

No. 26-286

IN THE
Supreme Court of the United States

OLYMPUS SPA, ET AL.,

Petitioners,

v.

ANDRETA ARMSTRONG, EXECUTIVE DIRECTOR OF THE
WASHINGTON STATE
HUMAN RIGHTS COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF NC VALUES INSTITUTE AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae respectfully urges this Court to grant the Petition and reverse the Ninth Circuit ruling.

NC Values Institute, formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation that works in various arenas of public policy to protect faith, family, and freedom, including parental rights. See <https://ncvi.org>.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Transgender ideology is invading American life at an alarming rate. This case is a variation on that theme with shocking consequences.

As applied to Olympus Spa, the Washington Law Against Discrimination ("WLAD") requires the business to admit unclothed males into its intimate "female only" setting, based on any male person's assertion that "he" identifies as a "she." Enforced by the Washington's Human Rights Commission ("HRC"), WLAD protects against discrimination because of "sexual orientation," which expressly includes "gender expression or identity." *See* Wash.

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Rev. Code § 49.60.030(1)(b); § 49.60.040(29). The result defies the owners’ religious convictions, the privacy expectations of patrons, and state criminal laws prohibiting indecent exposure and voyeurism.

Anti-discrimination laws, originally necessary to eradicate racial discrimination, have morphed from a shield into a weapon wielded against culturally unpopular views, including religious convictions about sexuality. The inevitable collision with the First Amendment, as this case demonstrates, underscores the need to define “discrimination” and calls for re-examination of this Court’s ruling in *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) which significantly weakened protections for religious liberty.

ARGUMENT

I. THIS COURT SHOULD DEFINE “DISCRIMINATION” AND EXAMINE THE SCOPE OF ANTI-DISCRIMINATION LAWS IN THE CONTEXT OF RELIGIOUS LIBERTY CONCERNS.

The Ninth Circuit broadly presupposes the government’s “important or substantial”—or even “compelling”—interest in “protecting against ‘acts of invidious discrimination in the distribution of publicly available goods [and] services.’” *Olympus Spa v. Armstrong*, 169 F.4th 817, 832 (9th Cir. 2026), citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). WLAD’s goal is “to prevent discrimination and enable individuals to seek recourse for discriminatory treatment.” *Olympus Spa*, 169 F.4th at 832. But “discrimination” must be clearly defined concerning

the categories protected and the places and persons subject to the law. Here, clarity is absent. Indeed, “[i]t 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.” *Id.* at 867 (Collins, J., dissenting from the denial of rehearing en banc) (explaining that the Spa may apply its “no-male-genitalia rule” to men who identify as male, but not to men who identify as female).

The State’s extreme intolerance toward the Spa’s policy grates against the interests in tolerance, diversity, inclusion, and equality often heralded by advocates of expanded anti-discrimination laws. This assaults the Free Exercise Clause, which “strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform.” Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1139 (1990). Laws that prohibit gender identity discrimination tend to demand uniformity of thought on deeply personal subjects, resulting in the exclusion of those who cannot conform. Freedom of thought undergirds the Bill of Rights. *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). The Constitution protects the right to advance ideological causes and “*the concomitant right to decline to foster such concepts.*” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). These complementary rights are components of “individual freedom of mind.” *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Washington contravenes “[t]he very purpose of the First Amendment . . . to foreclose public authority from

assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

A. Anti-discrimination provisions have expanded to cover more places and protect more categories—complicating the legal analysis and triggering collisions with the First Amendment.

Anti-discrimination policies have ancient roots. Early American laws were carefully crafted with narrow definitions of the people and places regulated. These laws primarily targeted racial discrimination. James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 965 (2011). Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875. *See id.* at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 352 (5th Cir. 1968); *see* 42 U.S.C. § 2000a.

Early anti-discrimination laws narrowly defined "places of public accommodation," e.g., transient lodging, theaters, restaurants, and public entertainment. *Just Shoot Me*, 64 Vand. L. Rev. 961 at 966. Eventually these traditional "places" expanded beyond inns and trains to commercial

entities and even membership associations—escalating the potential collision with First Amendment rights. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000). Even today, federal law remains comparable to common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b).

