statutory provisions should not be read in isolation, and the meaning of a statutory provision must be consistent with the structure of the statute of which it is a part.” *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 731 (9th Cir. 2013), *aff’d sub nom. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 135 S.Ct. 1591, 191 L.Ed.2d 511 (2015). And in our case, that means “gender identity” cannot be exported out of its place in the statutory structure to establish a new standalone protected class.

2. The Washington Human Rights Commission, of course, does not have authority to issue regulations that conflict with the authorizing statute. *See Washington Water Power Co. v. Washington State Hum. Rights Comm’n*, 91 Wash.2d 62, 586 P.2d 1149, 1152 (1978).

*Appendix A***B. Olympus Spa does not discriminate on the basis of sexual orientation.**

WLAD prevents businesses from discriminating based on, among other things, sexual orientation. But there is no whiff of discrimination based on sexual orientation by Olympus Spa. The Spa allows lesbians, heterosexuals, and bisexuals. And it allows post-operative transgender women to visit the Spa regardless of their sexual orientation. The Spa's entry policy focuses not on sexual orientation but on whether an individual has male genitalia.

Neither the state nor the complainant has alleged that the Spa's policy discriminates against patrons based on their sexual orientation. Rather, the state took issue only with Olympus Spa excluding pre-operative transgender women from a women's spa. In short, Olympus Spa's entry policy does not discriminate based on sexual orientation and thus does not run afoul of WLAD.

C. The Supreme Court's decision in *Bostock v. Clayton County* does not bear on this case.

Some may be thinking about the elephant in the room—what about the Supreme Court's decision in *Bostock v. Clayton County*? 590 U.S. 644, 683, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020). Relying on a literalist textual reading of the statute, the Court held that discrimination on the basis of sexual orientation or transgender status must logically be discrimination based on “sex” under Title VII. *See id.*

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But *Bostock* has no relevance here. Unlike WLAD, Title VII does not define “sex.” *Bostock*, 590 U.S. at 655, 140 S.Ct. 1731. Nor does it include “sexual orientation” or “gender expression or identity” anywhere in its text. *Id.* at 670, 140 S.Ct. 1731. Because Congress did not include any definitions, the Court interpreted sex discrimination broadly to include transgender status based on a logical syllogism that the undefined term “sex” must implicate sexual orientation and gender identity. *Id.* at 680, 140 S.Ct. 1731.

Here, on the other hand, we are not left in the dark on how to interpret the term “sex” or to guess if the statute covers sexual orientation or gender identity. The state legislature has already given us the answers. WLAD explicitly prohibits discrimination based on “sexual orientation” and defines “sex” and “sexual orientation” differently. Wash. Rev. Code §§ 49.60.030(1), 49.60.040(28)–(29). WLAD also expressly includes “gender expression or identity” under the definition of “sexual orientation” (but not under “sex”), confirming that “gender identity” is distinct from “sex.” *Bostock*’s reasoning thus has no application to WLAD’s intricate statutory structure and express definitions. Not to mention that to read “sex” under WLAD to include sexual orientation or gender identity would render the 2006 amendment adding “sexual orientation” entirely superfluous. *See Whatcom Cnty. v. City of Bellingham*, 128 Wash.2d 537, 909 P.2d 1303, 1308 (1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”) (citation omitted).

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It is no surprise that the Court in *Bostock* emphasized that its decision did not extend to any state anti-discrimination laws. 590 U.S. at 681, 140 S.Ct. 1731 (“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination . . . [b]ut none of these other laws are before us[,] . . . and we do not prejudge any such question today.”).

* * * *

Washington is not just legally wrong in misconstruing its anti-discrimination law. It is also wrong in how it overzealously pursued its case against the interests of protected class members—the women and girls of the state, and the Korean owners of Olympus Spa, an immigrant-founded small business.

In 1973, the state amended WLAD to include “sex” as a forbidden basis for discriminatory treatment. H.B. No. 404, 43rd Leg., Reg. Sess. (Wash. 1973). Over the years, the Washington Supreme Court construed the statute broadly to protect women and girls. *See, e.g., MacLean v. First Northwest Indus.*, 96 Wash.2d 338, 635 P.2d 683, 684–86 (1981) (holding that “ladies’ night” with half-price tickets for women at an NBA game was a lawful way to increase attendance of female fans). Our court, too, has recognized that our laws provide privacy for females: For example, we noted that in shared “bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy.” *Fair Hous. Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216, 1221 (9th Cir. 2012).

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But Washington has now rolled back the clock in protecting women and girls by bizarrely citing the very law that safeguarded their rights for decades. Now, women and girls as young as 13 years old must lay naked alongside individuals with exposed male genitalia as they receive treatment at Korean spas. And for the female employees at the Spa, they must provide full-body deep-tissue massage to naked persons with intact male sexual organs—or else lose their livelihood.

The state also unjustly hounded Olympus Spa's Korean owners. The Washington Human Rights Commission threatened them with prosecution on questionable legal grounds. As the owners explained, they wanted to share their ethnic heritage to the larger community, but they also felt obligated to ensure privacy for their female patrons and employees. That did not matter to the Commission. Nor did the Commission care about the owners' fear of losing clients and ultimately their small business that they had worked so hard to build.

The Washington Human Rights Commission threatened prosecution against a protected class—racial minority members who want to share their cultural traditions—to favor a group that is not even a protected class under the statute. To be clear, transgender persons, like all people, deserve to be treated with respect and dignity. But showing respect does not mean the government can distort the law and impose its will on the people the law was intended to protect.

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Ultimately, this case is not just about the fate of a family-owned business. It is about power—which groups have it and which do not. And Asian Americans in Washington have historically lacked political clout. Washington barred Chinese people from voting as soon as it became a territory in 1853.³ Other restrictions (such as preventing them from testifying against whites) followed.⁴ Even in the post-civil rights era, the University of Washington has faced repeated allegations of discrimination against Asian Americans.⁵ And the Washington Human Rights Commission’s bullheaded investigation of Olympus Spa makes plain who has political power (and who does not) today.⁶

3. See Matthew W. Klinge, Ctr. for the Study of the Pac. Nw., Univ. of Washington Dep’t of Hist., *A History Bursting with Telling: Asian Americans in Washington State* 5, https://content.lib.washington.edu/curriculumpackets/A_History_Bursting_With_Telling.pdf (last visited May 7, 2025).

4. See *id.*

5. See, e.g., Hannah Fry, *Rejected by 16 colleges, hired by Google. Now he’s suing some of the schools for anti-Asian discrimination*, L.A. Times, Apr. 4, 2025 (detailing how Stanley Zhong—who “had a 4.42 grade-point average, a nearly perfect SAT score, had bested adults in competitive coding competitions and started his own electronic signing service all while still in high school”—was rejected by, among others, University of Washington); Heath Foster and Ruth Schubert, *Two UW law school applicants, two paths: one got in, one didn’t*, Seattle Post-Intelligencer, Oct. 15, 1998 (noting disparity in LSAT scores).

6. Not only did the state contort its reading of the statute, it flipped-flopped and took inconsistent positions in pursuing its case against the Spa’s owners. While the state thought Olympus Spa’s entry policy was serious enough to merit potential prosecution,

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Make no mistake about it: the Washington Human Rights Commission has wielded its power to advance its own political agenda. The homepage of its website includes statements about national politics that have little to do with the Commission’s duties under state law: It declares that “President Trump is misleading the American people on diversity, equity, and inclusion and accessibility initiatives.”⁷ The agency then links to a press release from a group of politicians attacking “President Trump’s executive orders” as “unnecessary and disingenuous” and condemning him for “baseless and offensive claims.”⁸ All this political palaver—from an

it then argued to the district court that the Spa lacked standing because it faced no credible threat of state prosecution. In an about-face, the state argued that the Spa faces no credible threat of enforcement because it is unlikely that a pre-operative transgender woman will visit the Spa in the future. The state emphasized that there had been “only one instance of a transgender woman, who has not had gender-affirming surgery, who [] attempted to access the spa’s services in over 20 years of the spa’s existence.” The state even oddly invoked Olympus Spa’s contention that the complainant never visited the Spa to show that enforcement is unlikely. Intellectual consistency was no bar for the state in its campaign against the Spa.

7. Washington State Human Rights Commission Home Page, <https://www.hum.wa.gov/> (last visited on May 7, 2025).

8. Joint statement from 13 state attorneys general: President Trump is misleading the American people on diversity, equity, and inclusion and accessibility initiatives, Washington State Attorney General (Jan. 31, 2025), <https://www.atg.wa.gov/news/news-releases/joint-statement-13-state-attorneys-general-president-trump-misleading-american> (last visited on May 7, 2025).

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agency tasked with impartially investigating and neutrally enforcing the state's anti-discrimination laws on behalf of all Washington citizens. It is no wonder then that the Washington Human Rights Commission exerted the full force of state power to bully members of a politically weak minority group.

I respectfully dissent.

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McKEOWN, Senior Circuit Judge, joined by MURGUIA, Chief Judge, HAWKINS, S.R. THOMAS, GRABER, FLETCHER, PAEZ, BERZON, CLIFTON, BYBEE, and HURWITZ, Senior Circuit Judges, WARDLAW, GOULD, RAWLINSON, M. SMITH, CHRISTEN, NGUYEN, FRIEDLAND, MILLER, KOH, SUNG, SANCHEZ, H.A. THOMAS, MENDOZA, DESAI, JOHNSTONE, and DE ALBA, Circuit Judges, respecting the denial of rehearing en banc:

The American legal system has long been regarded as a place to resolve disputes in a dignified and civil manner or, as Justice O'Connor put it, to "disagree without being disagreeable."¹ It is not a place for vulgar barroom talk. Nor is it a place to suggest that fellow judges have "collectively lost their minds," or that they are "woke judges[]" "complicit" in a scheme to harm ordinary Americans. That language makes us sound like juveniles, not judges, and it undermines public trust in the courts. The lead dissent's use of such coarse language and invective may make for publicity or entertainment value, but it has no place in a judicial opinion. The lead dissent ignores ordinary principles of dignity and civility and demeans this court. Neither the parties nor the panel dissent found it necessary to invoke such crude and vitriolic language. Decorum and collegiality demand more.

1. Justice Sandra Day O'Connor, Speech to the American Bar Association (Dec. 12, 1993).

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McKEOWN, Senior Circuit Judge, joined by HAWKINS, FLETCHER, and PAEZ, Senior Circuit Judges, GOULD, M. SMITH, and DE ALBA, Circuit Judges, respecting the denial of rehearing en banc:

The lead dissent’s crass language serves, at most, to distract from what this case is about. As the majority opinion explained, this is a case about the application of Washington’s “entirely unexceptional” public accommodations law, the Washington Law Against Discrimination (“WLAD”). *303 Creative LLC v. Elenis*, 600 U.S. 570, 591–92 & n.2, 143 S.Ct. 2298, 216 L.Ed.2d 1131 (2023) (citing Wash. Rev. Code § 49.60.215). That law prohibits discrimination on the basis of “sexual orientation,” which Washington law defines to include gender identity. Wash. Rev. Code § 49.60.040(29). The Washington legislature, not the panel, set out this controlling definition.¹ The majority simply held that the WLAD applied to Olympus Spa, a commercial establishment, when it purported to deny admission to certain transgender women, and that the WLAD survived the rational basis scrutiny applicable to such laws under the First Amendment.

Here’s what this case is not about:

- COVID gathering restrictions. *See Tandon v. Newsom*, 593 U.S. 61, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam).

1. The dissents cannot simply wish away this definition and substitute their preferred judicial gloss on the unambiguous statute. Importantly, the Spa did not contest for purposes of this litigation that this definition applied.

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- Exemptions that the Spa never claimed, related to private clubs and religious institutions. *See* Wash. Rev. Code § 49.60.040(2).
- An Establishment Clause theory that the Spa never presented. *See Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 145 S.Ct. 1583, 221 L.Ed.2d 881 (2025).

It is certainly not a case involving “[w]oke regulators” and “complicit judges” out to harm “women and young girls,” or in the words of the second dissent, a ruling that places the “public peace” at risk. Those assertions describe a case entirely different from the one presented to the panel.

When it comes to the thankfully more appropriate arguments about why the panel should have applied strict scrutiny to the WLAD under the Free Exercise clause, my colleagues are no closer to the mark.

Start with the basics. The WLAD prohibits various types of discrimination in places of public accommodation, including discrimination based on sexual orientation. Wash. Rev. Code § 49.60.030(1)(b). Like all such laws, the WLAD is limited to “place[s] of *public* resort, accommodation, assemblage, or amusement.” *Id.* § 49.60.040(2) (emphasis added). The WLAD therefore exempts any “bona fide club, or place of accommodation, which is by its nature distinctly private.” *Id.* The law also exempts certain facilities tied to “bona fide religious or

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sectarian institution[s],” like cemeteries. *Id.* These carve outs for private clubs and religious institutions are very common in public accommodations laws.

Under the Free Exercise Clause, the Spa must demonstrate that the challenged Washington law lacks general applicability for strict scrutiny to apply. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022). There are “two ways” to do so, *Tingley v. Ferguson*, 47 F.4th 1055, 1087 (9th Cir. 2022): The Spa can show that the law contains a “formal mechanism” for “discretionary” and “individualized exemptions” or that the law does not treat comparable religious and secular conduct alike. *Id.* at 1088 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021)).

The Spa failed to carry its burden in this case. The WLAD does not permit individualized exemptions, formal or otherwise. And the exemptions the law does contain, like the one for “bona fide private clubs,” are categorical and mandatory, meaning they do not invite the government to “pass[] judgment upon” an entity’s “religious beliefs,” see *Masterpiece Cakeshop v. Colorado C.R. Comm’n*, 584 U.S. 617, 638, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018).

Nor does the law distinguish between secular and religious activity. Under the WLAD’s general anti-discrimination mandate, a spa with a religious motivation for discrimination and a spa with a secular motivation for discrimination are treated exactly alike. Wash. Rev. Code § 49.60.030(1)(b). The private club exemption is likewise available across the board. And the Spa presented no

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evidence that those provisions—which are general on their face—create “religious gerrymanders” in practice. See *Walz v. Tax Comm’n of New York City*, 397 U.S. 664, 696, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring).

The dissenters nevertheless complain that this commercial Spa could be treated differently than a spa that claims the private club exemption. They argue that this case is analogous to *Tandon v. Newsom*, 593 U.S. 61, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam), where a California COVID restriction unlawfully treated at-home religious gatherings less favorably than “comparable secular” gatherings at “salons,” “stores,” and “restaurants.” *Id.* at 63, 141 S.Ct. 1294.

But they overlook precedent establishing that the government interests in regulating the two entities are distinct, meaning they are not comparable in the *Tandon* sense. The Supreme Court has long recognized that the antidiscrimination interest in regulating businesses like the Spa stems from the “unique evils” that can only accompany the “denials of equal access to *public* establishments” and the related “deprivation of personal dignity.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (emphasis added) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)); accord *303 Creative LLC*, 600 U.S. at 590, 143 S.Ct. 2298.²

2. Washington asserted that precise interest in this case. In an effort to make the WLAD seem underinclusive, the dissenters cherry-pick a portion of the statute to make the interest sound

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That does not negate other types of antidiscrimination interests. Yet it must follow that Washington lacks a *comparable* interest in regulating clubs that were never public to begin with.

The government may even have a countervailing interest *in exempting* private clubs to the extent their membership decisions are central to expressive activity. *E.g.*, *Jaycees*, 468 U.S. at 623, 104 S.Ct. 3244; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 581, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (noting the “potential for conflict” between “public accommodation” laws and “the First Amendment rights” of “membership organizations”). The private club exemption thus reflects the “necessary,” “appropriate,” and “practical” distinction “between genuinely public and private accommodations” that the First Amendment requires. *Heart of Atlanta Motel*, 379 U.S. at 293, 85 S.Ct. 348 (Douglas, J., concurring). That distinction was entirely absent in *Tandon*, and it is dispositive.

These omissions in the dissenters’ analysis belie a much deeper tension with history and precedent. By definition, all public accommodations laws distinguish between *public* businesses and *private* organizations closed to the public. That is, they contain the same distinction the dissenters complain of. Yet the Supreme Court has twice

broader. *See* Wash. Rev. Code § 49.60.010. But the WLAD clarifies that the relevant “right” is a “right to the full enjoyment of . . . any place of *public* resort, accommodation, assemblage, or amusement.” Wash. Rev. Code § 49.60.030(1)(b) (emphasis added).

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stated that public accommodations statutes, including the WLAD, are “entirely ‘unexceptional’” and do not “implicate the First Amendment” as a general matter. *303 Creative*, 600 U.S. at 591–92 & n.2, 143 S.Ct. 2298 (quoting *Masterpiece Cakeshop*, 584 U.S. at 632, 138 S.Ct. 1719) (citing examples including the WLAD).³ And the Court has situated those laws in a “venerable history” dating back at least 300 years. *Hurley*, 515 U.S. at 571, 115 S.Ct. 2338 (citing *Lane v. Cotton*, 88 Eng. Rep. 1458, 1464–1465 (K.B. 1701) (Holt, C.J.)). It beggars belief that the Court would make such statements if every public accommodations law was facially flawed as the dissenters imply.

Indeed, if distinguishing between public and private accommodations deprives a law of general applicability, then not just every public accommodations law, but every *antidiscrimination* law from Title VII to the ADA would face strict scrutiny when a business justifies discrimination on religious grounds. 42 U.S.C. §§ 2000a(e), 12187 (Title VII and ADA exemptions for private clubs). The dissenters do not bother to defend that radical result, and their statements are glaringly devoid of authority to support it.

3. Many of the statutes the Supreme Court cited alongside this statement contain special provisions for “private clubs.” *See, e.g.*, Mich. Comp. Laws Ann. § 37.2302a; Me. Rev. Stat. Ann. tit. 5, §§ 4592(1)(B), (C) (exemption for certain “private entit[ies]”); Nev. Rev. Stat. Ann. § 651.060 (exemption for “any private club . . . or other establishment not in fact open to the public”); Va. Code Ann. § 2.2-3904 (exemption for “a private club” or “religious corporation” “not in fact open to the public”); Wis. Stat. Ann. § 106.52(e)(2) (exemption for “bona fide private, nonprofit organization or institution”).

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Separately, the dissents point to other provisions of the WLAD that exempt “bona fide religious or sectarian institution[s]” when operating certain facilities, and argue that they render the WLAD non-neutral. *See* Wash. Rev. Code § 49.60.040(2)). What they omit, however, is that no party mentioned those provisions at *any* stage of this case, and it would have violated party presentation principles for the panel to address them. *See Clark v. Sweeney*, 607 U.S. 7, 8, 146 S.Ct. 410, 223 L.Ed.2d 157 (2025). The lead dissent’s resort to an orthogonal Establishment Clause precedent issued days *after* the majority opinion only underscores the Spa’s failure to present any such theory here. *See Catholic Charities*, 605 U.S. at 241–42, 145 S.Ct. 1583.

I do not address the religious-institution provision at length, as we lack both a record and briefing. But I observe that in a future case, Washington will have several compelling arguments at its disposal: This court has twice held that similar provisions reinforce a law’s neutrality, *Tingley*, 47 F.4th at 1085; *Welch v. Brown*, 834 F.3d 1041, 1045 (9th Cir. 2016); those provisions may well be required to “protect the principle of church autonomy,” *McMahon v. World Vision Inc.*, 147 F.4th 959, 970 (9th Cir. 2025); and, much like the private club exemption, exemptions for “entities controlled by religious organizations” are common features of antidiscrimination statutes that have existed for decades without courts batting an eye. *E.g.*, 42 U.S.C. § 12187.

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Our court's practice of entertaining spirited dissents from denials of rehearing en banc has its virtues. Such statements allow members of the court to present considered views on the legal issues before us. And they may deepen the understanding of those issues by the courts, the litigants, and the public.

But the statements here exhibit some of the downsides. They are not subject to the deliberative process that ordinarily ferrets out specious legal arguments. They are not held to the strictures of party presentation and may extend to arguments that were either forfeited or never discussed at all. And in the unfortunate case of the lead dissent, they may serve to air personal grievances entirely unbecoming of members of this court.

In view of Supreme Court and circuit precedent, the active judges of this court appropriately declined to reconsider this decision en banc.

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OWENS, Circuit Judge, joined by FORREST, Circuit Judge, respecting the denial of rehearing en banc:

Regarding the dissenting opinion of Judge VanDyke:
We are better than this.

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VANDYKE, Circuit Judge, dissenting from the denial of rehearing en banc:

This is a case about swinging dicks. The Christian owners of Olympus Spa—a traditional Korean, women-only, nude spa—understandably don’t want them in their spa. Their female employees and female clients don’t want them in their spa either. But Washington State insists on them. And now so does the Ninth Circuit.

You may think that swinging dicks shouldn’t appear in a judicial opinion. You’re not wrong. But as much as you might understandably be shocked and displeased to merely encounter that phrase in this opinion, I hope we all can agree that it is far more jarring for the unsuspecting and exposed women at Olympus Spa—some as young as thirteen—to be visually assaulted by the real thing.

Sometimes, it feels like the supposed adults in the room have collectively lost their minds. Woke regulators and complicit judges seem entirely willing, even eager, to ignore the consequences that their Frankenstein social experiments impose on real women and young girls. Yet if harmful and unfortunate consequences were all this case was about, we’d have to shrug and say: “That’s what comes with living in a democracy.” Unless the Constitution is implicated, we get what we voted for “good and hard.”¹

1. H.L. MENCKEN, *A LITTLE BOOK IN C MAJOR* 19 (John Lane Co., 1916) (“Democracy is the theory that the common people know what they want, and deserve to get it good and hard.”).