As anti-discrimination provisions expanded, the potential encroachment on religious liberty escalated. The Massachusetts law at issue in *Hurley v. Irish-American Gay* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. 515 U.S. 557, 571 (1995). But like many other states today, Massachusetts had broadened the scope to add more categories and places. *Id.* at 571-572. Such vast expansion of covered categories often occurs with little analysis of the difference between race and newly protected classes—or as to how or when the criteria might be legitimately applied.

B. A business owner following core religious doctrine is not engaged in irrational, invidious, or arbitrary discrimination.

WLAD exhibits hostility toward religion by characterizing the Spa's religiously motivated policy as unlawful "discrimination." This Court should grant the Petition to clarify the First Amendment's application to public life in the context of anti-discrimination laws.

WLAD extends far beyond the "meal at the inn" promised by common law and encroaches on the Spa's right to operate a business and participate in public life free of legal mandates that trample its religious convictions. Action motivated by conscience or faith is not arbitrary, invidious, irrational, or unreasonable. As this Court warned in the unemployment cases, "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981).

Discrimination is "arbitrary" where an entire group is denied access to basic public goods and services—lodging, food, transportation—based on irrelevant factors. This Court rightly upheld the legislation Congress passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles as a sword to suppress traditional viewpoints and impose social change on unwilling participants.

Religious liberty is particularly susceptible to infringement—"advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant." Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993). Religious voices have

shaped views of sexual morality for centuries, but political and judicial power can be used to squeeze religious views out of public debate about controversial social issues. These deeply personal convictions impact the way people of faith live, both privately and in public. Government has no right to legislate a view of sexual morality and then demand universal affirmation.

The Ninth Circuit held that “the Spa's *practice* of denying admission to preoperative transgender women is unlawful under WLAD.” *Olympus Spa*, 169 F.4th at 830. But this refusal to admit persons with male genitalia is not the invidious, irrational, arbitrary discrimination that may lawfully be proscribed. It is hardly “discrimination” to decline to advance a politically charged agenda or refuse to act against religious conscience. As Justice Alito warned, “those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes” but “if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.” *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting). Washington unquestionably treats the Spa as a bigot—and *that* could be construed as invidious discrimination.

Many decisions necessitate selection criteria. Discrimination may or may not be invidious, depending on the context and the identity of the one who discriminates. Employers “discriminate” when selecting employees from a pool of applicants. Students experience “discrimination” in admissions,

honor rolls, sports teams. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). It is impossible to eradicate every form of discrimination. Anti-discrimination policies are reasonable where selection criteria are truly irrelevant. Here, “the discrimination claim presented . . . is a good deal more nuanced than the panel majority admits” and “does not fit [a] simple paradigm.” *Olympus Spa*, 169 F.4th at 866 (Collins, J., dissenting from the denial of rehearing en banc) (the Spa’s concern is “only whether the person has male genitalia,” not “whether a person seeking admittance is transgender”).

C. The State threatens liberty of conscience, a time-honored principle in American jurisprudence.

Liberty of conscience is deeply rooted in American history, as illustrated by many statutory and judicially crafted exemptions. This Court, acknowledging man's "duty to a moral power higher than the State," quoted Harlan Fiske Stone (later Chief Justice) stating that "both morals and sound policy require that the state should not violate the conscience of the individual." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919). Indeed, “nothing short of the state’s self-preservation should warrant its violation,” and even then it is questionable “whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.” *Id.* It is hazardous for government to crush conscience and force people of

faith to set aside conscience or face ruinous penalties. Such oppression tends to breed a nation of citizens who lack *conscience*.

Courts, legislatures, and state constitutions have historically protected the right to live according to conscience and to decline participation in morally objectionable causes. “[Many religious Americans are unable to confine their religious exercise to the contexts of private clubs or formal worship. Nor should they.” *Olympus Spa*, 169 F.4th at 854 (Van Dyk, J., dissenting). The Constitution “does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life.” *Kennedy v. Bremerton*, 597 U.S. 507, 524 (2022). Congress has ranked religious freedom “among the most treasured birthrights of every American.” Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, pp. 1893-1894. This Court, holding that an alien could not be denied citizenship because of his religious objections to bearing arms, observed that “[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State.” *Girouard v. United States*, 328 U.S. 61, 68 (1946).