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But some fundamental rights, like the right to the free exercise of religion, are constitutionally protected precisely to avoid majoritarian infringement. Unfortunately, in this case the panel majority has allowed Washington State bureaucrats to trample on such rights long secured by the Constitution. The Washington State legislature enacted the Washington Law Against Discrimination (“WLAD”) to eliminate “discrimination against any of [the state’s] inhabitants.” Wash. Rev. Code § 49.60.010. To achieve this end, WLAD prohibits discrimination based on a long list of protected characteristics, including “sexual orientation.” The statute defines “sexual orientation” to include a person’s “gender expression or identity.” *Id.* § 49.60.040(29).

In 2020, a man attempted to use WLAD’s antidiscrimination mandate to gain access to Olympus Spa, the state’s only traditional Korean, women-only, nude spa. Olympus Spa is owned and operated by a family of theologically conservative Christians who hold religious convictions that men and women should not be present together while unclothed unless married to one another. Based on these convictions, Olympus Spa denied the man entrance into its women-only, nude space. The man filed a complaint with state officials, who initiated enforcement proceedings and threatened Olympus Spa with prosecution. When Olympus Spa filed a complaint in federal court challenging WLAD on Free Exercise grounds, the district court ruled that the statute was neutral and generally applicable and dismissed the spa’s suit. On appeal, a split panel of our court affirmed the district court on the theory that WLAD did not mention

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religion or grant preferential treatment to comparable secular conduct, and held that the statute's application here survives rational basis review.

But the panel majority's decision mischaracterized WLAD's text and failed to apply controlling Free Exercise case law. WLAD is *not* a categorical ban on discrimination in Washington State. Instead, as relevant to this case, the text of WLAD carves out two groups for preferential treatment. First, WLAD grants an exemption to similarly situated private organizations. Second, WLAD grants an exemption to a narrow category of religious activities—an exemption only available to religions that practice their faith by teaching, worshiping, or performing last rites.

WLAD's exemption of private clubs grants preferable treatment to secular activities that pose a comparable threat to the government interest underlying the statute. As a result, WLAD is not generally applicable, and we should have subjected WLAD's application in this case to strict scrutiny, a standard it cannot survive. And as the intervening publication of *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238, 145 S.Ct. 1583, 221 L.Ed.2d 881 (2025), has made clear, WLAD is also not neutral because it facially distinguishes between religious activities based on religious practitioners' theological choices.

The panel majority inappropriately attempted to characterize this case as a straightforward application of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108

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L.Ed.2d 876 (1990). That result is an affront to the Olympus Spa owners' Free Exercise rights—one that is amplified by more general harms. Indeed, Washington has applied WLAD's redefinition of sexual classifications in a perverse way that actually undermines legal protections granted to women. Moreover, that redefinition generates an irreconcilable conflict with Washington's criminal laws against voyeurism and indecent exposure.

The Supreme Court's recent Free Exercise jurisprudence controls this case. An optimist might expect that to have had some effect on the outcome of this dispute and our court's en banc vote. But even where the Supreme Court has defined a clear rule protecting disfavored constitutional rights, never underestimate woke judges' willingness to sacrifice those rights on the altar of "social progress."

I.

Olympus Spa is a traditional Korean, women-only, nude spa that is owned and operated by a family of theologically conservative Christians in Washington State.² Olympus Spa has operated in Washington for more than twenty years and is the only Korean spa in the state. For centuries, traditional Korean spas have provided treatment to women in female-only spaces. Full nudity is central to the tradition, and every woman is required

2. Because this case was decided at the motion to dismiss stage, unless otherwise stated the quotations and facts recounted herein are taken from the plaintiffs' pleadings and the record in this case.

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to be completely nude when using Olympus Spa. While nude, women collect in a common steam room, soak in a common pool, and are given body scrubs in the open by female employees. Girls as young as thirteen attend the spa with their mothers, participating together in this traditional cultural practice.

Consistent with this tradition and its owners' religious convictions, Olympus Spa "is designed specifically for women and [its] mission is to restore and rejuvenate women's physical health as well as spiritual health." The owners and employees of Olympus Spa hold conventional religious beliefs that men and women should not be present together while unclothed unless married to one another. Recognizing that "[w]omen are in a vulnerable position when they are unclothed," the owners of Olympus Spa consider themselves theologically compelled to maintain the spa as a female-only space where women "feel their privacy and rights are respected." Thus, the religious owners, their employees, and the patrons of Olympus Spa must maintain a female-only space to participate in the traditional practices of Korean spas in compliance with their sincerely held religious convictions.

In 2006, Washington's legislature amended WLAD to prohibit discrimination based on "sexual orientation." Wash. Rev. Code § 49.60.010. WLAD is a wide-reaching statute aimed at eliminating "discrimination against any of [Washington's] inhabitants."³ *Id.* WLAD defines "sexual orientation" to mean:

3. The panel majority agreed that WLAD's "stated purpose . . . is to prevent discrimination and enable individuals to seek recourse for discriminatory treatment." Panel Op. 23.

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heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, “gender expression or identity” means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

Id. § 49.60.040(29). WLAD created a state agency, the Washington State Human Rights Commission (“HRC”), to enforce the statute’s anti-discrimination mandate “in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions.” *Id.* §§ 49.60.010, 49.60.050. The statute’s definition of “place[s] of public resort, accommodation, assemblage, or amusement” encompasses almost every establishment in the state. *Id.* § 49.60.040(2). But notably, two categories of institutions are carved out from WLAD’s scope. First, “any institute, bona fide club, or place of accommodation, which is by its nature distinctly private,” is exempted from WLAD’s requirements. *Id.* Second, “any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution” is also exempted. *Id.*

In the spring of 2020, Olympus Spa became the target of one man’s campaign to compel the admission of men into the state’s only traditional Korean, women-only, nude spa. *See* Brief of Women’s Declaration International USA

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as Amicus Curiae in Support of Petitioners’ Petitions for Rehearing and Rehearing En Banc at 8 n.6 (“I did it! I got the main naked lady spa in the area to change their policies and allow all self-identified women access regardless of surgery and genitals.”). Haven Wilvich is a man who identifies as female, has twice been married to women, and remains sexually attracted to women.⁴ On May 2, 2020, Wilvich filed a complaint with HRC alleging that he had visited Olympus Spa and that spa employees had denied him services based on his sexual orientation because he was a biological male “without surgery.”⁵

In November 2020, HRC served a Notice of Complaint of Discrimination on Olympus Spa. Olympus Spa responded in March 2021, disputing the claim that its women-only rule violated WLAD’s anti-discrimination provision. In an April 2021 reply, HRC stated that Olympus Spa’s women-only rule was “clearly discriminatory and violate[d] the WLAD.” HRC gave Olympus Spa ten days to indicate its interest in negotiating a pre-finding settlement agreement, after which the Commission would refer the case to the Attorney General’s Office for prosecution. Olympus Spa

4. By his own account, Wilvich is sexually attracted to women. “I enjoy dating women and enbies in a way that I just don’t get the same fulfillment with men.” *Sex and Dating Updates*, Finding Haven (Feb. 20, 2022), <https://findinghaven.blog/2022/02/20/sex-and-dating-updates/> [<https://perma.cc/5JSQ-R8CP>].

5. Though the spa maintains a formal sign-in and screening process, Olympus Spa staff had no records or recollection of Wilvich ever having come into the spa. Wilvich later told local reporters that he never actually visited the spa but had, in reality, merely called ahead of a friend’s visit.

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agreed to negotiate a settlement, and, in October 2021, the parties executed a settlement agreement. At Olympus Spa’s request, a clause was added to the settlement reserving the spa’s right to bring a legal challenge as to the constitutionality of the agreement or the underlying statutes.

In the spring of 2022, Olympus Spa, several employees, and a patron filed suit against the Executive Director of the Commission in the United States District Court for the Western District of Washington. Olympus Spa brought three First Amendment claims, challenging the Commission’s actions and WLAD’s antidiscrimination provision on Free Exercise, speech, and associational grounds. The plaintiffs asserted that Olympus Spa was a “family-run business . . . owned by Christians who hold sincere, faith-based convictions” against allowing males into the nude, female-only spa. The district court, relying in part on the Tenth Circuit’s subsequently reversed decision in *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1178 (10th Cir. 2021), *rev’d*, 600 U.S. 570, 143 S.Ct. 2298, 216 L.Ed.2d 1131 (2023), dismissed Olympus Spa’s complaint without prejudice for failure to state a claim after concluding that WLAD was a neutral and generally applicable law that survived rational basis review.

Olympus Spa filed an amended complaint asserting the same Free Exercise, speech, and associational claims, alleging specifically that WLAD was “not neutral nor generally applicable.” The district court dismissed Olympus Spa’s amended complaint again, this time with prejudice. Olympus Spa appealed that dismissal to

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this court, arguing repeatedly in its opening brief that WLAD’s “statutory carve outs” required that the court “review this case under strict scrutiny instead of rational basis.”

A divided panel of this court affirmed dismissal of all of Olympus Spa’s claims. Despite the statute’s express exemption for certain religious activities, the panel majority incorrectly claimed that “[t]he statute does not ‘refer[] to a religious practice’” and concluded that “WLAD is both neutral and generally applicable.” Panel Op. 23 (alteration in original) (citation omitted). And no doubt writing from the fully clothed comfort of their judicial chambers, the panel majority also concluded that WLAD “only incidentally burdened” Olympus Spa’s Free Exercise rights because the law “[did] not prohibit the Spa from expressing its religious beliefs.” *Id.* at 23. Judge Lee dissented. *Id.* at 32–48 (Lee, J., dissenting).

II.

WLAD does not categorically ban all discrimination based on gender identity. Instead, the statute expressly exempts *some* secular organizations and *some* religious practices from the statute’s mandate. Because these exemptions grant preferential treatment to comparable secular activity and favor some stereotypical religious practices over (apparently) disfavored ones, WLAD is neither neutral nor generally applicable and should have been subjected to strict scrutiny. The statute fails that demanding standard.

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What is more, WLAD redefines “sex” in a manner that undermines the legal protections granted to women as a class and generates an irreconcilable conflict with criminal laws against voyeurism and indecent exposure. We should have reheard this case en banc and reversed this perversion.

A. WLAD is not generally applicable because it treats comparable secular activity more favorably than Olympus Spa’s religiously motivated activity.

“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 593 U.S. 61, 62, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam); *see also* *Fulton v. City of Philadelphia*, 593 U.S. 522, 534, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021). Religious and secular activities need not be *identical* to be *comparable*. Instead, “[c]omparability is concerned with the risks various activities pose,” and therefore “must be judged against the asserted government interest that justifies the regulation at issue.” *Tandon*, 593 U.S. at 62, 141 S.Ct. 1294.

Courts do not compare the regulation of religious and secular activity in the aggregate or by artificially segmenting broad categories of activity. Even if “a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue,” a statute may still not be generally applicable. *Tandon*, 593 U.S. at 62, 141 S.Ct.

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1294. If “*any* comparable secular activity” is treated “more favorably than religious exercise,” the law is not generally applicable. *Id.* Put another way, “[e]xceptions for one means strict scrutiny for all.” *Fulton*, 593 U.S. at 624, 141 S.Ct. 1868 (Gorsuch, J., concurring in the judgment).

WLAD is not generally applicable because it prohibits religiously motivated conduct like Olympus Spa’s while permitting comparable secular conduct that identically undermines the government’s asserted interest. WLAD’s public accommodation provision expressly exempts “any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations,” from the statute’s antidiscrimination mandate. Wash. Rev. Code § 49.60.040(2).

In practice, this means that a secular, traditional Korean, nude spa organized as a private institute, club, or accommodation would be permitted to enforce a women-only policy in Washington State. But next door, an otherwise identical, for-profit spa seeking to enforce the same policy based on the owners’ sincere religious convictions would be prohibited from doing so. It’s hard to think of a case in which a statute provides preferential treatment to a more identical secular analog.

For purposes of general applicability, Olympus Spa’s for-profit status is not a relevant distinction for WLAD’s private-organization exemption. “Comparability is concerned with the risks various activities pose” and therefore “must be judged against the asserted government interest that justifies the regulation at issue.”

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Tandon, 593 U.S. at 62, 141 S.Ct. 1294. Here, Washington’s interest asserted to justify WLAD is the elimination of “discrimination against any of its inhabitants.” Wash. Rev. Code § 49.60.010. Though the panel majority now attempts to retroactively narrow that interest in response to the en banc call, the panel majority recognized in its opinion that WLAD’s “stated purpose . . . is to prevent discrimination and enable individuals to seek recourse for discriminatory treatment.” Panel Op. 23. This is a broad interest. Women-only policies pose an identical—certainly comparable—threat to the state’s asserted interest whether they are enforced by for-profit or private-club spas. Both exclude the same category of people (males) from the same activity (traditional Korean, nude spa treatments). Nor could private clubs be said to affect a smaller share of the population. A private club’s admissions policies do not impact *only* members of the club. When a private club maintains a women-only admissions policy, it excludes all men in the state. When a for-profit business maintains the same policy, it excludes precisely the same population. Because it expressly exempts private organizations’ sex-based discrimination against all male inhabitants of Washington state, WLAD is underinclusive for purposes of the interest it aims to advance.

Ample Supreme Court precedent makes clear that risks to the government’s asserted interests can and should be compared across the for-profit divide. In *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court considered a set of city ordinances that banned certain forms of animal slaughter within city limits to “protect[] the public health and prevent[] cruelty to

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animals.” 508 U.S. 520, 527–28, 543–44, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). The Court held that the ordinances were not generally applicable and that they violated the Free Exercise Clause because they prohibited the animal sacrifices of the Santeria religion while exempting nonreligious conduct such as fishing, hunting, commercial butchering, extermination, humanitarian euthanasia, and medical research. *Id.* The Court did not allow the city to distinguish commercial conduct simply because it was *commercial*. Instead, the Court reasoned that any form of animal killing, whether executed by a private, non-profit, or commercial entity, posed a comparable risk to the government’s asserted interests. *Id.* at 543–46, 113 S.Ct. 2217. The ordinances were “underinclusive on [their] face” because they “pursue[d] the city’s governmental interests only against conduct motivated by religious belief” and not with regard to nonreligious conduct. *Id.* at 544–45, 113 S.Ct. 2217.

The same was true in *Tandon*, where the Supreme Court considered a California statute that restricted at-home religious gatherings and that California attempted to justify by pointing to its interest in “reducing the spread of COVID.” 593 U.S. at 63, 141 S.Ct. 1294. The Court reasoned that “at-home religious exercise” posed the same threat to that interest as “comparable secular activities” such as *for-profit business* in “hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants.” *Id.* Again, the Court did not allow California to distinguish activities presenting similar risks simply because one was private and the other was commercial. The Free Exercise

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Clause requires that comparable secular and religious activities be treated equally in either context.

So too here. Washington allows private institutes, clubs, places of accommodation, and fraternal organizations to freely exclude every biological male in the state, while penalizing Olympus Spa’s identical “conduct motivated by religious belief.” *Lukumi*, 508 U.S. at 545, 113 S.Ct. 2217. A policy of excluding men poses a risk of “discrimination against [Washington’s] inhabitants” whether the policy is enforced by private, non-profit, or commercial parties. Wash. Rev. Code § 49.60.010. Discrimination, like COVID, is transmitted through interpersonal interactions and “gather[ings.]” See *Tandon*, 593 U.S. at 62, 141 S.Ct. 1294. If “at-home religious exercise” and for-profit public accommodations present a comparable risk of *interpersonal transmission* of COVID, then certainly female-only admissions policies in private clubs and in for-profit “public accommodations” present a comparable risk of *interpersonal discrimination*. Accordingly, WLAD is “underinclusive on its face” and is not generally applicable. *Lukumi*, 508 U.S. at 545, 113 S.Ct. 2217. And though the majority insists that private clubs can *never* be comparable to public accommodations, it is notable that they cannot cite a single case to support that extreme proposition. Because WLAD does not meet the Free Exercise Clause’s general applicability standard, it must be subjected to strict scrutiny in this case.

It is also worth noting that many religious Americans are unable to confine their religious exercise to the contexts of private clubs or formal worship. Nor should they. Devout

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adherents to religious faiths that have a public mission and a moral code cannot live consistently with their convictions by locking themselves behind the closed doors of clubs and churches. The right to the free exercise of religion extends to cake makers, business owners, and employees while they participate in society. *E.g., Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 584 U.S. 617, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018). “[W]hen constitutional religious liberty rights ‘are extended to corporations, the purpose is to protect . . . the religious liberty of the humans who own and control those companies.’ . . . Corporate structure is not relevant in this analysis.” *Oregon Right to Life v. Stolfi*, 158 F.4th 1013, 1019–20 (9th Cir. 2025) (second alteration in original) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014)). Thus, the free exercise of religion is not sufficiently protected simply because the government deigns to allow “non-secular aggregations” to cloister in private places or attend traditional services. The Constitution’s protection of free exercise is not so parsimonious.

B. WLAD’s application is not neutral because it facially differentiates among religions based on theological choices by granting an exemption to only a small set of favored religious activities.

WLAD’s exemption of comparable secular activity is not the statute’s only Free Exercise problem. Days after the panel majority published its opinion in this case holding that WLAD was neutral, the Supreme Court published *Catholic Charities*—holding that a religious exemption that “facially differentiat[ed] among religions based on

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theological choices” violated the First Amendment’s guarantee of religious neutrality. *Cath. Charities*, 605 U.S. at 241–42, 251, 145 S.Ct. 1583. After *Catholic Charities*, it is clear that WLAD suffers from the same defect: the statute guarantees preferential treatment to a small set of formal religious practices by granting them a statutory exemption, while disfavoring all other religious activity, including Olympus Spa’s. WLAD is not neutral and, for this additional reason, should have been subjected to strict scrutiny.

“The Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.” *Masterpiece Cakeshop*, 584 U.S. at 638, 138 S.Ct. 1719 (citation modified) (quoting *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217). “A law that differentiates between religions along theological lines is textbook denominational discrimination.” *Cath. Charities*, 605 U.S. at 248, 145 S.Ct. 1583. And a law may impermissibly differentiate between religions on theological lines even if it does not identify and grant preferential treatment to some denomination by name. Accordingly, a law discriminates along theological lines if it bars “less ritualistic, more unorthodox, [and] less formal” religious conduct while permitting formal or orthodox religious practices. *Fowler v. Rhode Island*, 345 U.S. 67, 69–70, 73 S.Ct. 526, 97 L.Ed. 828 (1953). For example, “a law exempting only those religious organizations that perform baptisms or worship on Sundays” and a law containing “an exemption that requires proselytization or exclusive service of co-religionists” both impermissibly “establish[] a preference for certain religions based on the commands of their

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religious doctrine.” *Cath. Charities*, 605 U.S. at 250, 145 S.Ct. 1583.

WLAD discriminates between religions by exempting only a small set of favored religious practices from its antidiscrimination mandate. WLAD’s public accommodation provision expressly exempts “any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution” from the statute’s antidiscrimination requirements. Wash. Rev. Code § 49.60.040(2). Additionally, interpretive guidance published by WLAD’s implementing agency, the Washington State Human Rights Commission, further clarifies that “a church or other religious entity in the activity of conducting worship services is not a place of public accommodation, and neither are religious educational institutions. However, other church-sponsored activities, such as a soup kitchen or public bake sale, might be considered a place of public accommodation.” *Sexual Orientation & Gender Identity In Public Accommodations, Guide to Sexual Orientation & Gender Identity & the Washington State Law Against Discrimination*, Wash. State Hum. Rts. Comm’n, [hereinafter *HRC Guide*] <https://www.hum.wa.gov/public-accommodation-pa/sexual-orientation-gender-identity-pa> [<https://perma.cc/MRM2-RREZ>].

In practice, this exemption means that only the religious convictions of the singing, praying, preaching, burying, and teaching types of religions are protected when their practices come into conflict with Washington

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law. In Washington, a church, school, or cemetery with thousands of members and with doors open to the public can freely exclude men from its services. But the religious owners of a Korean spa, compelled by the same religious convictions, are denied the same exemption and are not permitted to exclude men from entering their nude, female-only rituals intended “to restore and rejuvenate women’s . . . spiritual health.”

WLAD’s express discrimination between religious practices is proscribed by the Supreme Court’s unanimous decision in *Catholic Charities*. 605 U.S. 238, 145 S.Ct. 1583. Catholic Charities, the organization at issue in that case, provided services to the general public regardless of the recipient’s faith, did not require its employees to adhere to any religious faith, and did not proselytize during its work. *Id.* at 243–44, 145 S.Ct. 1583. Indeed, as the Supreme Court observed, the services performed by Catholic Charities were not uniquely religious, but rather “could [have been] provided by organizations of either religious or secular motivations.” *Id.* at 247, 145 S.Ct. 1583 (citation modified).