Many state constitutions link free exercise to “liberty of conscience,” typically subject to disruption of public peace and safety. Washington is one of them: “Absolute freedom of *conscience* in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual . . . but the liberty of

conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the *peace and safety* of the state.” Wash. Const. art. 1, § 11 (emphasis added). The word “conscience” appears nowhere in the Ninth Circuit’s decision and the concept is never discussed. Worse yet, public safety is compromised by allowing unclothed biological males to inhabit a space reserved for women, including underage girls. The State violates its own constitution by disregarding the Spa owners’ conscience.

II. HRC USES WLAD AS A SWORD INSTEAD OF A SHIELD.

Anti-discrimination laws should provide a shield ensuring that no one is arbitrarily excluded based on irrelevant criteria. But Washington wields WLAD as a sword that threatens to shut down a small business. This is one reason for the urgent call to revisit *Smith*, a decision sanctioning laws that “make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community”—provided they do not directly target religion. *Smith*, 494 U.S. at 897 (O’Connor, J., concurring). The Ninth Circuit ruling is based in part on the observation that WLAD’s “stated purpose . . . makes no mention of religion or religious activities. Wash. Rev. Code § 49.60.010.” *Olympus Spa*, 169 F.4th at 832. But this verbal omission does not alter the underlying reality.

The State’s refusal to tolerate disagreement with the government-sanctioned view of sexuality

“vilif[ies]” business owners “unwilling to assent to the new orthodoxy.” *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting). Washington “put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.” *Id.* at 672.

A. Washington’s application of WLAD creates intolerance, uniformity, exclusion, and inequality.

Intolerance. “Tolerance is a two-way street.” *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). WLAD “mandates orthodoxy, not anti-discrimination.” *Ibid.* Such intolerance is intolerable in a country devoted to liberty. But in a post-*Obergefell* world, secular ideologies increasingly employ the strong arm of the state to promote tolerance and respect for some while ruthlessly suppressing others. Liberty collapses in this toxic atmosphere. McConnell, “*God is Dead and We have Killed Him!*” 1993 BYU L. Rev. at 186-188.

Uniformity. America has always valued diversity. No one escapes offense in a free society. No government official may “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Barnette*, 319 U.S. at 642. Nor may an official determine what shall be offensive—that would be “the essence of viewpoint discrimination.” See *Matal v. Tam*, 582 U.S. 218, 248 (2017). Washington destroys diversity by demanding uniformity about sensitive issues of sexuality.

Washington may not agree with the Spa owners' beliefs, but the Constitution demands that courts protect their freedom to decide for themselves "the ideas and beliefs deserving of expression, consideration, and adherence. . . ." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994).

Exclusion. Washington punishes the Spa for its religious views of sexuality, threatening its ability to continue in business. The Constitution is an inclusive document protecting the life, liberty, religion, and viewpoint of all within its realm. *Inclusion* is trumpeted as a key rationale for anti-discrimination provisions, but Washington *excludes* the Spa from serving its patrons and respecting their privacy. The Ninth Circuit ruling enables states to punish those who hold traditional beliefs by excluding them from full participation in public life. The same was true for pharmacists in Washington forced to provide abortifacient drugs. "The dilemma this creates for the Stormans family and others like them is plain: Violate your sincerely held religious beliefs or get out of the pharmacy business." *Stormans, Inc. v. Wiesman*, 579 U.S. 942, 944 (2016) (Alito, J., dissenting).

Inequality. Equality is another common "buzzword." Some use the phrase "marriage equality" to describe *Obergefell*. Legal advocates have not only achieved their goals but far exceeded them. The LGBT community enjoys broad legal protection and a wide array of options for public services.