Like the State of Washington here, the State of Wisconsin had a statutory exemption for “certain religious organizations,” but not one that fit Catholic Charities’ religious practices. *Id.* at 241, 145 S.Ct. 1583. As the State of Wisconsin explained, Catholic Charities did not qualify for Wisconsin’s statutory exemption because Catholic Charities did not “engage in proselytization” and did not “serve only Catholics in their charitable work.” *Id.* Wisconsin’s state courts affirmed the denial of the

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exemption, reasoning that Catholic Charities' services were "neither inherently or primarily religious activities" and did not fall within the "[t]ypical activities of an organization operated for religious purposes." *Id.* at 245, 145 S.Ct. 1583 (alteration in original) (citations omitted). Wisconsin's state courts held that Wisconsin's statutory exemption should be limited to only organizations that "participated in worship services, religious outreach, ceremony, or religious education." *Id.* (citation omitted).

The Supreme Court disagreed. It reversed the state courts, holding that the statute's religious organization exemption violated the Free Exercise Clause's requirement of "government neutrality between religions" by "facially differentiat[ing] among religions based on theological choices." *Id.* at 241–42, 251, 145 S.Ct. 1583. The Court reasoned that "[d]ecisions about whether to 'express and inculcate religious doctrine' through worship, proselytization, or religious education when performing charitable work are . . . fundamentally theological choices driven by the content of different religious doctrines." *Id.* at 252, 145 S.Ct. 1583 (citation omitted). Thus, Wisconsin's exemption was not, "on its face, 'available on an equal basis' to all denominations." *Id.* at 251, 145 S.Ct. 1583 (quoting *Larson v. Valente*, 456 U.S. 228, 247 n.23, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)).

WLAD's religious exemption suffers from the same facial defect that necessitated reversal in *Catholic Charities*. The panel majority claimed that WLAD "does not 'refer[] to a religious practice,'" but that's plainly incorrect. Panel Op. 24 (alteration in original) (quoting

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Lukumi, 508 U.S. at 533, 113 S.Ct. 2217). By providing a religious exemption that is only available to religious “educational facilit[ies], columbarium[s], cremator[ies], mausoleum[s], or cemetery[ies],” Wash. Rev. Code § 49.60.040(2), Washington “facially differentiates among religions based on theological choices” just like Wisconsin did, *Cath. Charities*, 605 U.S. at 251, 145 S.Ct. 1583.⁶ Decisions about whether to practice and express one’s religion by educating, worshiping, burying, or performing services that “could be provided by organizations of either religious or secular motivations” are “fundamentally theological choices driven by the content of different religious doctrines.” *Cath. Charities*, 605 U.S. at 246, 252, 145 S.Ct. 1583 (citation modified). So too is the decision to practice and express one’s religion by offering spiritual healing through single-sex ritualistic massage treatments.

Because WLAD exempts only a small set of formal and orthodox religious practices while excluding “less ritualistic, more unorthodox, [and] less formal” religious practices, WLAD’s religious exemption is not, “on its face, ‘available on an equal basis’ to all denominations,” and therefore must be subjected to strict scrutiny. *Fowler*, 345 U.S. at 69, 73 S.Ct. 526; *Cath. Charities*, 605 U.S. at 251, 145 S.Ct. 1583 (quoting *Larson*, 456 U.S. at 247 n.23, 102 S.Ct. 1673). WLAD’s preferential treatment of comparable

6. Indeed, the Washington State Human Rights Commission’s interpretive guidance confirms this, explaining that the same activities at issue in *Catholic Charities* would not qualify for WLAD’s religious exemption. *HRC Guide*, *supra* (indicating that “other church-sponsored activities, such as a soup kitchen” may not qualify for the religious exemption).

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secular activities independently requires application of the same standard. *Tandon*, 593 U.S. at 62, 141 S.Ct. 1294.

A law survives strict scrutiny only if it is narrowly tailored to advance a compelling government interest. *Lukumi*, 508 U.S. at 531–32, 113 S.Ct. 2217. While eliminating discrimination may very well be a compelling interest, WLAD’s exemptions render the statute fatally “underinclusive in substantial respects.” *Id.* at 546, 113 S.Ct. 2217. WLAD’s “proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.” *Id.* Similarly, “the line [WLAD] has drawn among religious organizations cannot be described as narrow tailoring.” *Cath. Charities*, 605 U.S. at 254, 145 S.Ct. 1583. The “absence of narrow tailoring suffices to establish the invalidity” of WLAD. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217.

C. WLAD’s woke redefinition of “sex” undermines the hard-fought legal protections granted to women as a class and undercuts established criminal laws against voyeurism and indecent exposure.

This case illustrates the alarming human costs imposed by a social cause that blindly drives forward without the self-awareness to realize that it has begun to incinerate its own hard-won, historic achievements. For millennia, women around the world have been denied the opportunity to participate as equals in society—they were barred from property ownership, excluded from educational institutions, refused political participation,

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denied economic opportunity, and victimized by sexually deviant men without effective legal recourse.

One of the great triumphs of our nation, delayed and imperfect as it may have been, was the recognition that women as a class were entitled to the equal protection of the law. For more than six decades, the federal legislature and federal judiciary have enacted and enforced protections for women as a sex-based class. Civil Rights Act of 1964, Title VII, codified at 42 U.S.C. § 2000e-2; *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

But from its inception, the protection of women's rights has been predicated on the fact that men and women are different from one another, and immutably so. As Justice Ruth Bader Ginsburg recognized in her majority opinion in *United States v. Virginia*, “[p]hysical differences between men and women . . . are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (all but the first alteration in the original) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 91 L.Ed. 181, (1946)). And as a member of the legal team representing the female plaintiff in *Reed v. Reed*—the Supreme Court case to first extend the Equal Protection Clause to women—then-attorney Ruth Bader Ginsburg urged the Court to recognize that “[s]ex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth.” Brief of Petitioner–Appellant at 20, *Reed*, 404 U.S. 71, 92 S.Ct. 251. The immutability of sex, the recognizability of sex, and

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the physical distinction between the sexes were bedrock justifications for the protection of women as a class.

This all makes a great deal of sense since—to recognize and protect women as a class—the law must rely upon a coherent conception of what a woman is.⁷ “Classifying” women is synonymous with “distinguishing” them from non-women, namely “men.” If “[s]ex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ [and] to advance full development of the talent and capacities of our Nation’s people,” the law and its practitioners must be able to distinguish members of the class, women, from non-members, men. *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264 (all but the first and fourth alterations in original). Biological sex provides—and has always been relied upon to provide—the litmus test for membership in the protected class of women. See Ryan T. Anderson, Neither Androgyny nor Stereotypes: Sex Differences and the Difference They Make, 24 Tex. Rev. L. & Pol. 211, 217 (2019) (“The conceptual distinction between male and female based on reproductive organization provides the only coherent way to classify the two sexes.”).

But now an elite caste of high-profile activists, supported by some government leaders including some

7. *But see* Transcript of Oral Argument at 98–99, *Hecox v. Little* (Jan. 13, 2026) (No. 24-38), where in response to Justice Alito’s question, “For equal protection purposes, what does . . . it mean to be a boy or a girl or a man or a woman?,” Respondent’s counsel replied, “We do not have a definition for the Court.”

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federal judges, seek to erase sex as a coherent legal category. In its place they impose an irrational and unscientific redefinition of sex to encompass an unlimited and unknowable variety of “sexual orientations,” “gender expressions,” and “gender identities.” In so doing, they emasculate the law’s protections for women as a class. What meaning remains of “compensating women for particular economic disabilities they have suffered” when the “compensation” will be directed to men who have never suffered the same disabilities? *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264 (citation modified). What account can the law take of the “enduring” “physical differences between men and women” when the sexes are mischaracterized as fungible and mutable? *Id.* Without a stable legal definition of “women,” it becomes impossible to protect women from discrimination, let alone preserve their access to single-sex spaces in accordance with Equal Protection jurisprudence. By denying the immutability, recognizability, and physical distinctions of sex as historically recognized for millennia, today’s activists threaten to destroy both the justification for and mechanism of protecting women as a class only recently established in our nation.

The fact that the religious owners of a traditional Korean, women-only, nude spa are *prohibited by law* from preventing a naked adult male, who remains sexually attracted to women, from exposing himself to thirteen-year-old girls tragically illustrates the sick and twisted consequences of erasing sex as a coherent legal category. It is perversely ironic to see the categorical protections women spent decades fighting to obtain now weaponized to destroy their privacy and deny the enduring physical

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distinctions that define the sexes. *See* Panel Op. 78 (Lee, J., dissenting) (“Washington has perversely distorted a law that was enacted to safeguard women’s rights to strip women of protections.”). Such a result is not required by the law. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc) (holding that a school’s sex-based bathroom policy did not violate the Equal Protection Clause or Title IX). And such a result insults the moral principles of the overwhelming majority of Americans who recognize that sex is biologically based and who sensibly prefer female-only interactions for women and girls in athletics, restrooms, and similar situations. Brief of Women’s Declaration International USA as Amicus Curiae in Support of Petitioners’ Petitions for Rehearing and Rehearing En Banc at 1 n.1 (citing SurveyUSA, *Strong Majorities Prefer Female-Only Interactions for Women, Girls, in Athletics, Restrooms, Other Situations* (Sep. 28, 2023)).

The prime directive of the activist class redefining sex in every corner of our law and lives seems to be: “When women stand in the way of men who want to be women, the women be damned.” It is a tragedy that state governments like Washington’s have decided to privilege recently discovered, woke “rights” over natural rights that have been recognized and protected since before our Nation’s Founding. It is doubly so when a court like ours, entrusted to protect the time-honored rights enshrined in our Constitution, stands aside and pretends there is nothing to see here. The owners of Olympus Spa might fairly ask: “When the foundations are destroyed, what can the righteous do?”

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Washington's enforcement of WLAD's antidiscrimination mandate neuters even more basic protections the law has historically guaranteed to women. WLAD's ban on sex-based exclusions renders Washington's criminal laws on indecent exposure and voyeurism practically unenforceable in traditionally female-only spaces.

Voyeurism and indecent exposure laws primarily protect women and girls from the predations of sexually deviant men. *See* Brief of Women's Declaration International USA as Amicus Curiae in Support of Neither Party at 14 n.10 (citing U.S. Sent'g Comm'n, "Quick Facts: Sexual Abuse Offenders" (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Sexual_Abuse_FY21.pdf [<https://perma.cc/D2TB-ATEH>] (indicating that, in 2021, 93.6% of federal sexual abuse offenders were men)). But as it has been interpreted and enforced by Washington in this case, WLAD now requires entities like Olympus Spa to permit these crimes to be committed on its premises against its patrons. And simultaneously, WLAD as applied by Washington's government provides an effective legal shelter for sexually deviant men to prey upon vulnerable women and girls without the threat of prosecution.

Under Wash. Rev. Code § 9A.44.115, a person commits voyeurism if, "for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views . . . [a]nother person without that person's knowledge and consent while the person being viewed . . . is in a place where he or she would have a reasonable expectation of

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privacy.” Likewise, under Wash. Rev. Code § 9A.88.010 a person commits indecent exposure “if he or she intentionally makes any open and obscene exposure of his or her person . . . knowing that such conduct is likely to cause reasonable affront or alarm.” The crime is elevated to a gross misdemeanor when minors under the age of fourteen are present. *Id.*

When an adult male enters a female-only nude spa and observes naked female patrons for sexual gratification, he is guilty of voyeurism. Until approximately yesterday, even liberal judges were willing to recognize that men and women felt that they could maintain sufficient privacy while disrobing in a single-sex space but could not maintain their privacy while disrobing in the presence of the other sex. And the record in this case makes clear that the female patrons of Olympus Spa felt that their “reasonable expectation of privacy,” Wash. Rev. Code § 9A.44.115, was violated when men entered the facility—they repeatedly fled the scene and vowed never to return. But WLAD, as perversely applied by Washington, now virtually guarantees that male voyeurs can enter female-only spaces to satisfy their prurient interests with impunity simply by claiming that they identify as women.

Likewise, when an adult male enters a female-only spa and strips naked in front of its female patrons, he is guilty of indecent exposure. Again, the record here is clear that such indecent exposure is “likely to cause reasonable affront or alarm.” Wash. Rev. Code § 9A.88.010. And in Olympus Spa, where girls as young as thirteen attend with their mothers, the offense would, in

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some circumstances, be elevated to a gross misdemeanor. But again, Washington's perverse application of WLAD here insulates such sexual predators from prosecution by mandating that they be allowed to enter the spa as soon as they mouth the redoubtable phrase: "I am a woman."

It is a sad but certain fact that WLAD and similar "anti-discrimination" laws interpreted this way will be used by sexual deviants to prey on women in female-only spaces. Consider the case of Darren Merager, a 52-year-old man charged with nine counts of felony indecent exposure under California Penal Code § 314 after allegedly exposing his erect penis in the female spa area of the Korean Wi Spa in Los Angeles. Lois Beckett and Sam Levin, *Person charged with indecent exposure at LA Spa*, *The Guardian* (Sept. 2, 2021), <https://www.theguardian.com/us-news/2021/sep/02/person-charged-with-indecent-exposure-at-la-spa-after-viral-instagram-video> [<https://perma.cc/XZ2H-4VSA>]; Jeremy Lee Quinn, *Exclusive: WiSpa Suspect Not Guilty on All Nine Counts of Indecent Exposure*, *Los Angeles Magazine* (June 1, 2025), <https://lamag.com/news/wispa-suspect-not-guilty-on-all-nine-counts-of-indecent-exposure/> [<https://perma.cc/G7UY-MALN>]. Merager, a registered sex offender with a long history of previous indecent exposure charges, gained access to the women's side of the spa by claiming that he identified as a woman. Like WLAD, California Civil Code § 51 prohibited Wi Spa from excluding males from female spaces. Merager's ultimate acquittal on all counts underscores how the incoherence of redefining "sex" in civil statutes shields male offenders from criminal accountability.

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For women nationwide, this is not progress. This is regression. Confusion in civil discrimination codes now compels tolerance of the very same conduct that the criminal code simultaneously penalizes. The instances of male voyeurism and indecent exposure in female spaces will continue to grow in number. *See* Brief of Women’s Declaration International USA as Amicus Brief in Support of Neither Party at 12–19. Sadly, the crowd of women and girls who have been victimized by men in formerly safe and private female spaces will grow as well.

III.

Finally, I’ll respond briefly to my colleagues’ discomfort with how I’ve written this dissent. My distressed colleagues appear to have the fastidious sensibilities of a Victorian nun when it comes to mere unpleasant words in my opinion, yet exhibit the scruples of our dearly departed colleague Judge Reinhardt when it comes to the government trampling on religious liberties⁸ and exposing women and girls to male genitalia.⁹ That kind of selective outrage speaks for itself. The public

8. *See, e.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *cert. granted, judgment vacated sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 127 S.Ct. 1484, 167 L.Ed.2d 225 (2007).

9. *See, e.g., Nunez v. Holder*, 594 F.3d 1124, 1132, 1137–38 (9th Cir. 2010) (opining that our court had “moved away from . . . austere moral values” before characterizing as “relatively harmless” (1) a man who, “in a fit of ‘road rage,’ exposed his penis and yelled” a vulgar remark at a female driver and (2) a boy who intentionally exposed himself to his “two female classmates”).

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deserves a court that is *actually* trustworthy. We should be earning that trust, not demanding it like petty tyrants.

Yes, the introduction to this dissent intentionally uses indecorous language. But that is quite literally what this case is about. Male genitalia is precisely (and only) what the Spa, for religious reasons, objects to admitting into its female-only space. The fact that so many on our court want to pretend that this case is about anything other than swinging dicks is the very reason the shocking language is necessary. The panel majority uses slick legal arguments and deflection to studiously avoid eye contact with the actual and horrific consequences of its erroneous opinion. The “ordinary Americans” affected by the majority’s opinion don’t have that luxury. Squirm as we might, I think it’s only fair for our court to have a small taste of its own medicine.

Sometimes “dignified and civil” words are employed to mask a legal abomination. Or, to put it in vernacular perhaps more palatable to my colleagues’ Victorian sensibilities: “In law, what plea so tainted and corrupt, / But, being seasoned with a gracious voice, / Obscures the show of evil?”¹⁰

Sometimes coarse and ugly words bear the truth.¹¹ I coarsely but respectfully dissent from our court’s willingness to leave this travesty in place.

10. William Shakespeare, *Merchant of Venice* act 3, sc. 2, ll. 75–77.

11. *See, e.g.*, Matthew 3:7, 12:34.

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TUNG, Circuit Judge, joined by R. NELSON, BUMATAY, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

Let us be clear about what the law in Washington requires. Under its law, the State can disregard a small-business owner’s Christian beliefs and force her family-run Korean spa to allow a nude man (who claims to be a woman) into an intimate space reserved for its female patrons. Yet under that same law, private clubs embracing secular values can refuse entry to that man. Schools and cemeteries can refuse service to that man, too, so long as they are run by institutions deemed “sectarian.” Thus, while the law purports to protect any Washington resident from so-called gender-identity “discrimination,” the State’s prohibition exempts some secular organizations and certain religious ones—it just does not exempt the small business in its exercise of its religious beliefs here.

How is this at all a “neutral law of general applicability”? *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). It is not. The panel’s conclusion to the contrary—immunizing the law from any serious First Amendment scrutiny—should have been vacated. I dissent.

* * *

The Supreme Court has told us what to do in these kinds of cases. “[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they

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treat *any* comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 593 U.S. 61, 62, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam) (emphasis in original).

Washington discriminates against religious exercise in just that way. The State prohibits “discrimination” against men who identify as women or against women who identify as men, declaring that “such discrimination . . . menaces the institutions and foundation of a free democratic state.” Wash. Rev. Code §§ 49.60.010, 49.60.030, 49.60.040(29). To address that “state concern” (Wash. Rev. Code § 49.60.010), the law grants “[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.” Wash. Rev. Code § 49.60.030(1)(b).

But despite the State’s asserted concern, the law *exempts* certain organizations from its prohibition on gender-identity “discrimination”: “any institute, bona fide club, or place of accommodation, which is by its nature distinctly private . . . [or] any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.” Wash. Rev. Code § 49.60.040(2).

The existence of those exemptions refutes the law’s purported neutrality and general applicability. The exemptions permit secular private clubs to refuse service to a person who claims a sex different from his actual sex, while a business motivated by religion (such

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as the business here) and engaged in the same activity is subject to a penalty by the State. Accordingly, the law of Washington State treats a “comparable secular activity more favorably than religious exercise” and thus should have been subject to strict scrutiny. *Tandon*, 593 U.S. at 62, 141 S.Ct. 1294.

The application of strict scrutiny is not defeated just because it is claimed that the “exemption for private clubs appl[ies] equally to secular and non-secular aggregations.” Amended Op. 25 (asserting that “this is not a situation where a ‘comparable secular activity [is treated] more favorably than religious exercise’”).¹ Strict scrutiny is triggered “whenever [the law] treat[s] *any* comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62, 141 S.Ct. 1294 (emphasis in original). Here, the State’s exemption allows “any” one comparable secular activity (a private club refusing

1. The panel majority wrongly asserts that Appellants “waived” their argument about private clubs. Amended Op. 24–25. Appellants did not intentionally relinquish a known right and so did not “waive” the argument. *See Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Indeed, Appellants have preserved it: their complaint contended that the law was “not neutral nor generally applicable” (2-ER-130, 139, 144); the issue was briefed and argued before the district court (*see* 2-ER-19, 54; 3-ER-314–15, 3-ER-345–46, 361, 405–07); Appellant’s opening brief discussed the private-clubs carveout (*see* Opening Br. 11, 32); the State argued in response that the carveout did not render the law unconstitutional (*see* Ans. Br. 41–45); and Appellants replied (*see* Reply Br. 9–12). In any event, the panel majority addressed the argument on the merits resulting in an erroneous holding that warrants review.

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services on secular grounds) to be treated more favorably than religious exercise (a business refusing services on religious grounds). Indeed, “[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.” *Id.* Thus, the fact that some secular public accommodations are treated the same as the religious exercise here does not preclude strict scrutiny. Where, as here, a comparable secular activity is treated more favorably than religious exercise, strict scrutiny applies.

Any response that the two activities are not “comparable” would fail. “[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” *Id.* Because the “asserted government interest” here is the elimination of “discrimination against *any* of its inhabitants because of” “gender identity” (Wash. Rev. Code §§ 49.60.010, 49.60.040(29) (emphasis added)), a secular private club’s refusal to serve a man claiming to be a woman, and a religiously motivated refusal by a business to serve that same person, are “comparable” activities. *Tandon*, 593 U.S. at 62, 141 S.Ct. 1294. Both activities result in “discrimination” because of “gender identity”—“a matter of state concern[.]” Wash. Rev. Code §§ 49.60.010, 49.60.040(29). But because the law treats the former (secular) activity more favorably than the latter (religious) activity, the law should be strictly scrutinized.

It might be suggested that the State’s statutory carveout for private clubs reflects that the “asserted

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government interest” is, in fact, protection from discrimination in public, but not private, accommodations. If that suggestion were correct, then secular private-club activity would not be “comparable” to the business’s religiously motivated activity. But that suggestion is not correct. What the State “asserts” as its interest is one thing; how it in fact enforces that interest is another; and the mismatch between the two is what can cause a law to not be neutral or generally applicable. Here, the State has expressly “declare[d]” (or asserted) that “practices of discrimination against any of its inhabitants” on a gender-identity basis “are a matter of state concern” and that “such discrimination . . . menaces the institutions and foundation of a democratic free state.” Wash. Rev. Code §§ 49.60.010, 49.60.040(29). That asserted interest is categorically expressed without qualification for where the discrimination occurs—all inhabitants should be protected against it. It is impossible to square the State’s categorical declaration—that discrimination is a “matter of state concern” and “menaces” free institutions—with the suggestion that discrimination is a “concern” for the State and “menacing” *only in some places* but not in many others. Measured against its categorically asserted interest, the State’s enforcement of that interest is pockmarked with exceptions that render its law not neutral or generally applicable.

The logic that statutory carveouts always reflect an “asserted government interest” proves too much. If that logic were accepted, then such carveouts (no matter how gerrymandered to target a particular religious exercise) could *never* be subject to strict scrutiny, since the State

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could always say that its statutory exceptions are what delineate the “asserted government interest,” so that any activity falling outside those exceptions would never be “comparable.” That is not the law. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), the Supreme Court held that the statutory exceptions there established that a law prohibiting religious animal sacrifice was not neutral or generally applicable. *Id.* at 542–46, 113 S.Ct. 2217. If the asserted interest were always a perfect match with the statutory exceptions, the case would not have come out the way it did.

Plus, any claim that the “asserted government interest” is restricted to eradicating all discrimination in just public accommodations—and not private ones (as supposedly demonstrated by the statutory carveout for private clubs)—is belied by the fact that the State has exemptions even for certain *public* accommodations. *See, e.g.*, Wash. Rev. Code § 49.60.040(2) (schools, crematories, cemeteries operated by religious or sectarian institutions). Would the State’s position then be that it has an “asserted government interest” against discrimination . . . *except* for these places too? Again, that logic—that the law’s exceptions always mark the contours of the asserted government interest—would prove too much.

Last, one cannot save Washington’s law from strict scrutiny by claiming that it exempts *some* religious exercises. That just reinforces the law’s lack of neutrality and general applicability. The law exempts “any” school, crematory, mausoleum, or cemetery operated

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by a “religious or sectarian institution.” Wash. Rev. Code § 49.60.040(2). But, as Judge VanDyke explains (*see ante* at 69–74), such arbitrary line-drawing, which protects only certain religious exercises (of sectarian institutions operating certain businesses) but not other religious exercises (of family-run businesses), offends our Constitution’s guarantee of religious liberty. *Cf. Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 97 L.Ed. 828 (1953). Consideration of First Amendment rights might have spurred the State into enacting these partial religious exemptions (and the statutory carveout for private clubs) in the first place. But that does not excuse the law’s lack of neutrality and general applicability. Righting half the wrong does not right all of the wrong. Rather than immunize State law from scrutiny, these preexisting exceptions reinforce the need for further scrutiny here.

* * *

We have strayed far from Founding-era principles (and decency) when the State can force a nude man (claiming to be a woman) into a room of women against the sincerely held religious beliefs of the host. In our country’s history, “the right to religious liberty” enjoyed “broad protection,” but it did not extend to “conduct that would endanger ‘the public peace’ or ‘safety.’” *Fulton v. City of Philadelphia*, 593 U.S. 522, 571–78, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (Alito, J., concurring in the judgment). How ironic that this court would now risk endangerment to public peace or safety, not to protect religious liberty, but to advance a secular ideology *at the expense of* that liberty.

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Rather than accept the distortions in our Free Exercise jurisprudence that have led us here, we should have corrected course. I dissent.

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COLLINS, Circuit Judge, dissenting from the denial of rehearing en banc:

Based on somewhat different reasoning, I agree with Judge Lee’s conclusion that the relevant practices of Olympus Spa that are at issue in this case do not violate the Washington Law Against Discrimination (“WLAD”), *see* Rev. Code Wash. § 49.60.010 *et seq.*—thereby rendering it unnecessary to address any “thorny constitutional issues” in this case. *See Olympus Spa v. Armstrong*, 138 F.4th 1204, 1225 n.1 (9th Cir. 2025) (Lee, J., dissenting); *see also* Amended Opin. at 38 n.1 (Lee, J. dissenting). But the panel majority’s opinion instead holds that the statute “unambiguous[ly]” applies to Olympus Spa’s conduct, and on that basis it further declares categorically that Olympus Spa “cannot” obtain any relief “from the First Amendment,” either under its Free Exercise Clause or its Free Speech Clause. *Olympus Spa*, Amended Opin. at 10, 15 (majority opinion). In my view, the panel majority’s opinion rests on a fundamentally flawed reading of the statute, and that error vitiates the entirety of the panel majority’s analysis of the important constitutional issues it unnecessarily decides. We should have taken this case en banc.

Because (as both the panel majority and dissent recognize) there is no Washington Supreme Court case that addresses the relevant scope of WLAD here, this court must construe the act in accordance with general principles of statutory interpretation under Washington law. That means (again, as both the panel majority and dissent recognize) that one must begin with the plain meaning of the statute’s language. *See Floeting v.*

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Group Health Coop., 192 Wash.2d 848, 434 P.3d 39, 41 (2019) (holding that, in construing WLAD, as with other statutes, “the court will give effect to the statute’s plain language,” and that, “[i]n determining if the statute is plain, [the court] will consider the ordinary meaning of words, basic rules of grammar, and statutory context”). Here, § 49.60.030 of WLAD guarantees the “right to be free from discrimination because of,” *inter alia*, “sex” or “sexual orientation,” with respect to the “full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.” Rev. Code Wash. § 49.60.030(1)(b). The definitional section of WLAD states that “[s]exual orientation’ means heterosexuality, homosexuality, bisexuality, and gender expression or identity.” *Id.* § 49.60.040(29). That section further defines the term “gender expression or identity” to “mean[] having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.” *Id.*

Plugging the phrase “gender expression or identity” into § 49.60.030’s prohibition of discrimination “because of . . . sexual orientation,” the panel majority concludes that discrimination “because of . . . gender identity or expression” *simpliciter* is prohibited by WLAD. *Olympus Spa*, Amended Opin. at 15–16. Judge Lee disputes that conclusion, *see id.* at 30–35 (Lee, J., dissenting), but for present purposes, I will assume *arguendo* that the panel majority is correct on this point. In my view, however, it

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does not follow that Olympus Spa engaged in discrimination “because of . . . gender identity or expression” here.

Under the panel majority’s view that “gender identity” is a “standalone protected class” under WLAD, *see Olympus Spa*, Amended Opin. at 42 (Lee, J., dissenting), there would be no doubt that WLAD prohibits a hotel from refusing to rent a room to a person because he is transgender or for a shoe shop to decline to sell shoes to a person for the same reason. And such a prohibition would be neutral and generally applicable and would readily survive rational basis scrutiny. If that were what is at issue here, this would be an easy case. But the discrimination claim presented in this case is a good deal more nuanced than the panel majority admits, because it does not fit that simple paradigm.

As the State concedes in its answering brief, Olympus Spa’s entrance policy to its nude Spa “focuses on the genitals of patrons.” Specifically, the Spa’s policy is that no person with male genitalia is allowed into the Spa, precisely due to its all-nude environment. As Judge Lee explained:

The Spa limits entry to biological women and post-operative transgender women (*i.e.*, people who were born biological males but underwent sex-reassignment operations). The Spa will treat biological women *and post-operative transgender women* of any sexual orientation, race, religion, or any other protected status. To put it plainly, Olympus

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Spa—a female-only spa—provides services to anyone without male genitalia.

Olympus Spa, Amended Opin. at 34–35 (Lee, J., dissenting) (emphasis added). The panel majority agrees on this point as well. *Id.* at 28 (majority opinion) (noting that the Spa will admit “any woman, except a transgender woman who has not yet received gender confirmation surgery” and who therefore still possesses male genitalia).

Given this crucial fact, I do not see how Olympus Spa’s policy can be said to discriminate “*because of*” gender identity or expression. Rev. Code Wash. § 49.60.030(1) (emphasis added). In contrast to the above examples involving a refusal to provide a hotel room or to sell shoes to a transgender person, Olympus Spa simply does not care whether a person seeking admittance is transgender; it cares only whether the person has male genitalia. If the person lacks male genitalia, the person will be admitted *regardless* of whether that person was born without male genitalia or had them removed. A transgender person who was born with female genitalia will be admitted, even though that person identifies as a male, and a transgender person who was born with male genitalia will be admitted if that person has had those genitalia removed. Because the *only* factor at play is the possession of male genitalia, there is no sense in which a person’s “transgender” status can be said to be a “substantial factor” in Olympus Spa’s admissions policy. *State v. Arlene’s Flowers, Inc.*, 193 Wash.2d 469, 441 P.3d 1203, 1220 (2019). For the same reason, Olympus Spa’s exclusively genitalia-based line—which rests on the unique privacy, modesty, and even potentially safety concerns associated with having

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male genitalia in its all-nude space—cannot be said to be a pretext or proxy for transgender discrimination. *Id.* at 1220–22. Accordingly, the Spa’s policy does not amount to “discrimination because of” “gender identity or expression,” and it therefore does not violate WLAD.

In reaching its contrary conclusion that the Spa engages in discrimination because of gender identity, the panel majority’s reasoning rests on the following one sentence: “The Spa’s entrance policy denies entry to preoperative transgender women whose ‘gender identity’ or ‘appearance,’ as defined in WLAD, differ from *the physical traits* associated with postoperative or cisgender women.” *Olympus Spa*, Amended Opin. at 15 (emphasis added). But this ignores the plain language of the statute, which says nothing about a person’s current “physical traits.” Rather, the statute defines “gender expression or identity” as denoting one’s actual or perceived gender identity “whether or not” it “is different from that traditionally associated *with the sex assigned to that person at birth*.” Rev. Code Wash. § 49.60.040(29) (emphasis added). For the reasons I have explained, it is undisputed and indisputable that Olympus Spa does not care whether a potential patron has any particular real or perceived “gender identity,” nor does it care whether a patron’s gender identity does or does not match “the sex assigned to that person at birth.” *Id.* The Spa cares only whether the person has male genitalia. That is not “discrimination because of” “gender identity.”¹

1. The State does not contend (and could not contend) that the Spa’s discrimination based on male genitalia constitutes unlawful discrimination based on “sex,” such that it would violate WLAD on

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Indeed, under the panel majority’s reading of WLAD, the Spa cannot ignore gender identity but instead *must take it into account*. That is, under the panel majority’s construction of WLAD, the Spa must modify its no-male-genitalia rule, but *only* for those patrons with male genitalia *who identify as female*, and not for those who identify as male. It is a little Orwellian to assert that a “law against discrimination” based on a characteristic should be construed to *require* differential treatment based on that characteristic.

I acknowledge that my plain-language reading of WLAD is directly contrary to the view that the Washington Human Rights Commission has adopted in its regulations implementing WLAD. *See* WASH. ADMIN. CODE § 162-32-060(1) (“All covered entities shall allow

that alternative ground. In Washington, as elsewhere, it has long been accepted and understood that the maintenance of separate public restrooms, locker rooms, and shower facilities on the basis of sex does not constitute unlawful sex discrimination in light of the privacy, modesty, and safety issues arising from the “[p]hysical differences between men and women.” *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *see also id.* at 550 n.19, 116 S.Ct. 2264 (noting that “[a]dmitting women to [the Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements”); *cf. Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (stating that separate restroom facilities do not violate equal protection principles, because that “gender classification *is justified* by acknowledged differences” between men and women and is confirmed by “society’s undisputed approval of separate public rest rooms for men and women based on privacy concerns”).

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individuals the use of gender-segregated facilities, such as restrooms, locker rooms, dressing rooms, and homeless or emergency shelters, that are consistent with that individual's gender expression or gender identity."). But as the panel majority correctly notes, "[t]he unambiguous statute is the statute and it, not the regulations, controls." *Olympus Spa*, Amended Opin. at 17.

For the foregoing reasons, I agree with Judge Lee's bottom-line conclusion that "Olympus Spa's entry policy . . . does not run afoul of WLAD." *Olympus Spa*, Amended Opin. at 43 (Lee, J., dissenting). Because the panel majority incorrectly concluded otherwise, and thereby wrongly proceeded unnecessarily to resolve the "thorny constitutional issues" presented in this case, *id.* at 38 n.1, we should have taken this case en banc. I respectfully dissent from our failure to do so.

**APPENDIX B — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON AT SEATTLE,
DATED NOVEMBER 13, 2023**

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

CASE NO. 22-CV-00340-BJR

OLYMPUS SPA, *et al.*,

Plaintiffs,

v.

ANDRETA ARMSTRONG, MADISON IMIOLA,

Defendants.

November 13, 2023, Decided;
November 13, 2023, Filed

**ORDER GRANTING MOTION
TO DISMISS AMENDED COMPLAINT**

This matter comes before the Court on a Motion to Dismiss filed by Defendants Andreta Armstrong, Executive Director of the Washington State Human Rights Commission (“HRC”), and Madison Imiola, an investigator with HRC (“Defendants”), seeking dismissal of the Amended Complaint filed by Plaintiffs Olympus Spa (the “Spa”), “Jane Doe Employee 1,” and “Jane Doe Patron 1” (“Plaintiffs”).¹

1. The original complaint was also brought by Myoon Woon Lee and Sun Lee, the owner and president, respectively, of Olympus Spa.

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This lawsuit was originally filed as a First Amendment challenge to HRC’s application of the Washington Law Against Discrimination (“WLAD”) to Olympus Spa’s admittance policy. *See* Compl., Dkt. No. 1; Wash. Rev. Code § 49.60 *et seq.* On June 5, 2023, the Court issued an order granting Defendant’s Motion to Dismiss the Complaint and dismissed Plaintiffs’ Free Exercise, Free Speech, and Free Association claims. At the same time, the Court granted Plaintiffs leave to file an amended complaint and a second opportunity to state claims upon which relief could be granted. *See* Order Granting Motion to Dismiss, Dkt. No. 21 (“June 5 Order”). Plaintiffs filed a timely amended complaint, restating their First Amendment claims and adding federal procedural and substantive Due Process Clause claims and a Religious Freedom claim under Article I, Section 11 of the Washington State Constitution. Am. Compl., Dkt. No. 24. Defendants again moved to dismiss Plaintiffs’ claims. Dkt. No. 28. Having reviewed the briefs and exhibits filed in support of and opposition to the motion, the Court finds and rules as follows.

I. BACKGROUND

The facts of this case were thoroughly outlined in the Court’s June 5 Order and need not be repeated in full here. In sum, Plaintiff Olympus Spa, with two locations in the Great Puget Sound Area, is a spa “specifically designed for women.” Am. Compl., ¶¶ 3, 11. The services offered there “are closely tied to the Korean tradition,” meaning patrons

See Compl., Dkt. No. 1, ¶¶ 4 and 5. These individuals are not named plaintiffs in the Amended Complaint.

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are “require[d] . . . to be naked” during certain services. *Id.*; *see also id.*, ¶ 21 (“It is Olympus Spa’s business purpose to provide traditional Korean kiln saunas and exfoliation therapy experiences.”). As noted, patrons are “typically fully naked” while utilizing the Spa’s massage, bath, and other areas and thus “have visual access” to other nude patrons. *Id.*

Until 2021, Olympus Spa maintained a “biological women” only policy, under which it restricted admission to women, which it defined as individuals who “physically present[] in the nude as . . . female.” *Id.*, ¶ 26, 39. Thus the Spa’s policy was to admit transgender women only if they had “gone through post-operative sex confirmation surgery.” *Id.*, ¶ 26. Plaintiffs attribute the policy to the owners’ “traditional, theologically conservative” Christian values. *Id.*, ¶ 25. The owners “hold the conviction that a male and female should not ordinarily be in each other’s presence while in the nude unless married to each other.” *Id.*

In February 2020, HW²—a transgender woman who “identifies as a woman” who at the time had not undergone sex reassignment surgery—filed a complaint with HRC. HW alleged that she had gone to Olympus Spa in January 2020 but was denied entry “because of [her] sexual orientation.” Am. Compl., Ex. 3 at 2. According to the complaint, HW was told “that transgender women without surgery are not welcome because it could make

2. Defendants request that complainant be referred to by her initials HW, as she has received threats of violence as a consequence of her association with this lawsuit.

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other customers and staff uncomfortable.” *Id.* Plaintiffs have consistently denied that HW visited the Spa in person, noting in their Amended Complaint that HW has made statements to the media indicating she merely made a telephone call to the Spa inquiring about its admittance policy. Am. Compl., ¶ 35. Plaintiffs do not deny that in February 2020, HW would not have been admitted under its then-existing policy.

HRC subsequently served the Spa with a Notice of Complaint of Discrimination. Am. Compl., Ex. 3. The Notice outlined HW’s allegations and sought the Spa’s written response. It also apprised Olympus Spa of HRC’s early resolution services: “The WSHRC may assist the parties in early resolution of this Complaint through joint fact finding conferences and/or settlement negotiation which gives the parties an opportunity to resolve the issues . . . without extensive investigation or expenditure of resources.” *Id.* Olympus Spa was invited to contact the assigned Civil Rights Investigator, Defendant Madison Imiola, if it was interested in settlement. *Id.*

In subsequent correspondence with HRC, Plaintiffs defended the Spa’s entry policy. Am. Compl., Ex. 3 at 10-12. The Spa provided HRC with a copy of that policy, which stated, “Biological women are welcome[.] It is the policy of Olympus Spa not to discriminate on the basis of race, color, national original, sex, age, or disability in its programs or activities, as required by applicable laws and regulations.” Am. Compl., Ex. 3 at 13. The Spa’s president further explained that “[o]ur attendance rules limit guests to females only, including post-operative transsexuals.”

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Id. at 11. Plaintiffs also denied that HW had visited the Spa. *Id.* at 18. In response, HRC, through Imiola, informed Plaintiffs that by maintaining a policy that refused entry to transgender women who had not had surgery, the Spa was violating the WLAD because it discriminated on the basis of gender identity. *Id.* at 15. Imiola again offered the Spa “the opportunity to enter into a Pre-Finding Settlement (PFS) Agreement.” *Id.* at 15. As her letter explained, such settlement agreements are “used to resolve the issues of a complaint prior to completing the investigative process.” *Id.* Such an agreement would not require an admission of guilt, and HRC “would take no further action on the issues of the complaint.” *Id.* In sum, a PFS Agreement was Olympus Spa’s “opportunity” to “revise [its] policies and practices,” bring itself “into compliance with the law, avoid the costs of non-compliance and litigation, and reduce the likelihood of future complaints.” *Id.*

The Spa ultimately removed the “biological women only” entry policy from its website and elected to enter into a PFS agreement with HRC. *See* Am. Compl., Ex. 3 at 22, 30-32. Under the agreement, Olympus Spa was required to complete WLAD training within 60 days. *Id.* It was allotted 60 days to “[i]mplement and/or revise existing company policies as necessary to ensure their compliance with the [WLAD].” *Id.* at 36. The PFS agreement also reserved the Spa’s right to challenge HRC’s application of the WLAD to the entry policy. *Id.* at 37. In October 2021, HRC issued a notice of final agency action and officially closed the complaint. *See id.* at 34-39.

Plaintiffs first brought this Section 1983 suit alleging that enforcement of the WLAD against them violated

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their First Amendment rights to free exercise of religion, freedom of speech, and freedom of association. Compl., Dkt. No. 1 at 1, 13-15. Plaintiffs sought declaratory relief and asked the Court to “preliminarily and permanently” enjoin HRC from “enforcing the public accommodation law and implementing regulations” against them. *Id.* at 15. The HRC brought a motion to dismiss the complaint, which the Court granted on June 5, 2023. Dkt. No. 21. However, as indicated *supra*, the Court granted Plaintiffs leave to amend their complaint. Plaintiffs filed an Amended Complaint on June 29, 2023 (and a praecipe to that filing on July 6, 2023), restating the three First Amendment claims and adding two more claims, for violation of their Due Process rights under the Fourteenth Amendment, and for violation of the Washington State Constitution.

II. DISCUSSION

A. Rule 12(b)(6) Motion to Dismiss

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs. Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). At this stage, the Court accepts as true all factual allegations in the complaint and construes them in the light most favorable to the nonmoving party. *Gonzalez v. Google LLC*, 2 F.4th 871, 885 (9th Cir. 2021). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct.

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1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); see Fed. R. Civ. P. 8(a)(2) (a plaintiff must make a “short and plain statement of the claim showing that the pleader is entitled to relief”). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

B. Free Exercise, Free Speech, and Free Association Claims

The Amended Complaint includes Plaintiffs’ original “Free Exercise of Religion,” “Freedom of Speech,” and “Right of Association” claims, which the Court has already thoroughly analyzed and dismissed. Am. Compl., ¶¶ 53-58; 59-66; 67-85; see June 5 Order, at 27-38. The few additional facts included in the Amended Complaint do not accomplish what Plaintiffs hope, which is to raise an inference of a “clear and impermissible hostility” HRC might harbor towards Plaintiffs’ religious beliefs. *Cf. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. 617, 138 S. Ct. 1719, 1729, 201 L. Ed. 2d 35 (2018). These new allegations include that within weeks of filing her complaint, HW underwent gender confirmation surgery that would apparently have qualified her for admittance to the Spa. Am. Compl., ¶ 35. Plaintiffs claim that HRC could and should have investigated HW’s allegations and determined that the surgery, in Plaintiffs’ view, “mooted” her complaint. While Plaintiffs argue that this failure is somehow evidence of religious animus, they ignore

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that the violation HRC ultimately charged the Spa with was maintaining a “biological women only” entry policy, apart from whether or not the Spa denied HW entry. *See* Am. Compl., Ex. 5 (“After reviewing the response you submitted on behalf of Olympus Spa, the evidence in this investigation supports that you[r] company’s ‘biological women’ policy is not compliant with the [WLAD].”). In other words, regardless of whether HW had a discrete claim of discrimination against the Spa, HRC had determined, pursuant to its statutory directive, that the Spa was in active violation of the WLAD. *See* Wash. Code. Rev. 49.60.240 (authorizing HRC to determine whether “there is reasonable cause for believing that an unfair practice has been or is being committed”). For similar reasons, new allegations regarding HW’s history of transgender activism have no material impact on HRC’s charge of discrimination.³ Furthermore, Plaintiffs’ unsupported arguments that HRC’s religious animus is evidenced by its use of the fairly common term “cisgender” (*see, e.g., Parents for Privacy v. Barr*, 949 F.3d 1210, 1240 (9th Cir. 2020) (discussing policy “that allows transgender students to use school bathroom and locker facilities that match their self-identified gender in the same manner that cisgender students utilize those facilities”)); and by

3. While Defendants also assert that Plaintiffs’ allegations that HW never went to the Spa in person are new, this issue was raised in the original complaint and addressed in the Court’s previous order. *See* June 5 Order at 7, n. 3 (“Plaintiffs dispute the veracity of [HW’s] complaint Olympus Spa performed an internal investigation “to determine when the alleged discrimination happened and . . . who denied entry” to [HW] but “found no record” of [HW] having been at either the Tacoma or Lynnwood locations.”).