The government may not punish religious doctrine it believes to be false. *United States v.*

Ballard, 322 U.S. 78, 86-88 (1944). Washington punishes the Spa for adhering to its religious beliefs—and for respecting the privacy and safety of patrons—creating invidious *inequality*. This blatant viewpoint discrimination is anathema to the First Amendment and ultimately destroys liberty for everyone. Americans must “develop thicker skin” to “preserve their civil liberties.” David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003). “A society that undercuts civil liberties in pursuit of the ‘equality’ offered by a statutory right to be free from all slights will ultimately end up with neither equality nor civil liberties.” *Ibid.*

This Court should reaffirm these core constitutional principles. The *Obergefell* majority assured dissenters their First Amendment rights would remain intact. *Obergefell*, 576 U.S. at 679. Instead, *Obergefell* triggered multiple threats to the liberty to think, speak, and live according to conscience.

The Spa’s refusal to sacrifice its religious doctrine may lead to the shuttering of its business. Washington compels the Spa to choose between its religious doctrine and remaining in business, all because it refuses to sacrifice faith on the altar of an agenda it cannot support.

B. Washington’s application of WLAD creates the very discrimination it was designed to eradicate.

The Washington Law Against Discrimination ("WLAD") covers a wide variety of protected categories. This case is focused on gender identity—a contentious matter of public concern—but other characteristics under WLAD’s umbrella are also threatened. The “state’s contorted reading of its anti-discrimination law” (*Olympus Spa*, 169 F.4th at 837 (Lee, J., dissenting)) triggers discrimination against women, racial minorities, and minors.

Women. If the Ninth Circuit ruling is affirmed, Washington’s perverse distortion of WLAD will compel girls as young as 13 to “be nude alongside patrons with exposed male genitalia as they receive treatment.” *Id.* at 836-837 (Lee, J., dissenting). A law “enacted to safeguard women’s rights” will effectively “strip women of [those] protections.” *Ibid.* It is *women* – not *men* – who are detrimentally impacted by this twisting of the law. This case exposes “the alarming human costs” of a social agenda that “has begun to incinerate its own hard-won, historic achievements.” *Id.* at 857-858 (Van Dyk, J., dissenting).

Racial minorities. HRC failed to acknowledge that the Spa owners are “members of a racial minority group who want to share their cultural heritage and provide a safe space for women and girls.” *Id.* at 837 (Lee, J., dissenting). *Olympus Spa* is “an immigrant-founded small business” (*id.* at 842), but HRC

“overzealously pursued its case” against them (*ibid.*) and “exerted the full force of state power to bully members of a politically weak minority group” (*id.* at 844).

Minors. The Spa serves girls as young as thirteen. HRC ignores the Spa’s “responsibility to safeguard the privacy of those minors.” *Id.* at 838 (Lee, J., dissenting). That responsibility aligns with the Spa owners’ religious belief in “modesty between males and females as a central tenet.” *Ibid.*

In a nutshell, HRC threatened to prosecute a protected class—“racial minority members who want to share their cultural traditions”—to cater to the demands of a group that is “not even a protected class under the statute.” *Id.* at 843 (Lee, J., dissenting).

C. Transgender status is not a protected class under this Court’s precedents.

“A man does not have a legal right to compete against women just because he believes that he is a woman.” *West Virginia v. B.P.J.*, 2026 U.S. LEXIS 2884, *41-42 (2026) (Thomas, J., concurring). The same is true here—a man has no right to enter a private space reserved for women “just because he believes that he is a woman.” This Court has not recognized transgender status or gender identity as a category entitled to heightened scrutiny. *Id.* at *34, citing *United States v. Skrmetti*, 605 U.S. 495, 517 (2025). Several Justices of this Court “concluded that classifications based on transgender status or gender identity should receive only deferential rational basis

review and not intermediate or other heightened scrutiny.” *B.P.J.*, at *34; *Skrmetti*, 605 U.S. at 550-553. “[T]ransgender status is not a suspect class requiring heightened equal-protection scrutiny.” *B.P.J.*, at *42 (Thomas, J., concurring); *Skrmetti*, 605 U.S. at 550-551 (Barrett, J., concurring) (“people who are experiencing gender dysphoria” do not constitute a “discrete group”).