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the fact that the Washington Attorney General and HRC “have recently engaged in highly publicized litigation against those who hold traditional Biblical views including Union Gospel Mission and Seattle Pacific University,” are patently frivolous. *See* Am. Compl., ¶¶ 40, 51.

Other than the arguments listed above, Plaintiffs offer no new grounds for the Court to change its original opinion. Leave to amend the original Complaint was not intended as an opportunity for Plaintiffs to relitigate the facts and law that have already been adjudicated. The Court will not revisit its original rulings regarding these claims. They are, accordingly, again dismissed on the grounds stated in the Court’s original order.

C. Due Process Claims

The new Fourth Cause of Action outlined in the Amended Complaint is brought against Defendant Imiola for violation of the Fourteenth Amendment Due Process Clause of the U.S. Constitution. Am. Compl., ¶¶ 86-92. That clause provides “no state shall . . .deprive any person of life, liberty, or property, without due process of law.” U.S. Const., amend. XIV, § 1. Plaintiffs claim that their procedural due process rights were violated because Imiola failed to “tak[e] evidence as to whether [complainant] actually ‘went to...the spa,’” and was “uninterested in whether the alleged predicate act occurred.” Am. Compl., ¶¶ 87-89; *see also id.*, ¶ 33 (HRC failed “to properly investigate false claims”); ¶ 44 (HRC “is entirely incurious as to whether the predicate fact of the presence of [complainant] at the spa is true or not.”).

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Plaintiffs also assert a violation of their substantive due process rights, claiming that Imiola's actions deprived them "of the right to provide a defense with a presumption of innocence" and that "[a] determination of guilt by mere accusation violates [their] substantive due process rights." *Id.*, ¶¶ 90, 91.

Defendants seek dismissal of both the substantive and the procedural due process claims. The Court addresses each in turn.

1. Substantive Due Process Claim

To state a claim for a substantive due process violation, a plaintiff must allege (1) a valid liberty or property interest, that (2) the government infringed in an arbitrary or irrational manner. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926). As Plaintiffs acknowledge, a substantive due process claim requires "a 'careful description' of the asserted fundamental liberty interest." Pls.' Resp. at 12 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

Plaintiffs fail to articulate a "careful description" of a fundamental liberty interest that is cognizable in the context of a substantive due process claim. Instead, the "asserted liberty interest" for which they seek substantive due process protection is "freedom of speech, religion, and association." See Pls.' Resp. at 12. It is black-letter law, however, that "[w]here a particular Amendment 'provides an explicit textual source of constitutional

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protection’ against a particular sort of government behavior, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.” *Addison v. City of Baker City*, 258 F. Supp. 3d 1207, 1234-35 (D. Or. 2017), *aff’d*, 758 F. App’x 582 (9th Cir. 2018) (citing *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). Thus a claim for violation of rights explicitly guaranteed under the First Amendment—here, the freedoms of speech, religious exercise, and association—cannot be vindicated under the Due Process Clause. *See Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001) (“In this case, because the First Amendment explicitly covers [plaintiff’s] claim, the First Amendment, not the Fourteenth Amendment’s guarantee of substantive due process, should guide the analysis of the claims.”) (citations omitted, cleaned up).

The other purported “fundamental liberty interests” Plaintiffs seek to defend are equally unsuited to a substantive due process analysis. First, Plaintiffs argue that it was a violation of their right to substantive due process that they were denied a “presumption of innocence” in the course of HRC’s investigation into HW’s complaint. *Am. Compl.*, ¶¶ 90-91 (“A determination of guilt by mere accusation violates the substantive due process rights of Olympus Spa as guaranteed by the Fourteenth Amendment.”). But Plaintiffs do not cite any legal authority for the novel proposition that the right to substantive due process guarantees a “presumption of innocence” in a civil proceeding such as the one initiated

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by HW's complaint to HRC. Cf. Defs.' Mot. at 11 (citing *Hamid v. City of Chicago*, No. 98 C 3789, 1999 U.S. Dist. LEXIS 14745, 1999 WL 759423, at *3 (N.D. Ill. Sept. 2, 1999) ("no right to a presumption of innocence in civil proceedings"); *Leyh v. Property Clerk of the City of New York Police Dep't*, 774 F. Supp. 742, 746 (E.D.N.Y. 1991) ("the 'presumption of innocence' is inapplicable to a non-criminal proceeding.")). In any event, Plaintiffs admitted all facts underlying HRC's finding of discrimination, and agreed to remediate the violation even before entering into the PFS agreement. See Am. Compl., Ex. 4 (Olympus Spa Entry Policy, welcoming "biological women"); Ex. 10 at 30 ("Respondent agrees that, during the investigation of this complaint and prior to execution of this agreement, it has adopted new language on its website reflecting a non-discriminatory policy that comports with RCW 49.60."). Indeed, HRC did not make a "determination of guilt" on this issue at all; the PFS explicitly provided that "this agreement does not constitute a determination by the Commission that any violation of [the WLAD] has or has not occurred." *Id.*

Plaintiffs also allege that Imiola failed to follow the prescribed procedures outlined in the WLAD by not investigating HW's claims to determine whether HW had, in fact, physically visited the Spa, or had merely called ahead to determine whether she would be admitted. Plaintiffs suggest that consequently, the PFS was "arbitrary and capricious," and therefore violated Plaintiffs' substantive due process rights. But Plaintiffs were explicitly given a choice between a full investigation or settlement, and freely chose the latter. See Am. Compl.,

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Ex. 3 at 1 (“The WSHRC may assist the parties in early resolution of this Complaint through joint fact finding conferences and/or settlement negotiation which gives the parties an opportunity to resolve the issues of a Complaint without extensive investigation or expenditure of resources.”). Plaintiffs can hardly be heard to complain they were denied the benefit of a full investigation when it was one of the options they were offered, but did not choose.

Furthermore, it is clear from the correspondence between Plaintiffs and HRC leading up to execution of the PFS agreement that the WLAD violation HRC identified was not predicated on whether HW visited the Spa in person or by telephone or indeed, contacted the Spa at all. The violation identified by HRC was the Spa’s entry policy, which the HRC deemed discriminatory on its face, and had nothing to do with whether or how it was applied to HW. *See* Am. Compl., Ex. 3 at 15 (“[T]he evidence in this investigation supports that your company’s ‘biological women’ policy is not compliant with the Washington Law Against Discrimination (WLAD), RCW 49.60, which prohibits discrimination on the basis of gender identity in places of public accommodation. As such, I am writing to offer Olympus Spa the opportunity to enter into a Pre-Finding Settlement (PFS) Agreement.”). Plaintiffs’ argument that the truth or falsity of HW’s claims somehow forms the basis of a due process violation is entirely without merit.

*Appendix B***2. Procedural Due Process Claim**

Plaintiffs also attempt to state a claim for procedural due process violations under the Fourteenth Amendment. To state a claim of a procedural due process violation, a plaintiff must show: “(i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process.” *Reed v. Goertz*, 598 U.S. 230, 143 S. Ct. 955, 961, 215 L. Ed. 2d 218 (2023).

Plaintiffs attempt to cast Imiola’s “failure” to investigate HW’s allegations as a procedural due process claim (as well as the substantive due process claim, discussed above). As noted above, however, HRC’s decision not to investigate the allegations was a product not of any procedural failure, but of Plaintiffs’ decision to enter into a settlement agreement and forgo the right to an investigation. In their motion, Defendants thoroughly outline the procedural state-law protections that were available to the Spa, but which it voluntarily declined to avail itself of:

[The Spa] had notice of HW’s complaint and the opportunity to contest the complaint and supply its own evidence The Spa had no obligation to choose to enter into a pre-finding settlement agreement Indeed, the Spa was entitled to have the complaint adjudicated under the trial process provided by the WLAD rather than resolving the matter via settlement, and the Spa choose to forego that opportunity An administrative law judge (ALJ) would

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have been appointed to hear the complaint, and a formal, administrative hearing would have been governed by the extensive due process protections provided by Washington's Administrative Procedures Act. And if the Spa disagreed with the ALJ's ruling, it would have enjoyed the right to seek judicial review of the decision.

Defs.' Mot. at 8-9 (citing Wash. Rev. Code § 49.60.240, .250). Plaintiffs are unable to explain how these procedures fall short of a constitutional guarantee of due process. They chose to bypass the investigative and adjudicative process that was available to them. In other words, Plaintiffs were offered the process they were due, and chose to forgo it in favor of settlement. Under these circumstances, no procedural due process claim can lie. *See, e.g., Patel v. City of S. El Monte*, 2019 U.S. Dist. LEXIS 241003, 2019 WL 13037008, at *8 (C.D. Cal. Jan. 10, 2019) ("Plaintiffs cannot sustain their procedural due process claim because there are adequate state remedies available to challenge the administrative officer's decision.") (citing, inter alia, *Lake Nacimiento Ranch Co. v. San Luis Obispo Cnty.*, 841 F.2d 872, 879 (9th Cir. 1987) (plaintiff's procedural due process claim barred because there was a California statutory remedy to challenge the results of the agency decision)).

D. Washington State Constitutional Claims

The Amended Complaint contains as its Fifth Cause of Action a claim against "All Defendants" for violation of

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the religious freedom guaranteed under Article I, § 11 of the Washington State Constitution. Am. Compl., ¶¶ 93-99. That provision guarantees, among other things, an “[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship.” Wa. Const. Art. I, § 11.

Defendants seek dismissal of Plaintiffs’ state-law constitutional claims, arguing that the Eleventh Amendment to the U.S. Constitution bars such claims against state officials acting in their *official* capacity from proceeding in federal court. Defs.’ Mot. at 13-14 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Pena v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992)). Defendants also argue that Washington law does not recognize state constitutional claims against state officials acting in their *personal* capacity. *Id.* (citing *Blinka v. Washington State Bar Ass’n*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001) (“Washington courts have consistently rejected invitations to establish a cause of action for damages based upon constitutional violations.”) (citation omitted)).

Plaintiffs do not respond to Defendants’ arguments or in any way defend their Washington State Constitution claims. Their response to Defendants’ Motion lacks any reference to the Washington State Constitution or the Freedom of Conscience clause, let alone an argument regarding Defendants’ claim to *Pennhurst* abstention or Eleventh Amendment immunity, or the grounds upon which their state constitutional claims may be brought against officials acting in their personal capacity. Accordingly, the Court deems these claims abandoned.

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See Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 888 (9th Cir.2010) (“A plaintiff who makes a claim ... in his complaint, but fails to raise the issue in response to a defendant’s motion to dismiss ... has effectively abandoned his claim, and cannot raise it on appeal.”); *see also Jenkins v. Cty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (finding plaintiff abandoned claims by not raising them in opposition to defendant’s motion for summary judgment). Defendants’ motion to dismiss the state constitutional claims is granted.

III. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint. This matter is dismissed with prejudice.

Dated: November 13, 2023.

/s/ Barbara Jacobs Rothstein

Barbara Jacobs Rothstein
U.S. District Court Judge

**APPENDIX C — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON AT SEATTLE,
DATED JUNE 5TH, 2023**

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

June 5, 2023, Decided;
June 5, 2023, Filed

CASE NO. 22-CV-00340-BJR

OLYMPUS SPA, *et al.*,

Plaintiffs,

v.

ANDRETA ARMSTRONG,

Defendant.

ORDER GRANTING MOTION TO DISMISS

This matter comes before the Court on Defendant Andreta Armstrong's¹ Motion to Dismiss. Dkt. No. 13.

1. Plaintiffs originally sued Sharon Ortiz in her official capacity as the Executive Director of the Washington State Human Rights Commission. *See* Dkt. No. 1 at 1. Ms. Ortiz has since retired, and Ms. Armstrong is now the Executive Director of the Commission. Dkt. No. 13 at 7 n.1. The Court therefore substitutes Director Armstrong as the defendant in this suit and directs the Clerk to update the case caption accordingly. *See* Fed. R. Civ. P. 25(d).

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On June 2, 2023, the Court heard oral argument on the motion, and after thorough review of the record and the governing law, the Court grants the motion and dismisses Plaintiffs’ complaint without prejudice. Dkt. No. 1.

I. BACKGROUND

This case involves a First Amendment challenge to Washington’s Law Against Discrimination (the “WLAD”). *See* Wash. Rev. Code § 49.60 *et seq.* Before delving into the facts of the dispute, the Court will provide some historical and statutory context.

A. Public Accommodation Laws, the WLAD, and the Washington State Human Rights Commission

The WLAD “is a regulatory law enacted under the legislature’s police power to promote the health, peace, safety, and general welfare of the people of Washington.” *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 317 P.3d 1009, 1012 n.2 (Wash. 2014) (plurality opinion); *see* Wash. Rev. Code § 49.60.010. To borrow from the Supreme Court, it is one of “many public accommodations statutes across the Nation”—laws that “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination[.]” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571-72, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (public accommodation laws “do not, as a general matter, violate the First or Fourteenth Amendment”); *Masterpiece Cakeshop, Ltd.*

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v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1727, 201 L. Ed. 2d 35 (2018) (“[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”).

Washington lawmakers have expanded the WLAD’s reach over the years to “bar discrimination on the basis of age, sex, sexual orientation, and disability, and to incorporate a private right of action for employees and persons who use public accommodations.” *Woods v. Seattle’s Union Gospel Mission*, 197 Wn.2d 231, 481 P.3d 1060, 1064 (Wash. 2021). With this expansion, “the potential for conflict between state public accommodation laws and the First Amendment rights of organizations has increased.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); *see, e.g., Green v. Miss United States of Am., LLC*, 52 F.4th 773 (9th Cir. 2022) (forcing pageant to accept transgender woman pursuant to Oregon’s public accommodation law violated First Amendment); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1176-88 (10th Cir. 2021) (application of Colorado’s public accommodation law to website designer who refused to create websites celebrating same-sex marriages did not violate First Amendment). Indeed, the Washington Supreme Court recently confronted—and dispensed with—a florist’s First Amendment challenge to the WLAD. *See State v. Arlene’s Flowers, Inc.*, 193 Wn.2d 469, 441 P.3d 1203, 1224-36 (Wash. 2019). It is against this backdrop that the suit at hand arises.

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As relevant here, the WLAD recognizes “[t]he right to be free from discrimination because of . . . sexual orientation[.]” Wash. Rev. Code § 49.60.030(1). This general right includes “[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement[.]” *Id.* § 49.60.030(1)(b); *see also id.* § 49.60.215 (declaring discrimination based on sexual orientation an “unfair practice”).² The statute defines “sexual orientation” as “heterosexuality, homosexuality, bisexuality, and gender expression or identity.” *Id.* § 49.60.040(27). And “gender expression or identity” is further defined as “having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.” *Id.*

Although the WLAD provides a private right of action for “[a]ny person deeming himself or herself injured” by a violation of the statute, *see id.* § 49.60.030(2), the legislature also created the Washington State Human

2. Under the WLAD, “full enjoyment of” encompasses “the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges or any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular . . . sexual orientation . . . to be treated as not welcome, accepted, desired, or solicited.” Wash. Rev. Code § 49.60.040(14).

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Rights Commission (the “Commission”) to superintend enforcement of the law, *see id.* § 49.60.010 (vesting the Commission with “general jurisdiction and power” to eliminate and prevent discrimination). The Commission does so through an administrative scheme. First, any person “aggrieved by an alleged unfair practice” may file a complaint with the Commission identifying “the person alleged to have committed the unfair practice and the particulars thereof[.]” *Id.* § 49.60.230(1)(a). The Commission then “prompt[ly] review[s] and evaluat[es] the complaint” to determine whether the facts stated therein constitute an “unfair practice.” *Id.* § 49.60.240(1)(a). If they do not, “a finding of no reasonable cause may be made without further investigation.” *Id.* If, however, the facts could “constitute an unfair practice” under the WLAD, the Commission conducts “a full investigation and ascertainment of the facts[.]” *Id.*

The results of the full investigation must then be “reduced to written findings of fact” and the Commission issues a formal finding “that there is or that there is not reasonable cause for believing that an unfair practice has or is being committed.” *Id.* § 49.60.240(2). Both the complainant and the target of the complaint (the “respondent”) receive a copy of the formal findings. *Id.* Where, as in this case, the Commission finds reasonable cause to believe an unfair practice has been committed or remains afoot, it “shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.” *Id.* § 49.60.240(3). The next step is particularly relevant here: “If an agreement is reached for the elimination of such unfair practice as a result

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of such conference, conciliation, and persuasion, the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the commission setting forth the terms of said agreement.” *Id.* Any such conciliation agreement “shall be an agreement between the respondent and the complainant and shall be subject to the approval of the commission.” *Id.* If the parties cannot reach a conciliation agreement, the dispute is referred for a hearing before an administrative law judge, following which the parties may seek judicial review. *See id.* § 49.60.250.

B. Olympus Spa and Other Plaintiffs

Myoon Woon Lee has owned and operated Olympus Spa for over 20 years. Dkt. No. 1 at 4. Joining him and his business as plaintiffs in this suit are Sun Lee (the president of Olympus Spa), Jane Doe Employees 1-3, and Jane Doe Patron. *See id.* at 3. The Olympus Spa is a Korean spa “specifically designed for women,” and the services offered there “are closely tied to the Korean tradition,” meaning patrons are “require[d] . . .to be naked” during certain services. *Id.* at 3-4; *see also id.* at 5 (“It is Olympus Spa’s business purpose to provide traditional Korean kiln saunas and exfoliation therapy experiences.”); Dkt. No. 1-2 at 3 (“Our spa is designed specifically for women and our mission is to restore and rejuvenate women’s physical health as well as spiritual health.”). The facilities include “a bath area containing multiple whirl-pools, a traditional Korean body-scrub service area, standing showers, sit-down showers, a steam room, and a dry sauna.” Dkt. No. 1 at 4. As noted, patrons are “typically fully naked” while

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utilizing these areas and thus “have visual access” to other nude patrons. *Id.* at 5. Nor is nudity optional. It is allegedly “required for certain procedures called ‘Seshin’” pursuant to Korean tradition. *Id.* According to Plaintiffs, female patrons receiving a Korean body scrub “must do so unclothed,” and all employees who provide those scrubs (“ddemiri”) are women. *Id.*

Olympus Spa maintains a “female-only policy” under which it restricts admission to women—or, more specifically, individuals who “physically present[] in the nude as . . . female.” *Id.* at 5, 7. It apparently advertised this entry policy on its website with the following language: “Biological women are welcome[.] It is the policy of Olympus Spa not to discriminate on the basis of race, color, national origin, sex, age, or disability in its programs or activities, as required by applicable laws and regulations.” Dkt. No. 1-3 at 13. Olympus Spa thus admits transgender women only if they have “gone through post-operative sex confirmation surgery.” Dkt. No. 1 at 5, 7. Plaintiffs attribute the policy to their “traditional, theologically conservative” Christian values. *Id.* at 5. They believe in “modesty as between the sexes” and “hold the conviction that a male and female should not ordinarily be in each other’s presence while in the nude unless married to each other.” *Id.*; *see also* Dkt. No. 1-2 at 4 (“Women are in a vulnerable position when they are unclothed and/or having treatment while unclothed and we seek to ensure that they feel their privacy and rights are respected. This is a biblical principle from 1 Peter 3:7, 1 Timothy 3:1-7, 1 Timothy 5:2, Phillipians 4:3, Genesis 1:27, Proverbs 31:17, Phillipians 2:3 and more.”). The Jane Doe Employees

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accordingly refuse to perform massages or body scrubs on naked men. Dkt. No. 1 at 5-6. And Jane Doe Patron, a Christian “who frequently receives treatments at Olympus Spa,” likewise “believes that men and women should not be viewing each other’s naked bodies unless married to each other.” *Id.* at 6.

There have nonetheless been “incidents” in which men have “penetrate[d] the interior” of an Olympus Spa facility. *Id.* For example, six years ago a customer alerted employees that an individual “with male genitals was roaming around the spa.” *Id.* at 6-7. The on-duty manager investigated the issue and determined that a “transgender woman with male genitals” was using the facilities. *Id.* at 7. Although the transgender patron left after the manager explained the female-only policy, other customers requested refunds and left the spa. *Id.* Plaintiffs allege that several such incidents have occurred in which patrons “noticed male genitals exposed in the locker room and/or pool area” and, as a result, experienced “humiliation, trauma, and rage[.]” *Id.* Those patrons apparently demanded refunds and never returned. *Id.*

C. Haven Wilvich and the Commission Complaint

In February 2020, Haven Wilvich—a transgender woman who “identifies as a woman” but “is biologically male and has not undergone sex reassignment surgery”—filed a complaint with the Commission. *Id.*; *see* Dkt. No. 1-3 at 4 (Notice of Complaint of Discrimination indicating that complaint was filed on February 13, 2020). Ms. Wilvich’s complaint alleges that she went to Olympus Spa in January

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2020 in search of services but was discriminated against “because of [her] sexual orientation” and “denied . . . equal services based on [her] sexual orientation.” Dkt. No. 1-3 at 2. According to Ms. Wilvich, she was denied services and told “that transgender women without surgery are not welcome because it could make other customers and staff uncomfortable.” *Id.* ³

Although Ms. Wilvich’s complaint is dated May 2020, it was not until November 2020 that the Commission mailed an initial Notice of Complaint of Discrimination to Olympus Spa. Dkt. No. 1 at 8; Dkt. No. 1-3 at 4. This first notice required “[n]o action” from Olympus Spa because it was “for timely notification purposes only[.]” Dkt. No. 1-3 at 4. As for the circumstances and basis of the complaint, the notice has a box checked next to “sexual orientation”

3. Plaintiffs dispute the veracity of Ms. Wilvich’s complaint. In his declaration, Olympus Spa President Sun Lee suggests that Ms. Wilvich would not have been denied entry to the spa because patrons “are checked in using electronic check in stations,” patrons “do not interface with owners,” and, “[g]enerally speaking,” employees “have no idea if a preoperative transgender violates the policy of the spa until they are undressed.” Dkt. No. 1-2 at 2. Olympus Spa performed an internal investigation “to determine when the alleged discrimination happened and . . . who denied entry” to Ms. Wilvich but “found no record” of Ms. Wilvich having been at either the Tacoma or Lynnwood locations: “We keep records via an electronic sign in portal of all individuals who enter the spa. They fill out their information prior to being admitted in the waiting area. Haven Wilvich would have submitted such information[.]” *Id.* at 2-3. Because Olympus Spa employees have no “recollection of speaking with a Haven Wilvich,” Mr. Lee concludes that Olympus Spa, its owners, and its employees have been “targeted by Haven Wilvich for [their] beliefs/creed.” *Id.* at 3.

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and summarizes the issues as follows: “Complaint alleges discrimination based on Sexual Orientation.” *Id.* The notice also directs Olympus Spa to use the listed Commission complaint number “[f]or further inquiry on this matter” and provides contact information for “[y]our written response, position statement, response to our request for information, or any inquiry you may have[.]” *Id.* The Commission simultaneously issued a letter advising Olympus Spa of its duty “to preserve all evidence that may be relevant to this complaint” and warning that refusal to turn over requested information would result in “a subpoena and order compelling production[.]” *Id.* at 5.

In March 2021, the Commission served Olympus Spa with a second Notice of Complaint of Discrimination. *Id.* at 7. This time it requested “a written response” to Ms. Wilvich’s complaint, “including a statement of [Olympus Spa’s] position o[n] the issues covered by th[e] Complaint, with copies of any supporting documentation[.]” *Id.* The second notice also apprised Olympus Spa of the Commission’s early resolution services: “The [Commission] may assist the parties in early resolution of this Complaint through joint fact finding conferences and/or settlement negotiation which gives the parties an opportunity to resolve the issues . . . without extensive investigation or expenditure of resources.” *Id.* Olympus Spa was invited to contact the assigned Civil Rights Investigator—here, Madison Imiola—if it was interested in participating in the settlement services. *Id.* Enclosed in the second notice was a copy of Ms. Wilvich’s May 2020 complaint. *Id.* at 7-8.

*Appendix C***D. Olympus Spa Disputes the Complaint**

In March 2021, President Sun Lee authored a letter to the Commission in which he defended Olympus Spa’s “women-only rule” and denied any violation of the WLAD. *Id.* at 10. There he set forth Olympus Spa’s history and purpose as a “family-owned women’s Korean traditional health spa” and explained that “[n]udity is required for certain procedures[.]” *Id.* (“We firmly believe it is essential for the safety, legal protection, and well-being of our customers and employees that we maintain adherence to this adaptation of a females-only rule.”). Mr. Lee then detailed the “cultural underpinnings” of the services offered at Olympus Spa—services “closely tied to the Korean tradition known as ‘jjimjilbang’[.]” *Id.* ⁴ In Olympus Spa’s view, “nudity and females-only . . . cannot be segregated from the cultural requirements for ‘seshin’ services[.]” *Id.* at 11. Citing Washington’s laws on lewd conduct, facilitating lewd conduct, and public indecency, Mr. Lee conveyed his fear that exposing female customers (especially minors) to male genitalia could subject Olympus Spa to criminal penalties. *Id.* at 11-12. He concluded the letter by indicating that Olympus Spa was “willing to consider a review of [its] current biological females only policy” with one caveat: “we are unwilling to remake the ‘jjimjilbang’ haven we have worked so hard over many years to build and preserve, simply for the sake of promoting gender neutrality.” *Id.* at 12.

4. “Jjimjilbang” is Korean for “steamed-quality room.” Dkt. No. 1-3 at 10.

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Ms. Imiola responded two weeks later. *See id.* at 15-16. After reviewing the evidence and Mr. Lee's letter, she determined that Olympus Spa's "biological women" policy violates the WLAD because it discriminates based on gender identity. *Id.* at 15. More specifically, Ms. Imiola opined that the policy "denies services to transgender women who have not had surgery . . . because their physical appearance is not 'consistent' with the traditional understanding of biological women." *Id.* She further observed that the WLAD "does not use genitals to define gender identity and . . . recognizes that a person's gender identity can be different from the biological sex assigned to that person at birth." *Id.* at 15-16 ("However, Olympus Spa's 'biological women' policy focuses on the genitals of patrons rather than allowing transgender women to access your facilities based on their gender identity[.]"). Ms. Imiola's letter served a dual purpose. In addition to stating her findings, she wrote "to offer Olympus Spa the opportunity to enter into a Pre-Finding Settlement (PFS) Agreement." *Id.* at 15. As her letter explains, such settlement agreements are "used to resolve the issues of a complaint prior to completing the investigative process." *Id.* Ms. Imiola guaranteed that a PFS Agreement would preclude Ms. Wilvich from taking any further legal action with respect to the complaint allegations, made clear that such an agreement would not require an admission of guilt, and promised that the Commission "would take no further action on the issues of the complaint." *Id.* In sum, a PFS Agreement was Olympus Spa's "opportunity" to "revise [its] policies and practices," bring itself "into compliance with the law, avoid the costs of non-compliance and litigation, and reduce the likelihood of future complaints."

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Id. Ms. Imiola concluded her letter with a threat: “If I do not hear from you within ten business days, I will conclude that Olympus Spa is not interested in settling the case and will proceed accordingly by preparing the case for referral to the Attorney General’s Office for prosecution.” *Id.* at 16.

Mr. Lee did not respond for over a month. *Id.* at 18. When he finally did, it was to inform Ms. Imiola that Olympus Spa had no record of Ms. Wilvich’s visit. *Id.* Nor could staff members recall any allegedly discriminatory interaction with any customer. *Id.* Mr. Lee asked whether Ms. Wilvich could provide more information about her January 2020 experience so that Olympus Spa could better “assist in ensuring that no person, especially Haven, feels discriminated against.” *Id.* Ms. Imiola replied that the Commission had already made its determination: Olympus Spa’s “biological women” policy violates the WLAD. *Id.* at 20. Ms. Imiola encouraged Olympus Spa to “strongly consider entering into a Pre-Finding Settlement (PFS) agreement” and reiterated the benefits of doing so: “an opportunity to avoid the costs of non-compliance and litigation; a reduction in the likelihood of future complaints against Olympus Spa; and the ability to resolve the complaint without an admission of guilt or formal findings of fact entered against Olympus Spa.” *Id.* And she again warned that declining a PFS agreement would result in “referral to the Attorney General’s Office for prosecution.” *Id.*

*Appendix C***E. Olympus Spa Enters into a Pre-Finding Settlement Agreement**

Mr. Lee subsequently indicated Olympus Spa's desire to correct its allegedly discriminatory policy and requested "the Pre-Finding Settlement details." *Id.* at 22. Although he continued to dispute the veracity of Ms. Wilvich's complaint, Mr. Lee informed Ms. Imiola that the "biological women" policy had been removed from Olympus Spa's website. *Id.* Ms. Imiola responded in a letter setting forth—and seeking Olympus Spa's agreement to—three settlement terms that the Commission identified as "of interest" in "moving forward with the resolution of this case." *Id.* at 24. First, Olympus Spa would be required to "remove references to 'biological women'" from its website. *Id.* Ms. Imiola recognized that Olympus Spa had "already addressed" this term and promised that the PFS agreement would "memorialize" the change. *Id.* Second, the Commission would provide Olympus Spa with "training materials" to ensure its understanding of and future compliance with the WLAD. *Id.* As for the third and final term, the Commission wished to review all Olympus Spa policies to ensure compliance with the WLAD. *Id.* Olympus Spa agreed to these terms. *See id.* at 26.

Although the Commission agreed to close the Wilvich complaint, it retained the right to "investigate and prosecute th[at] complaint" if Olympus Spa failed to comply with any terms of the agreement. *Id.* at 36; *see also id.* at 37 ("[T]he Commission may take action including, among other remedies, continuing its investigation or bringing an action in court for specific performance of

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this agreement.”). And the central terms of the agreement are as previewed in Ms. Imiola’s letter. Olympus Spa was required to complete WLAD training within 60 days. *Id.* It was similarly allotted 60 days to “[i]mplement and/or revise existing company policies as necessary to ensure their compliance with the [WLAD].” *Id.* at 36 (“Respondent agrees that . . .it has adopted new language on its website reflecting a non-discriminatory policy[.]”). And last, the PFS agreement reserves Olympus Spa’s right to challenge the Commission’s application of the WLAD: “This agreement does not preclude Respondent, its employees, or patrons from exercising their constitutional rights to . . .brin[g] a legal challenge as to the constitutionality of any term or provision in this agreement [or] the operative statutes, including but not limited to [the WLAD.]” *Id.* at 37. In October 2021, the Commission issued a notice of final agency action and officially closed the Wilvich complaint. *See id.* at 34-39.

F. Olympus Spa Sues

In March 2022, Plaintiffs brought this Section 1983 suit alleging that enforcement of the WLAD against them violates their First Amendment rights to free exercise of religion, freedom of speech, and freedom of association. Dkt. No. 1 at 1, 13-15. Plaintiffs seek declaratory relief and ask the Court to “preliminarily and permanently” enjoin the Commission from “enforcing the public accommodation law and implementing regulations” against them. *Id.* at 15. They also seek nominal damages. *Id.* Although Plaintiffs primarily frame their lawsuit as a pre-enforcement challenge, *see* Dkt. No. 14 at 12-15,

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they also seek retrospective relief for allegedly compelled speech. *See id.* at 27 (requesting nominal damages as redress for a “completed” constitutional violation).

With respect to their free exercise claim, Plaintiffs allege that enforcement of the WLAD “requires them to service nude males and females in the same rooms” and thus forces them to “choose between violating the law or their religious convictions.” Dkt. No. 1 at 14. According to Plaintiffs, this constitutes “a substantial burden on their religious beliefs.” *Id.* Their free association claim is similarly framed in prospective terms. Plaintiffs allege that enforcement of the WLAD, “which would require females in a state of nature to remain in the presence of naked males,” violates their right “to selectively enter into and carry on intimate or private relationships—or refrain from such relationships.” *Id.* at 15. In contrast to these two claims, Plaintiffs’ free speech action is retrospective. They assert that the Commission required Olympus Spa to “remove language from its website that has a viewpoint that ‘biological women’ are females and distinct from males.” *Id.* at 14. And because Olympus Spa “does not hold the view that transgender women are female,” forcing it to adopt a new, nondiscriminatory policy on its website “compels speech about a moral issue [with] which Plaintiffs disagree.” *Id.*

The Commission promptly moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6). Dkt. No. 13 at 13.⁵ In the Commission’s

5. Although Director Strobert is the only named defendant in this suit, the Court attributes the motion to dismiss (and the

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view, the Court lacks subject matter jurisdiction over this action because Plaintiffs do not have standing. *Id.* It further contends that, even if the Court has jurisdiction, Plaintiffs' claims fail as a matter of law. *Id.* at 13-14.

II. DISCUSSION

The Court rejects the Commission's standing argument. With respect to the merits of Plaintiffs' claims, however, the Court agrees that all three fail as a matter of law.

A. Rule 12(b)(1) Motion to Dismiss

A motion to dismiss for lack of subject matter jurisdiction can either attack the sufficiency of the pleadings on their face (a "facial attack") or present affidavits or other evidence that contest the truth of the allegations in the pleadings (a "factual attack"). *Sullivan v. Ferguson*, No. 3:22-CV-05403-DGE, 2022 U.S. Dist. LEXIS 193503, 2022 WL 13969427, at *2 (W.D. Wash. Oct. 24, 2022) (citing *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)). Because the Commission does not offer affidavits or other evidence challenging the truth of

arguments therein) to the Commission. See *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) ("Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (quoting *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978))); see also Dkt. No. 13 at 29 ("HRC respectfully asks that [the] Court dismiss Plaintiffs' Complaint, with prejudice, in its entirety.").

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the allegations in the complaint, the Court construes its motion as a facial attack on subject matter jurisdiction. *See id.* And the Court resolves a facial jurisdictional challenge “as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). The Court presumes that a case lies outside of its “limited jurisdiction” unless Plaintiffs establish otherwise. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

1. Standing

The Commission first contends that Plaintiffs lack standing to bring this action. Dkt. No. 13 at 15-22; *see Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (dismissal under Rule 12(b)(1) is appropriate when the plaintiff lacks standing).

“Under Article III, the Federal Judiciary is vested with the ‘Power’ to resolve not questions and issues but ‘Cases’ or ‘Controversies.’” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011). “Among other things, that limitation requires a plaintiff to have standing.” *Fed. Election Comm’n v. Cruz*, 596 U.S. 289, 142 S. Ct. 1638, 1646, 212 L. Ed. 2d 654 (2022). And the three elements of standing “are well established: A plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by

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the requested relief.” *Id.* Plaintiffs bear the burden of establishing each of these elements “with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice[.]” *Id.*; accord *Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022); see also *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (a plaintiff must “clearly allege” facts demonstrating each standing element (cleaned up)).

The Court addresses whether Olympus Spa has standing to bring this suit because the presence of one plaintiff with standing is sufficient to satisfy Article III’s case-or-controversy requirement. *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (“FAIR”); accord *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012); *Sullivan*, 2022 U.S. Dist. LEXIS 193503, 2022 WL 13969427, at *3.⁶ This is so in injunctive cases, too. *Atay v. Cnty. of Maui*, 842 F.3d 688, 696 (9th Cir. 2016). The Court first analyzes whether Olympus Spa has pre-enforcement standing to bring its free exercise and free association claims (Counts 1 and 3), then discusses whether Olympus Spa has standing to vindicate its compelled speech claim (Count 2).⁷

6. The Court refers to “Plaintiffs” as a collective entity throughout this Order but analyzes their complaint and arguments in terms of whether they establish Olympus Spa’s standing.

7. Plaintiffs appear to suggest that the provision in the PFS agreement reserving their right to bring a constitutional challenge to

*Appendix C***a. Injury in Fact: Pre-Enforcement Claims**

As for the “[f]irst and foremost” of standing’s three requirements, *Steel Co.*, 523 U.S. at 103, the Commission contends that Plaintiffs “fail to allege that they are in any danger of sustaining any injury that is both real and immediate.” Dkt. No. 13 at 16. The Court disagrees.

To establish an injury in fact, a plaintiff must show that it suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (cleaned up). Injury is particularized if it affects a plaintiff “in a personal and individual way.” *Id.* at 560 n.1. And it is concrete if it “actually exist[s],” meaning that it is “real, and not abstract.” *Spokeo*, 578 U.S. at 340 (cleaned up); *see also id.* (“concrete” is not synonymous with “tangible,” as “intangible injuries can nevertheless be concrete”). As for the “actual or imminent” requirement, the Supreme Court has “repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact and that allegations of *possible* future injury are not sufficient.”

the WLAD is sufficient to convey standing. *See* Dkt. No. 1 at 13 (“This lawsuit is an exercise of that right bargained for by the parties.”); Dkt. No. 14 at 11 (same). As the Commission notes, however, parties cannot contractually manufacture Article III standing or, by extension, federal subject matter jurisdiction. Dkt. No. 13 at 21; *see United Invs. Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 966-67 (9th Cir. 2004) (“It is well established that ‘lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties.’” (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338 (1934))).

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Clapper v. Amnesty Int'l, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (cleaned up); see *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (plaintiffs seeking declaratory and injunctive relief needed to show “a very significant possibility of future harm”). However, the imminence requirement is “concededly a somewhat elastic concept,” *Lujan*, 504 U.S. at 564 n.2, and a plaintiff is not required “to demonstrate that it is literally certain that the harms [it] identif[ies] will come about,” *Clapper*, 568 U.S. at 414 n.5. A “‘substantial risk’ that the harm will occur” can suffice. *Id.* (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010)).

To this end, the Supreme Court has made clear that threatened enforcement of a law can create Article III injury. See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (“When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.”); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) (a plaintiff may establish standing “to challenge a law or regulation that is not presently being enforced against them”). More specifically, “a plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’” *Driehaus*, 573 U.S. at 164 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). A district court considers three factors when evaluating whether

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there is a credible threat of prosecution or enforcement: (1) “whether the plaintiff[] ha[s] articulated a ‘concrete plan’ to violate the law in question”; (2) “whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings”; and (3) “the history of past prosecution or enforcement under the challenged statute.” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). All three point towards a credible threat of enforcement here.

As for the first factor, “[a] concrete plan need not be ‘cast in stone’ but must be ‘more than a hypothetical intent to violate the law.’” *Arizona v. Yellen*, 34 F.4th 841, 850 (9th Cir. 2022) (quoting *Thomas*, 220 F.3d at 1139). The Commission argues that Plaintiffs’ complaint “fails to allege any facts to indicate they are continuing to refuse service to transgender female patrons who have not yet undergone gender transition surgery or even that they have a specific plan to begin doing so.” Dkt. No. 13 at 17. But Plaintiffs do just that. In accordance with their conscience and faith, the employees aver that they “will not perform services such as massages and body scrubs on naked men,” by which they mean transgender women with male genitalia. Dkt. No. 1 at 5-6; *see also* Dkt. No. 14 at 14 (“Thus, the Complaint alleges that the Spa cannot and will not let males into the . . . facility where female nudity is a requirement, because it would violate their sincerely held religious beliefs that men and women [are] not to be nude in each other’s presence.”). Refusal to service customers who are transgender women with male genitalia necessarily evinces an intent to violate the WLAD’s proscription against discrimination based on

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sexual orientation, at least according to the Commission’s application of the WLAD in this case. *See Harborview Fellowship v. Inslee*, 521 F. Supp. 3d 1040, 1047 (W.D. Wash. 2021) (plaintiff articulated a concrete plan to violate mask mandate by alleging that individuals conducting services do not wear masks).

The Commission stretches the “concrete plan” requirement beyond what *Driedhaus* calls for: “Nothing in this Court’s decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.” 573 U.S. at 163; *see also Yellen*, 34 F.4th at 850 (a plaintiff need not “admit to violating the law or having a desire to do so”). The Ninth Circuit has further made clear that a plaintiff need not “specify ‘when, to whom, where, or under what circumstances’ [it] plan[s] to violate the law when”—as here—it has “already violated the law in the past.” *Tingley*, 47 F.4th at 1068 (quoting *Thomas*, 220 F.3d at 1139). The Commission’s reliance on Plaintiffs’ inability to pinpoint when in the future a pre-surgery transgender woman might seek services at Olympus Spa and, in turn, be denied those services thus misses the mark. Dkt. No. 15 at 3; *see also, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1123 (9th Cir. 2009) (pharmacists challenging state rules requiring them to sell Plan B could not “control when a patient requesting Plan B w[ould] visit their pharmacy,” but nonetheless had standing because they could “point to specific past instances when they h[ad] refused to sell Plan B” as “direct violations of the challenged rules”).⁸ The first

8. The Commission’s heavy reliance on the low probability of another Wilvich complaint is also unavailing, because its ability to

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Thomas factor weighs in favor of finding a credible threat of enforcement and, by extension, Article III injury.

As to the second factor, Plaintiffs do more than “cit[e] a generalized threat that [the WLAD] will be enforced”—they identify a threat of enforcement that is “particular to” Olympus Spa. *Cedar Park Assembly*, 402 F. Supp. 3d at 989. Although the Commission has not issued warnings or notices to Olympus Spa since the parties executed the PFS agreement, civil rights investigator Imiola’s communications during the Wilvich investigation make clear the Commission’s position on Olympus Spa’s “biological women” policy, as well as its intent to enforce the law against Olympus Spa. *See Yellen*, 34 F.4th at 850 (finding second factor satisfied where there was “affirmative conduct” by the government agency “evinced an intent to enforce” the law at issue); *Cal. Trucking Ass’n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) (finding sufficient intent to enforce a law where state agency “sent letters to businesses notifying them” of its interpretation of a new requirement under state law); *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (“[W]e have considered a government’s preliminary efforts to enforce a speech restriction or its past enforcement of a restriction to be strong evidence . . . that pre-enforcement plaintiffs face a credible threat of adverse state action.”).