Bostock v. Clayton County does not alter the analysis and cannot salvage HRC’s position: “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.” 590 U.S. 644, 681 (2020). This is “a point *Bostock* took care to underscore.” *B.P.J.*, at *46 (2026) (Gorsuch, J., concurring). Other policies “must be assessed with reference to the policies in question and according to the relevant law’s terms.” *Ibid.*

III. WLAD, AS APPLIED, EXTENDS AN OPEN INVITATION TO VIOLATE STATE CRIMINAL LAWS AGAINST INDECENT EXPOSURE AND VOYEURISM.

The ink is barely dry on this Court’s recent rejection of an attempt to “erase sex as a coherent legal category” in the sports arena. *B.P.J.*, 2026 U.S. Lexis 2884. This Court should grant certiorari to ensure that such erasure does not metastasize. Washington’s perverse application of WLAD “undermines legal protections granted to women” and “generates an irreconcilable conflict with

Washington's criminal laws against voyeurism and indecent exposure.” *Olympus Spa*, 169 F.4th at 850 (Van Dyk, J., dissenting). These laws “protect women and girls from the predations of sexually deviant men.” *Id.* at 860 (Van Dyk, J., dissenting).

A. WLAD’s application erases legal protections for women and children.

Under the Ninth Circuit ruling, WLAD “now *requires* entities like Olympus Spa to permit these crimes [voyeurism and indecent exposure] to be committed on its premises against its patrons” and “insulates such sexual predators from prosecution.” *Ibid.* (emphasis added).

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 distinctions that define the sexes.

Id. at 859 (Van Dyk, J., dissenting). This dystopian nightmare is a frightening reality. Washington’s warped application of WLAD “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.” *Id.* at 860. (Van Dyk, J., dissenting).

The danger is not confined to the State of Washington. A similar incident occurred in California when “a registered sex offender with a long history of previous indecent exposure charges gained access to the women's side of [a] spa” by identifying himself as a woman. California Civil Code § 51, like WLAD, required the spa to admit him. *Olympus Spa*, 169 F.4th at 861 (Van Dyk, J., dissenting).

B. *Smith* upheld a criminal law—here, the Ninth Circuit ruling facilitates the violation of criminal law.

Smith upheld the criminal prohibition of a controlled substance, “the epitome of a generally applicable law.” Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 5 (2016). This Court explained that it had “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.” *Smith*, 494 U.S. at 878-879.

The State was “free to regulate” the potentially dangerous drugs at issue in *Smith*. Ironically, the Ninth Circuit uses *Smith*—upholding a criminal law—to *facilitate* criminal activities the State is “free to regulate” and indeed *has* regulated. *See* Wash. Rev. Code § 9A.88.010 (indecent exposure); § 9A.44.115 (voyeurism). “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.” *Olympus Spa*, 169 F.4th at 850 (Van Dyk, J., dissenting). WLAD’s application to the Spa not only defies the “peace and safety” caveat that defines the outer limits of religious liberty but encourages an individual “to become a law unto himself”—precisely the result *Smith* sought to foreclose. *Smith*, 494 U.S. at 878, 885.

What the State is not “free to regulate” is a religious view of sexuality that threatens to exclude those holding that view from full participation in public life.

C. The Spa owners are peaceful conscientious objectors—not litigants asserting a right to engage in *criminal* acts.

No American should ever have to choose between allegiance to the state and faithfulness to God to participate in public life. Conscientious objector claims are “very close to the core of religious liberty.” Nora O’Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006).

In *Smith*, Petitioners “contend[ed] that their religious motivation for using peyote place[d] them *beyond the reach of a criminal law* that [wa]s not specifically directed at their religious practice, and that [wa]s concededly constitutional as applied to

those who use[d] the drug for other reasons.” 494 U.S. at 878 (emphasis added). *Smith* repeatedly emphasized the *criminal* conduct at issue. *Id.* at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

In earlier cases (*Sherbert, Thomas v. Review Bd., Hobbie*), “the conduct at issue . . . was not illegal” and had “nothing to do with an across-the-board criminal prohibition on a particular form of conduct.” *Smith*, 494 U.S. at 876, 884. Winning cases often involved conscientious objectors, i.e., believers seeking freedom from state compulsion to commit an act against conscience. *Girouard*, 328 U.S. 61 (military combat); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *Barnette*, 319 U.S. 624 (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Many losing cases involved civil disobedience claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor).