Moreover, the PFS agreement requires Olympus Spa to bring and keep its policies in compliance with the WLAD,

enforce WLAD violations does not turn on a third-party complainant. The Commission may issue a complaint on its own “[w]henever it has reason to believe that any person has engaged in or is engaging in an unfair practice[.]” Wash. Rev. Code § 49.60.230(1)(b).

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see Dkt. No. 1-3 at 36, and provides the Commission with a mechanism for enforcing that obligation, *see id.* at 37 (the Commission “shall determine whether [Olympus Spa] has fully complied with the terms of th[e] agreement” and “shall” give written notice to Olympus Spa “specifying the nature of [any] breach.”). And finally, the Commission has not disavowed any intent to enforce the WLAD against Olympus Spa. *See Stroh*, 205 F.3d at 1155 (“Courts have also considered the Government’s failure to disavow application of the challenged provision as a factor in favor of a finding of standing.”); *accord Tingley*, 47 F.4th at 1068. Indeed, as the Court’s preceding discussion makes clear, the opposite is true. The second factor thus weighs in favor of finding a credible threat of enforcement.

The third and final factor likewise supports this finding. As discussed above, the Commission has not only indicated an intent to enforce the WLAD against Olympus Spa; it *has* enforced the law against Olympus Spa. *See Driehaus*, 573 U.S. at 164 (finding threat of future enforcement “substantial” where plaintiff organization “was the subject of a complaint in a recent election cycle,” and observing that “past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical.” (cleaned up)). Based on the three-factor *Thomas* framework, the Court concludes that Plaintiffs’ feared injury is “sufficiently realistic and credible to confer standing under *Driehaus*[.]” *Yellen*, 34 F.4th at 851.

*Appendix C***b. Causal Connection: Pre-Enforcement Claims**

Plaintiffs must next demonstrate “a causal connection between the injury and the conduct complained of,” meaning “the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (cleaned up). The Court finds that Plaintiffs have sufficiently traced Olympus Spa’s injury to the Commission. *See Sullivan*, 2022 U.S. Dist. LEXIS 193503, 2022 WL 13969427, at *4 (“That state officials are entrusted with the enforcement of state criminal laws and have the actual power to enforce allegedly unconstitutional laws is sufficient to demonstrate ‘the requisite causal connection for standing purposes.’” (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004))).

The Commission nonetheless contends that Plaintiffs cannot show the requisite causal connection because “[t]here is no ongoing State action against Olympus Spa or threat of imminent State enforcement action against them.” Dkt. No. 13 at 20. “Any alleged ‘harm’ to Plaintiffs,” says the Commission, “is being caused by Olympus Spa’s decision to change its discriminatory website language [and] end its discriminatory business practices” pursuant to the PFS agreement. *Id.* Both arguments fail. As for the first one, it is merely a repackaging of the Commission’s injury-in-fact challenge, which the Court has already rejected because Olympus Spa faces a credible threat of future enforcement. The first argument also overlooks the

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nature of pre-enforcement standing. Olympus Spa seeks prospective relief from future enforcement of the WLAD. Thus, that the parties settled the Wilvich complaint does not mean there is no causal connection between the threat of future enforcement (the injury at issue) and the Commission.

Second, it is inaccurate to characterize the PFS agreement as a self-inflicted, invited, or willingly incurred injury. Olympus Spa was forced to choose between self-censorship (the agreement) and referral to the Attorney General for prosecution. Furthermore, the Supreme Court has rejected this approach to the causation element of standing. *See Cruz*, 142 S. Ct. at 1647 (“[W]e have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred.”). The Commission attempts to sidestep this straightforward result by pointing to *Clapper*, an inapposite case in which the Supreme Court held that the plaintiffs could not “manufacture standing merely by inflicting harm on themselves based on their fears of *hypothetical future harm that is not certainly impending*.” 568 U.S. at 416 (emphasis added); *see* Dkt. No. 15 at 5. eAs discussed above, Olympus Spa faces a threat of enforcement sufficiently credible to establish Article III injury.

c. Redressability: Pre-Enforcement Claims

“Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a

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favorable decision.” *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)). Plaintiffs are not required to guarantee that Olympus Spa’s injuries will be redressed by a favorable decision. *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). Rather, they “need only show that there would be a ‘change in a legal status,’ and that a ‘practical consequence of that change would amount to a significant increase in the likelihood that [they] would obtain relief that directly redresses the injury suffered.’” *Id.* (quoting *Utah v. Evans*, 536 U.S. 452, 464, 122 S. Ct. 2191, 153 L. Ed. 2d 453 (2002)). Plaintiffs’ burden under this element is “relatively modest.” *Bennett v. Spear*, 520 U.S. 154, 171, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

The Commission contests this element. In its eyes, Plaintiffs “plainly fail to demonstrate redressability” because “there is nothing to enjoin.” Dkt. No. 15 at 6. The Commission again points to the PFS agreement and claims that it extinguished any case or controversy. *See* Dkt. No. 13 at 21 (“[T]his Court cannot provide any relief to Plaintiffs because the settlement agreement ended [the Commission’s] investigation of Olympus Spa[.]”). The Court has determined that Olympus Spa faces a credible threat of future enforcement, and the settlement of the Wilvich complaint does not speak to that injury. The relief Plaintiffs request would redress the injury at issue because it would declare application of the WLAD to Olympus Spa’s “biological women” policy unconstitutional. And an order enjoining future enforcement would obviously preclude the Commission from penalizing that policy. The third standing element is met.

*Appendix C***d. Standing to Bring “Completed” Free Speech Violation**

The Court further finds that Olympus Spa has standing to vindicate its allegedly compelled speech. As an initial matter, “the inquiry tilts dramatically toward a finding of standing” whenever First Amendment speech is implicated. *Stroh*, 205 F.3d at 1155; *see also Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (“Particularly in the First Amendment-protected speech context, the Supreme Court has dispensed with rigid standing requirements.”). Plaintiffs have sufficiently alleged that Olympus Spa sustained an “actual” and “concrete” injury: self-censorship. *See Getman*, 328 F.3d at 1095 (plaintiff “suffered the constitutionally recognized injury of self-censorship.”); *Tingley*, 47 F.4th at 1067 (a chilling of the exercise of First Amendment rights is itself a constitutionally sufficient injury). Olympus Spa removed the “biological women” policy from its website in direct response to the Commission’s investigation and under threat of penalties. Indeed, removal of that language was a term of the PFS agreement. And the agreement suspends legal consequences for Olympus Spa only so long as it complies with the terms, i.e., so long as it continues to self-censor. *See Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006-1007 (9th Cir. 2003) (organization “was forced to modify its speech and behavior to comply with the statute”; it did not lack standing “merely because [it] chose to comply with the statute and challenge its constitutionality, rather than to violate the law and await an enforcement action.”). Contrary to the Commission’s suggestion, then, the PFS

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agreement does not nullify the alleged constitutional injury. *See* Dkt. No. 13 at 18 (“Any justiciable case or controversy between [the Commission] and Olympus Spa ended with the execution of the settlement agreement[.]”). Nor does it matter that the Commission “stopped its investigation of Olympus Spa,” made “[n]o formal finding of discrimination,” and closed the Wilvich complaint. *Id.*

The remaining two standing elements are likewise satisfied. As already discussed, the complained-of injury is traceable to the Commission because it is the state agency responsible for enforcing the WLAD. *See Sullivan*, 2022 U.S. Dist. LEXIS 193503, 2022 WL 13969427, at *4. And that Olympus Spa elected to self-censor rather than be referred to the Attorney General for prosecution does not defeat the causal connection. *See Cruz*, 142 S. Ct. at 1647. Plaintiffs have likewise established that nominal damages will redress Olympus Spa’s allegedly compelled speech. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802, 209 L. Ed. 2d 94 (2021) (“[A] request for nominal damages satisfies the redressability element of standing where a plaintiff’s claim is based on a completed violation of a legal right.”). Olympus Spa therefore has standing to assert its free speech claim.

2. Ripeness

The Commission also urges the Court to dismiss Plaintiffs’ complaint because their claims are not ripe for judicial review. It argues that prospective relief is inappropriate here because Plaintiffs’ claims “rest on contingent future events that may never happen.” Dkt.

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No. 13 at 22; *see also* Dkt. No. 15 at 6 (“Plaintiffs['] claims are not ripe for the same reasons they cannot establish standing[.]”).

“Along with standing and mootness, ripeness is one of three justiciability requirements.” *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1122 (9th Cir. 2022). “The basic rationale of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Id.* at 1123 (cleaned up). The doctrine “is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993). “Thus, in conducting a traditional ripeness inquiry, we evaluate both ‘a constitutional and a prudential component.’” *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (quoting *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017)). However, the constitutional component “overlaps with the ‘injury in fact’ analysis for Article III standing.” *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *see also Thomas*, 220 F.3d at 1138. To the extent, then, that the Commission targets the constitutional component of ripeness by suggesting that Olympus Spa has not suffered an injury, the Court rejects that argument for the reasons set forth *supra*.

The prudential component warrants some discussion. Under this portion of the ripeness doctrine, the Court must evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding judicial consideration. *Paxton*, 26 F.4th at 1123. “A claim

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is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 752 (9th Cir. 2020) (cleaned up). Also relevant to the fitness prong is “whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms.” *Tingley*, 47 F.4th at 1070 (cleaned up). As for the hardship prong, the Court considers whether the action “requires an immediate and significant change in plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance.” *Id.* at 1070-71 (cleaned up).

The fitness prong is satisfied here. The Court acknowledges that the record is somewhat “thin and sketchy.” *Thomas*, 220 F.3d at 1141 (record consisted of “a few conclusory affidavits”). And as the Ninth Circuit has recognized, “bringing a First Amendment challenge to a law does not necessarily mean that the issues presented are ‘purely legal.’” *Tingley* 47 F.4th at 1070 (quoting *Thomas*, 220 F.3d at 1142). But as was the case in *Tingley*, the law at issue here—the WLAD—“is final,” “represents Washington’s final decision with respect to prohibiting [discrimination based on sexual orientation],” and is “binding” on Olympus Spa, which “must immediately comply with its terms.” *Id.* And, unlike *Thomas*, where there were no aggrieved tenants, there was no history of enforcement, and the record was devoid of any factual context, here the Commission’s enforcement of the WLAD against Olympus Spa provides the Court with the requisite

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“concrete factual scenario that demonstrates how the [WLAD], as applied, infringe[s] [Plaintiffs’] constitutional rights.” *Thomas*, 220 F.3d at 1141; *see Paxton*, 26 F.4th at 1124 (issues were not fit for judicial decision because attorney general had not yet made an allegation against plaintiff, the facts were not yet developed, and the plaintiff did not need to comply with the civil investigative demand). Olympus Spa has also delineated the bounds of its “biological women” policy and clarified to whom it applies. *See Thomas*, 220 F.3d at 1142 n.8 (scope of landlords’ religiously driven tenant selection criteria was unclear). Thus, the record “is admittedly sparse,” but “there are no incomplete hypotheticals or open factual questions akin to those in *Thomas*[.]” *Stormans*, 586 F.3d at 1126.

This case is materially identical to *Stormans*. Although the plaintiffs there could not foretell when patients might enter their pharmacies and request Plan B, whenever that did happen, the plaintiffs would refuse to sell the drug. *See* 586 F.3d at 1126 (“If a patient enters their pharmacies requesting Plan B, which the record reflects has occurred, [plaintiffs] will refuse to deliver the medication.”). Here, too, Plaintiffs will refuse service to pre-surgery transgender women if they enter an Olympus Spa facility. And the complaint indicates that Plaintiffs have refused service to patrons with male genitalia on several occasions (including the January 2020 Wilvich incident). That Olympus Spa cannot tell the future with respect to prospective clientele does not render this dispute unfit for judicial review. *See 303 Creative*, 6 F.4th at 1176 (although “the record would be better developed, and the legal issues would be clearer, if Appellants had denied

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services to a customer, that customer filed a complaint, and that complaint was adjudicated through the appropriate administrative and judicial channels,” Article III does not require that).

The hardship prong is likewise met in this case. The WLAD and the Commission’s application of that law to Olympus Spa “requires an immediate and significant change in plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance.” *Tingley*, 47 F.4th at 1070-71 (cleaned up). Olympus Spa has had to self-censor and forego its “biological women” policy under both the PFS agreement and threat of future enforcement. If it breaches the terms of that agreement or otherwise violates the WLAD, it faces civil penalties. *See id.* at 1071 (application of law to plaintiff required an immediate and significant change in his conduct because he was forced to choose between refraining from desired speech and engaging in speech that risked costly sanctions). In *Thomas*, the Ninth Circuit stated that hardship analysis “dovetails, in part, with the constitutional consideration of injury.” 220 F.3d at 1142. And there “the absence of any real or imminent threat of enforcement . . . seriously undermine[d] any claim of hardship.” *Id.* The court was careful to emphasize several circumstances in that case: there were no “particular victims of discrimination,” neither of the plaintiff landlords had been charged with violating the statutes at issue, and, again, there was no reasonable or imminent threat of enforcement. *Id.* The opposite is true in this case. Olympus Spa faces a credible threat of future enforcement, the Commission has already enforced the WLAD against Olympus Spa

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for its “biological women” policy, and there is at least one “particular” alleged victim of that policy.

Finally, the Court considers the hardship to the government from moving forward with this case. *Paxton*, 26 F.4th at 1123. Even if Olympus Spa will suffer hardship from withholding judicial consideration, “that hardship may still be insufficient to overcome the uncertainty of the legal issue presented in the case in its current posture and thus fail to outweigh . . . the government’s interest in delaying review.” *Id.* (cleaned up). Here, however, the Commission fails to persuade the Court that judicial review will pose a hardship sufficient to justify prudential restraint. Indeed, and as already discussed, further factual development is unnecessary to resolve the legal issue presented: application of the WLAD to Olympus Spa’s “biological women” policy. The Commission passed on that issue and there is no reason to delay review until the next complaint is issued.

B. Rule 12(b)(6) Motion to Dismiss

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs. Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). At this stage, the Court accepts as true all factual allegations in the complaint and construes them in the light most favorable to the nonmoving party. *Gonzalez v. Google LLC*, 2 F.4th 871, 885 (9th Cir. 2021). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted

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as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); see Fed. R. Civ. P. 8(a)(2) (a plaintiff must make a “short and plain statement of the claim showing that the pleader is entitled to relief”). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

1. Free Exercise Claim (Count 1)

As for their first claim, Plaintiffs observe that they “have the liberty to not only believe as they do about males and females in a state of undress, but they also have the right to freely *exercise* their religious rights, i.e., to act in accordance with their faith-based convictions.” Dkt. No. 1 at 13. Plaintiffs allege that the Commission’s enforcement of the WLAD against them, “which requires them to service nude males and females in the same rooms,” forces them “to choose between violating the law or their religious convictions.” *Id.* at 14. This, according to Plaintiffs, imposes a substantial burden on the exercise of their religious beliefs. *Id.* The Commission counters that the WLAD is a neutral law of general applicability and therefore does not run afoul of the First Amendment. See Dkt. No. 13 at 23-26. The Court agrees with the Commission and dismisses this claim.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment,

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states that “Congress shall make no law . . .prohibiting the free exercise” of religion. U.S. Const. amend. I. This constitutional provision “protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through ‘the performance of (or abstention from) physical acts.’” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421, 213 L. Ed. 2d 755 (2022) (quoting *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). However, it does not exempt Olympus Spa from the WLAD. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727. The Supreme Court recently left intact *Smith*’s holding that “laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876, 210 L. Ed. 2d 137 (2021); *see Smith*, 494 U.S. at 878-79 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”).

Plaintiffs fail to plead—let alone plausibly—that the WLAD is anything but neutral. The law does not discriminate on its face, and it does not by its terms favor a particular religion or the non-exercise of religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (“To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.”). Nor have Plaintiffs alleged facts to suggest that the legislature was motivated by a masked intent

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to discourage religious exercise or discriminate against their religion. *See id.* at 534, 540 (governmental hostility can be “masked, as well as overt,” and the court may look to “the events leading to the enactment . . . in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”). Plaintiffs have also not alleged that the Commission’s application of the WLAD in this case was motivated by any “clear and impermissible hostility toward the sincere religious beliefs that motivated [their] objection,” and the Court is unable to discern any facts in the record that would support such a claim. *Cf. Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1729.

Because the WLAD is neutral and generally applicable, the Court applies rational basis review, meaning the law need only be rationally related to a legitimate governmental purpose to survive constitutional scrutiny. *See Stormans*, 586 F.3d at 1137.⁹ “Rational basis review is highly deferential to the government, allowing any conceivable rational basis to suffice.” *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018). Plaintiffs thus bear the burden of negating “every conceivable basis which might support” the WLAD. *Fed. Commc’ns Comm’n v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211

9. Plaintiffs repeatedly argue that the WLAD substantially burdens their religion and is not narrowly tailored to achieve the state’s anti-discriminatory goals. *See* Dkt. No. 14 at 23-25. But the “narrowly tailored” requirement is a facet of strict scrutiny—the “most rigorous” level of constitutional review that does not apply here. *See Lukumi Babalu Aye*, 508 U.S. at 546.

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(1993) (internal citation and quotation omitted). This they cannot do.

The Court finds that the WLAD survives the “two-tiered inquiry” of rational basis review. *Gascon*, 880 F.3d at 457. First, the WLAD has a legitimate purpose: “It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights.” Wash. Rev. Code § 49.60.010. Courts routinely find such purposes “compelling.” *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (Minnesota public accommodation law’s goals of “eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.”); *303 Creative*, 6 F.4th at 1178 (“Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace.”). And second, the WLAD promotes its purported purpose. The State “carries a light burden” with respect to the second tier of the test, *Gascon*, 880 F.3d at 457, because “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data,” *Beach Commc’ns*, 508 U.S. at 315. It is axiomatic that the WLAD—which proscribes discrimination in places of public accommodation—advances Washington’s “legitimate interest in ensuring equal access to public accommodation.” *Arlene’s Flowers*, 441 P.3d at 1231. Plaintiffs’ free exercise claim therefore fails.

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Plaintiffs attempt to raise a “hybrid rights” claim. In *Smith*, the Supreme Court excepted from rational basis review “hybrid situation[s]”—those cases that involve “not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press[.]” 494 U.S. at 881-82. Plaintiffs accordingly wish to tether their free exercise claim to “either or both” of their remaining claims in the hopes that the Court will apply strict scrutiny to the WLAD. See Dkt. No. 14 at 25; see *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (“If . . . a law burdens the free exercise of religion *and* some other constitutionally-protected activity, there is a First Amendment violation unless the strict scrutiny test is satisfied[.]”). But a hybrid rights claim requires more than a bald allegation that a companion right is implicated or has been violated. “[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated—that is, a fair probability or a likelihood, but not a certitude, of success on the merits.” *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (cleaned up). Put differently, a hybrid rights claim is not entitled to strict scrutiny analysis merely because it “combine[s] a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right[.]” *Id.* at 1208. For the reasons discussed below, Plaintiffs fail to allege a plausible free speech or free association violation. Neither of those claims, then, combines with their free exercise claim to create a viable hybrid rights claim. The Court dismisses Plaintiffs’ free exercise claim.

*Appendix C***2. Free Speech Claim (Count 2)**

Plaintiffs contend that the Commission required Olympus Spa to “remove language from its website that has a viewpoint that ‘biological women’ are females and distinct from males.” Dkt. No. 1 at 14. More specifically, the Commission “forced Olympus Spa to ‘adopt new language on its website reflecting a nondiscriminatory policy’ that affirms equal access, service, and treatment for all customers ‘without regard to . . .sexual orientation or gender identity.’” *Id.* (quoting Dkt. No. 1-3 at 36).¹⁰ And because Olympus Spa “does not hold the view that transgender women are female,” the new website language “compels speech about a moral issue [with] which the Plaintiffs disagree.” *Id.*; *see* Dkt. No. 14 at 19 (“By requiring the Spa . . .to erase its message on the website and change it to a government approved message, the State has abridged the speech rights of the Spa.”).¹¹

The Commission defends its actions on two fronts. First, it argues that Olympus Spa’s alteration of the website language cannot form the basis of a free speech

10. Plaintiffs’ excerpt of the PFS agreement contains two errors. The agreement memorialized the fact that Olympus Spa had “adopted” new website language reflective of a “non-discriminatory” policy. Dkt. No. 1-3 at 36.

11. The Court was unable to identify the so-called “government approved” message anywhere in the record. Plaintiffs appear to have attached the original “biological women” policy to their Complaint, *see* Dkt. No. 1-3 at 13; presumably the “government approved” message simply refers to the deletion of that policy from the Spa’s website.

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challenge because the alteration was a voluntary change pursuant to the PFS agreement. Dkt. No. 13 at 26. This is yet another variation of the already rejected “invited injury” argument. That Olympus Spa agreed to several terms (including self-censorship) to avoid formal prosecution is exactly the point, and the Court need not rehash this issue any further. The Commission’s second argument is the winning one. As it notes, the WLAD “does not control speech; it simply requires Plaintiffs, who have freely chosen to offer their services to the public, to refrain from turning customers away because they fall into a protected class.” Dkt. No. 15 at 9-10.