These pre-*Smith* cases are more consistent with the first draft of the First Amendment, as written by James Madison: “nor shall the full and equal rights of conscience be *in any manner, or on any pretext*, infringed.” 1 *Annals of Cong.* 451 (June 8, 1789) (speech by Rep. Madison) (emphasis added). Representative Daniel Carroll of Maryland observed that “the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand.” 1 *Annals of Cong.* 757 (Aug. 15, 1789).

The Spa owners are conscientious objectors. Unlike the *Smith* plaintiffs, they do not seek to commit a criminal act, but to preserve the privacy and safety of their patrons. There is nothing unlawful—let alone *criminal*—about their business. Indeed, the State’s position facilitates indecent exposure and voyeurism—*criminal* acts.

Ironically, this case flips the script. The Spa presents no threat to public peace or safety, but the State’s application of WLAD *creates* those threats.

D. Washington’s application of WLAD threatens public peace and safety.

Religious liberty in America has historically enjoyed "broad protection," but does not extend to "conduct that would endanger 'the public peace' or 'safety.'" *Fulton v. City of Philadelphia*, 593 U.S. 522, 571-578 (2021) (Alito, J., concurring in the judgment). This Court’s decision in *Reynolds v. United States*, 98 U.S. 145 (1879), upholding a polygamy conviction, “has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct ‘pose[s] some substantial threat to public safety, peace or order.’” *Sherbert*, 374 U.S. at 403.” *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 569 (1993) (Souter, J., concurring). “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.” *Olympus Spa*, 169 F.4th at 864 (Tung, J., dissenting from the denial of rehearing en banc) (emphasis added).

The Spa does not threaten “public safety, peace or order” but Washington’s application of WLAD threatens all three. “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.” *Id.* at 864 (Tung, J., dissenting from the denial of rehearing en banc).

**IV. THIS COURT SHOULD RECONSIDER
SMITH, PARTICULARLY IN THE CONTEXT
OF ANTI-DISCRIMINATION LAWS THAT
TOUCH SENSITIVE RELIGIOUS
CATEGORIES.**

Smith left religious accommodations to the political process, which sometimes carves out exemptions. But when this Court put its thumb on the scale in the national debate over marriage and sexuality, it could not lift a finger to relieve the burdens it created. “The majority’s decision imposing same-sex marriage cannot . . . create any such accommodations.” *Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting). This Court *bypassed* the political process by unilaterally redefining marriage, but because of *Smith* the *entire burden* fell on the political process to protect religious liberty through legislative exemptions. “[T]he People could have considered the religious liberty implications” of redefining marriage, but instead this Court “short-circuit[ed] that process, with potentially ruinous consequences for religious liberty.” *Id.* at 734 (Thomas, J., dissenting). The danger to religious

liberty has escalated far beyond the definition of marriage, as this case demonstrates.

A. WLAD lacks religious neutrality.

The Ninth Circuit characterized WLAD as “a neutral, generally applicable law” and concluded the Spa was not entitled to an exemption. But there is nothing neutral about a policy that blatantly defies commonly held religious convictions about sexuality.

Smith treats generally applicable laws as “presumptively neutral, with religious accommodations a form of special preference.” McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1133. *Smith* reduced religious liberty to “no more than an antidiscrimination principle.” *Lukumi*, 508 U.S. at 578 (Blackmun, J., concurring). Even under that standard, WLAD indisputably “discriminates against” the Spa’s religious belief that prohibits permitting “the mixing of nude persons of the opposite sex who are not married to one another.” *Olympus Spa*, 169 F.4th at 831.

Anti-discrimination laws covering sexual orientation and/or gender identity are increasingly weaponized against *religious* convictions. Where a policy protects a category defined by conduct many religious traditions consider sinful, faith-neutral application is virtually impossible and challenges are inevitable. The government’s failure to foresee these conflicts parallels the “reckless disregard” standard used in other contexts. Even where the law does not facially target religion—or where government

officials successfully conceal their hostility—there is a “reckless disregard” for the unavoidable conflict with religion. Dissenting Justices in *Obergefell* sent a clarion call about the coming collision. Justice Thomas explained that because marriage is not merely a governmental institution but also a religious institution: “It appears all but inevitable that the two will come into conflict.” *Obergefell*, 576 U.S. at 734 (Thomas, J., dissenting). A facially neutral law may also “lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids.” *Lukumi*, 508 U.S. at 561 (Souter, J., concurring). WLAD demands participation in activity the Spa owners regard as sinful and requires them to become complicit in *criminal* activity, including cases where minor children are involved.