The First Amendment prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const. amend. I. Under the Free Speech Clause, the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Laws that compel individuals to speak a particular message are content-based. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018); *see also Hurley*, 515 U.S. at 573 (“[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say[.]’” (quoting *Pac. Gas & Elec. Co. v. Pub. Utilities*

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Comm’n of Cal., 475 U.S. 1, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986))).

The law at issue here, however, is not a content-based speech restriction. The Commission correctly observes that the WLAD does not target speech—indeed, it says nothing at all about speech and does not purport to outlaw a particular idea, topic, message, or viewpoint. *See Reed*, 576 U.S. at 163 (a law is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed”; the court considers whether the challenged “regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.” (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011))). The WLAD instead regulates discriminatory conduct.¹² It “imposes a flat ban” on discrimination in places of public accommodation—“one that is applied without regard to [the] content” of a

12. Expressive conduct can of course be protected “speech” within the meaning of the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”). However, the conduct regulated by the WLAD—discriminatory exclusion of protected persons from places of public accommodation—is not the kind of “inherently expressive” conduct to which First Amendment protection extends. *See FAIR*, 547 U.S. at 65–66; *Jaycees*, 468 U.S. at 628 (“[L]ike violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [discriminatory] practices are entitled to no constitutional protection.”). Nor does the WLAD “proscribe particular conduct *because* it has expressive elements.” *Johnson*, 491 U.S. at 406.

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business's message. *One World One Fam. Now v. City and Cnty. of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996). And as the Supreme Court has repeatedly observed, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

The compelled speech to which Olympus Spa points is “plainly incidental” to the WLAD’s regulation of discriminatory conduct. *FAIR*, 547 U.S. at 62. The WLAD bars Olympus Spa from denying services to customers based on sexual orientation and, in this regard, it incidentally burdens Olympus Spa’s speech by prohibiting advertisement of discriminatory entrance policies (e.g., one that permits only “biological women”). But that does not convert the WLAD into a content-based regulation. To borrow an analogous example from the Supreme Court, “Congress . . . can prohibit employers from discriminating in hiring on the basis of race,” and “that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *Id.*; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (“[W]ords can in some circumstances violate laws directed not against speech but against conduct[.]”); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949) (“But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated,

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evidenced, or carried out by means of language, either spoken, written, or printed.”); *303 Creative*, 6 F.4th at 1183 (proposed statement on website, which expressed an intent to deny service based on sexual orientation, was not protected by the First Amendment).

This is critical for purposes of constitutional review because a facially neutral regulation that incidentally burdens speech receives intermediate scrutiny. Such a law does not violate the First Amendment “if it ‘furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’” *United States v. Albertini*, 472 U.S. 675, 687-88, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985) (quoting *United States v. O’Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). The WLAD meets all three of these requirements. First, the WLAD promotes an important—indeed, a “compelling”—state interest. *See, e.g., Jaycees*, 468 U.S. at 628 (“[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent[.]”). Second, this compelling interest in protecting the public’s civil rights has nothing to do with suppressing free expression. And third, the WLAD’s incidental restriction on speech is no greater than is essential to the furtherance of that interest.

The final *O’Brien* requirement is met where, as here, the government’s interest “would be achieved less

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effectively absent the regulation.” *Albertini*, 472 U.S. at 689. Why that is so needs little elaboration. The public’s civil rights—and more specifically, equal access to public accommodation—would be in dire jeopardy if businesses such as Olympus Spa could discriminate and refuse services to individuals on account of “race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability[.]” Wash. Rev. Code § 49.60.030(1). To be sure, there may be other adequate means the legislature could use to accomplish this goal. But that is not the test. Under *O’Brien*, the WLAD need only “add to the effectiveness” of the government’s efforts to safeguard civil rights and ensure equal access to public accommodation. *See FAIR*, 547 U.S. at 67 (the issue was not whether “other means of raising an army and providing for a navy might be adequate”; it sufficed that Congress’s chosen means “add[ed] to the effectiveness of military recruitment”); *Albertini*, 472 U.S. at 689 (“The validity of such regulations does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.”). The WLAD is a content-neutral regulation that does not run afoul of the Free Speech Clause. And the allegedly compelled speech Plaintiffs take issue with is incidental to the WLAD’s regulation of discriminatory conduct. Plaintiffs’ free speech claim is dismissed.¹³

13. To the extent Plaintiffs seek nominal damages to redress their allegedly compelled speech, the Court agrees with the Commission that such damages are unavailable here. *See* Dkt. No. 13 at 14. It is well-settled law that state officials cannot be sued in their

*Appendix C***3. Free Association Claim (Count 3)**

In their final claim, Plaintiffs allege that enforcement of the WLAD against them “would require females . . .to remain in the presence of naked males” and therefore violates their “freedom protected by the Bill of Rights to selectively enter into and carry on intimate or private relationships—or refrain from such relationships.” Dkt. No. 1 at 15; *see* Dkt. No. 14 at 21-22 (“To be exposed to the shocking and jarring visual of a penis while naked and to be viewed by someone who could become turgid due to viewing the female form would be an extreme offense and violative of the right to feel secure in one’s person and association.”). The Commission disagrees. It contends that “the First Amendment does not protect the association between and among [Olympus Spa’s] owners, staff, and customers.” Dkt. No. 13 at 28. Moreover, “Plaintiffs allege no facts indicating that such relationships bear the characteristics of personal associations protected by the First Amendment.” *Id.*

The Supreme Court distinguishes between two constitutionally protected freedoms of association: the “freedom of intimate association”¹⁴ and the “freedom of

official capacities for damages under Section 1983. They may be sued for damages only in their individual capacities. *See Arizonans for Off. English v. Arizona*, 520 U.S. 43, 69 n.24, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). Plaintiffs, however, are suing Director Armstrong in her official capacity only. *See* Dkt. No. 1 at 1.

14. The Supreme Court has also referred to this as the “freedom of private association.” *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 547, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987).

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expressive association.” *Jaycees*, 468 U.S. at 617-18. The former involves the right “to enter into and maintain certain intimate human relationships”—relationships which “must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Id.* at 617-18. The freedom of intimate association “receives protection as a fundamental element of personal liberty.” *Id.* at 618. On the other hand, the freedom of expressive association refers to the “right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Id.* It is viewed “as an indispensable means of preserving other individual liberties.” *Id.*

Plaintiffs raise an intimate association claim. Although the “precise boundaries of this type of constitutional protection” remain unmarked, the intimate relationships that have qualified for the protection include “marriage; the begetting and bearing of children; child rearing and education; and cohabitation with relatives.” *Rotary Club of Duarte*, 481 U.S. at 545 (internal citations omitted). This is not to suggest that intimate association is restricted to family matters. *Id.* Rather, qualifying relationships “are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.” *Jaycees*, 468 U.S. at 620; *Rotary Club of Duarte*, 481 U.S. at 546 (“In determining whether a particular association is sufficiently personal or private to warrant constitutional

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protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.”). The Court must conduct a “careful assessment” of the relationship’s characteristics to locate where it falls on a spectrum “from the most intimate to the most attenuated of personal attachments.” *Jaycees*, 468 U.S. at 620; *see, e.g., Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012) (finding that roommate relationship “easily qualifies” for protection because people “generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship[.]”).

The relationship between Olympus Spa and its customers clearly falls “outside of the category of relationships worthy of this kind of constitutional protection.” *Jaycees*, 468 U.S. at 620. It is a business—not a private club with an exclusive membership. As such, Olympus Spa is open to the public and provides services to countless (female) strangers on a daily basis. The Supreme Court has for these reasons observed that “a large business enterprise” is the type of association that “seems remote from the concerns giving rise to th[e] constitutional protection.” *Id.* Although Olympus Spa may not constitute a *large* enterprise, the analogy is still apposite: spa-goers “are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the [spa] admits all [biological females] who are willing to pay[.]” *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989) (activity of dancehall patrons did not qualify as a form of intimate association).

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Plaintiffs emphasize Olympus Spa's female-only exclusivity and female-oriented purpose. Dkt. No. 14 at 20. They likewise suggest that the business is sufficiently personal and private to warrant constitutional protection because "the state of being unclothed requires the most intimate of settings[.]" *Id.* at 21. But this again elides a basic, controlling fact: Olympus Spa is a business that provides services to the public. See *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 12, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) ("It may well be that a considerable amount of private or intimate association occurs in such a setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has barred it from doing so."). And as was the case in *Jaycees*, Olympus Spa does not—"[a]part from . . . sex"—employ any criteria for judging patrons, who are routinely "admitted with no inquiry into their backgrounds." 468 U.S. at 621. Indeed, "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship." *Id.*; *Rotary Club of Duarte*, 481 U.S. at 547 (many of organization's "central activities" were "carried on in the presence of strangers").

The Court does not minimize the privacy concerns at play when employees are performing exfoliating massages on nude patrons. Aside from this nudity, though, there is simply nothing private about the relationship between Olympus Spa, its employees, and the random strangers who walk in the door seeking a massage. Nor

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is there anything selective about the association at issue beyond Olympus Spa’s “biological women” policy. The Court therefore has little difficulty concluding that the personal attachments implicated here are too attenuated to qualify for constitutional protection. Plaintiffs’ intimate association claim is dismissed.

The Court therefore grants the Commission’s motion to dismiss.

4. Leave to Amend

Plaintiffs ask for leave to amend their complaint “to add defendants in their individual capacities” should the Court find that nominal damages are unavailable. Dkt. No. 14 at 27. The Commission objects to this request. It argues that any such amendment would be futile “because the individual defendants would be entitled to qualified immunity[.]” Dkt. No. 15 at 13. Given the extremely lenient standard governing Rule 15(a)(2), the Court permits Plaintiffs an opportunity to amend their complaint.¹⁵

“A party may amend its pleading with the court’s leave, which [t]he court should freely give . . .when justice so requires.” *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018) (alteration in original) (quoting Fed.

15. Although Plaintiffs limit their request to the addition of defendants in their individual capacities, the Court addresses the propriety of leave to amend the complaint generally (i.e., in other respects) because such leave should be granted “even if no request . . .was made[.]” *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

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R. Civ. P. 15(a)(2)). As the language of the rule suggests, the standard for leave to amend is “very liberal.” *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (“[T]his policy is to be applied with extreme liberality.”). The Court considers five factors when determining whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the party has previously amended the complaint. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014). “The party opposing amendment bears the burden of showing why leave to amend should not be granted.” *Hedglin v. Swift Transp. Co. of Ariz.*, No. C16-5127-BHS, 2016 U.S. Dist. LEXIS 186471, 2016 WL 8738685, at *1 (W.D. Wash. Nov. 15, 2016).

Leave to amend is appropriate here. As for the first three factors—bad faith, undue delay, and prejudice to the opposing party—the Court discerns nothing in the record sufficient to overcome Rule 15(a)’s presumption in favor of leave to amend. See *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam) (prejudice to the opposing party “carries the greatest weight” and, absent prejudice or a “strong showing” under the other factors, there is a presumption in favor of granting leave to amend). The Commission does not argue (and thus has not shown) that Plaintiffs intend to amend their complaint in bad faith or that permitting an amended complaint will result in undue delay. This case is also still in its earliest stages. The Court has not yet set a schedule, and there are therefore no impending deadlines or trial date.

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The Court even vacated the initial scheduling deadlines pending resolution of the Commission motion to dismiss. June 23, 2022 Docket Entry; *see DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187-88 (9th Cir. 1987) (granting leave to amend did not prejudice opposing party because the case was “still at the discovery stage with no trial date pending”).

The fourth and fifth factors likewise favor leave to amend. The Ninth Circuit has repeatedly emphasized that “[a] district court abuses its discretion by denying leave to amend unless amendment would be futile or the plaintiff has failed to cure the complaint’s deficiencies despite repeated opportunities.” *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012); *accord Heineke v. Santa Clara Univ.*, 812 F. App’x 644, 645 (9th Cir. 2020). The Court cannot say that amendment is futile here.

The Court therefore grants Plaintiffs leave to amend their Complaint, without restricting that leave to the specific grounds Plaintiffs have requested. Plaintiffs may file an amended complaint adding new facts and claims, and may do so within 30 days of the date of this order. Failure to do so will result in dismissal of the Complaint with prejudice.

III. CONCLUSION

For the reasons stated above, the Court GRANTS the Commission’s Motion to Dismiss, without prejudice. Dkt. No. 13. Plaintiffs may file an amended complaint within 30 days of the date of this Order.

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Dated: June 5th, 2023.

/s/ Barbara Jacobs Rothstein
Barbara Jacobs Rothstein
U.S. District Court Judge

**APPENDIX D — STATUTORY
PROVISIONS INVOLVED****U.S. Const., amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Wash. Rev. Code § 49.60

RCW 49.60.010. Purpose of chapter.

This chapter shall be known as the “law against discrimination.” It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, citizenship or immigration status, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance

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transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, citizenship or immigration status, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

RCW 49.60.020. Construction of chapter—Election of other remedies.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, citizenship or immigration status, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. However, to the extent that distinction or differential treatment on the basis of citizenship or immigration status is authorized by federal or state law, regulation, or government contract, it is not an unfair practice. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights. This

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chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation. Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage.

RCW 49.60.030. Freedom from discrimination—
Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

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(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin, citizenship or immigration status, or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

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(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

RCW 49.60.040 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

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(1) “Aggrieved person” means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) “Any place of public resort, accommodation, assemblage, or amusement” includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools,

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or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or

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commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) “Disability” means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, “impairment” includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special

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sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary [genitourinary], hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

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(8) “Dog guide” means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) “Dwelling” means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) “Employee” does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(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.

(12) “Employment agency” includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) “Families with children status” means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission

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of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) “Full enjoyment of” includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) “Honorably discharged veteran or military status” means a person who is:

(a) A veteran, as defined in RCW 41.04.007; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) “Labor organization” includes any organization which exists for the purpose, in whole or in part, of

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dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) “Marital status” means the legal status of being married, single, separated, divorced, or widowed.

(18) “National origin” includes “ancestry.”

(19) “Person” includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) “Premises” means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) “Race” is inclusive of traits historically associated or perceived to be associated with race including, but not limited to, hair texture and protective hairstyles. For purposes of this subsection, “protective hairstyles” includes, but is not limited to, such hairstyles as afros, braids, locks, and twists.

(22) “Real estate transaction” includes the sale, appraisal, brokering, exchange, purchase, rental, or

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lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(23) “Real property” includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(24) “Respondent” means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(25) “Service animal” means any dog or miniature horse, as discussed in RCW 49.60.214, that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by the service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological

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disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks. This subsection does not apply to RCW 49.60.222 through 49.60.227 with respect to housing accommodations or real estate transactions.

(26) "Sex" means gender.

(27) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

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**Wash. Rev. Code § 49.60.120.
Certain powers and duties of commission.**

The commission shall have the functions, powers, and duties:

- (1) To appoint an executive director and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.
- (2) To obtain upon request and utilize the services of all governmental departments and agencies.
- (3) To adopt, amend, and rescind suitable rules to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.
- (4) To receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter.
- (5) To issue such publications and results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of sex, sexual orientation, race, creed, color, national origin, citizenship or immigration status, marital status, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, or the use of a

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trained dog guide or service animal by a person with a disability.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies.

(7) To cooperate and act jointly or by division of labor with the United States or other states, with other Washington state agencies, commissions, and other government entities, and with political subdivisions of the state of Washington and their respective human rights agencies to carry out the purposes of this chapter. However, the powers which may be exercised by the commission under this subsection permit investigations and complaint dispositions only if the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices under this chapter. The commission may perform such services for these agencies and be reimbursed therefor.

(8) To foster good relations between minority and majority population groups of the state through seminars, conferences, educational programs, and other intergroup relations activities.

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Wash. Code. Rev. § 49.60.240

Complaint investigated — Procedure — Conference, conciliation — Agreement, findings — Rules.

(1)

(a) Except as provided for in (c) of this subsection, after the filing of any complaint, the chairperson of the commission shall refer it to the appropriate section of the commission's staff for prompt review and evaluation of the complaint. If the facts as stated in the complaint do not constitute an unfair practice under this chapter, a finding of no reasonable cause may be made without further investigation. If the facts as stated could constitute an unfair practice under this chapter, a full investigation and ascertainment of the facts shall be conducted.

(b) If the complainant has limitations related to language proficiency or cognitive or other disability, as part of the review and evaluation under (a) of this subsection, the commission's staff must contact the complainant directly and make appropriate inquiry of the complainant as to the facts of the complaint.

(c) After the filing of a complaint alleging an unfair practice in a real estate transaction pursuant to RCW 49.60.222 through 49.60.225, the chairperson of the commission shall refer it to the appropriate section of the commission's staff for prompt investigation and ascertainment of the facts alleged in the complaint.

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(2) The investigation shall be limited to the alleged facts contained in the complaint. The results of the investigation shall be reduced to written findings of fact, and a finding shall be made that there is or that there is not reasonable cause for believing that an unfair practice has been or is being committed. A copy of the findings shall be provided to the complainant and to the person named in such complaint, hereinafter referred to as the respondent.

(3) If the finding is made that there is reasonable cause for believing that an unfair practice has been or is being committed, the commission's staff shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.

If an agreement is reached for the elimination of such unfair practice as a result of such conference, conciliation, and persuasion, the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the commission setting forth the terms of said agreement. No order shall be entered by the commission at this stage of the proceedings except upon such written agreement, except that during the period beginning with the filing of complaints alleging an unfair practice with respect to real estate transactions pursuant to RCW 49.60.222 through 49.60.225, and ending with the filing of a finding of reasonable cause or a dismissal by the commission, the commission staff shall, to the extent feasible, engage in conciliation with respect to such complaint. Any conciliation agreement arising out of conciliation efforts by the commission shall be an agreement between the respondent and the complainant

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and shall be subject to the approval of the commission. Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the commission determines that disclosure is not required to further the purposes of this chapter.

If no such agreement can be reached, a finding to that effect shall be made and reduced to writing, with a copy thereof provided to the complainant and the respondent.

(4) The commission may adopt rules, including procedural time requirements, for processing complaints alleging an unfair practice with respect to real estate transactions pursuant to RCW 49.60.222 through 49.60.225 and which may be consistent with the federal fair housing amendments act of 1988 (42 U.S.C. Sec. 3601 et seq.), but which in no case shall exceed or be more restrictive than the requirements or standards of such act.

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Wash. Admin. Code § 162-32-040

(1) Harassment. Harassment based on an individual's sexual orientation or gender expression or gender identity is prohibited. Sexual orientation or gender expression or gender identity harassment in employment is offensive and unwelcome behavior serious enough to affect the terms and conditions of employment and which occurred because of an individual's sexual orientation or gender expression or gender identity, and can be imputed to the employer.

(2) Prohibited conduct. Prohibited conduct may include, but is not limited to, the following:

(a) Asking unwelcome personal questions about an individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth;

(b) Intentionally causing distress to an individual by disclosing the individual's sexual orientation, gender expression or gender identity, transgender status, or sex assigned at birth against his or her wishes;

(c) Using offensive names, slurs, jokes, or terminology regarding an individual's sexual orientation or gender expression or gender identity;

(d) The deliberate misuse of an individual's preferred name, form of address, or gender-related pronoun (except on legally mandated documentation, if the individual has not officially obtained a name change);

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(e) Posting offensive pictures or sending offensive electronic or other communications;

(f) Unwelcome physical conduct.

(3) Harassment in a place of public accommodation.

Sexual orientation harassment or harassment based on gender expression or gender identity in a place of public accommodation is offensive and unwelcome behavior serious enough to alter the individual's experience at the place of public accommodation, or severe enough that the individual has no choice but to leave the place of public accommodation, which occurred because of the individual's sexual orientation or gender expression or gender identity, and can be imputed to the place of public accommodation. In schools, such harassment is offensive and unwelcome behavior serious enough to interfere with a child's access to educational opportunities, which occurred because of the child's sexual orientation or gender expression or gender identity, and can be imputed to the school.

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**Wash. Admin. Code § 162-32-060.
Gender-segregated facilities.**

(1) Facility use. All covered entities shall allow individuals the use of gender-segregated facilities, such as restrooms, locker rooms, dressing rooms, and homeless or emergency shelters, that are consistent with that individual's gender expression or gender identity.

In such facilities where undressing in the presence of others occurs, covered entities shall allow access to and use of a facility consistent with that individual's gender expression or gender identity.

(2) Cannot require use inconsistent with gender expression or gender identity. A covered entity shall not request or require an individual to use a gender-segregated facility that is inconsistent with that individual's gender expression or gender identity, or request or require an individual to use a separate or gender-neutral facility.

(a) If another person expresses concern or discomfort about a person who uses a facility that is consistent with the person's gender expression or gender identity, the person expressing discomfort should be directed to a separate or gender-neutral facility, if available.

(b) Any action taken against a person who is using a restroom or other gender-segregated facility, such as removing a person, should be taken due to that person's actions or behavior while in the facility, and must be unrelated to gender expression or gender identity.

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The same standards of conduct and behavior must be consistently applied to all facility users, regardless of gender expression or gender identity.

- (3) Provision of options encouraged. Whenever feasible, covered entities are encouraged to provide options for privacy, such as single-use gender-neutral bathrooms or private changing areas, that are available to any individual desiring privacy.