B. *Smith* departed from this Court’s longstanding Free Exercise jurisprudence.

Religious freedom is “an independent liberty” that “occupies a preferred position” in our legal system. *Smith*, 494 U.S. at 895 (O’Connor, J., concurring). Encroachments are justified only by governmental interests “of the highest order.” *Yoder*, 406 U.S. at 215. Even “neutral, generally applicable” laws may “have the unavoidable potential of putting the believer to a choice between God and government.” *Lukumi*, 508 U.S. at 577 (Souter, J., concurring). Religious conduct, “like the belief itself, must be at least presumptively protected by the Free Exercise Clause.” *Smith*, 494 U.S. at 893 (O’Connor, J.,

concurring). At the very least, a generally applicable law that prohibits religiously motivated conduct “implicate[s] First Amendment concerns.” *Id.* at 893-894.

Earlier decisions, written “in language hard to read as not foreclosing the *Smith* rule,” indicate that “formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality.” *Lukumi*, 508 U.S. at 564-565 (Souter, J., concurring). And while religiously motivated action may be subject to the state’s broad police powers, “there are areas of conduct . . . beyond the power of the State to control, even under regulations of general applicability.” *Thomas v. Review Bd.*, 450 U.S. at 717.

Smith’s approach erodes religious liberty and is contrary to decades of previous case law. The unfortunate result was to “relegate[] a serious First Amendment value to the barest level of minimum scrutiny.” *Smith*, 494 U.S. at 894 (O’Connor, J., concurring), citing *Hobbie*, 480 U.S. at 141-142 (quoting *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (O’Connor, J., concurring in part and dissenting in part)). *Smith* severely restricted religious liberty violations to situations where the government has clearly targeted religion. *Smith*’s rationale was based on predictions that protecting religious liberty from the impact of neutral, generally applicable laws would permit each individual “to become a law unto himself” (citing *Reynolds*, 98 U.S. at 167) and thus be “courting anarchy.” *Smith*, 494 U.S. at 885, 888. Ironically, that is precisely what WLAD perpetrates.

C. *Smith* thwarts the very purpose of the Bill of Rights – to protect minorities from majoritarian oppression.

Smith leaves religious exemptions to the political process—but “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy.” *Barnette*, 319 U.S. at 638. Indeed, “the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.” *Smith*, 494 U.S. at 902 (O’Connor, concurring). Traditional views of sexuality are often viewed with extreme hostility. The compelling interest test ensures that the majority does not run roughshod over minority views. The First Amendment restrains the *legislative branch*—the very entity now charged with protecting religious liberty under *Smith*.

Smith admitted that leaving accommodations to the political process would place religious minorities at a “relative disadvantage” but dismissed that result as the “unavoidable consequence of democratic government.” *Smith*, 494 U.S. at 889. *Smith* “leav[es] the Court open to the charge of abandoning its traditional role as protector of minority rights against majoritarian oppression.” McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1129. That is contrary to decades of this Court’s jurisprudence protecting minority views, not disregarding them. *Dale*, 530 U.S. at 660 (“[T]he fact that [social acceptance of LGBT ideology] may be embraced and advocated by increasing numbers of people is all the

more reason to protect the First Amendment rights of those who wish to voice a different view.”); *Masterpiece Cake Shop, Ltd. v. Colorado Human Rights Comm’n*, 584 U.S. 617, 649 (2018) (Gorsuch, J., concurring) (“It is in protecting unpopular religious beliefs that we prove this country’s commitment to serving as a refuge for religious freedom [I]t is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith.”)

CONCLUSION

This Court should grant the petition and reverse the Ninth Circuit ruling.

Respectfully submitted,

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