

No. 26-286

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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF OF AMERICA FIRST LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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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 while inside the spa. The owners' religious beliefs and the demands of their customers prevent them from allowing naked men to use the spa alongside naked women. So the owners exclude biological men from the spa, unless they identify as female and have undergone surgery to remove their genitals.

A transgender activist filed a complaint with the Washington State Human Rights Commission, demanding that the spa admit *all* transgender individuals who identify as women, regardless of whether they continue to have male genitals. The Commission responded by accusing the spa of violating a state anti-discrimination statute that prohibits places of public accommodation from discriminating against patrons "because of" their "gender expression or identity." A divided Ninth Circuit dismissed the spa's lawsuit and rejected its constitutional attacks on the Commission's actions. The questions presented are:

1. Whether the Commission's attempt to force a Christian business to allow uncastrated biological men to appear naked in a spa reserved for naked women violates the First and Fourteenth Amendments.
2. Whether the Commission's actions violate the Equal Protection Clause by denying the spa's female patrons and employees the equal protection of Washington's indecent-exposure laws.

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BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS¹

Olympus Spa is a Korean spa that requires its patrons to be fully nude. Because nudity is required and because patrons of the spa see each other naked when using the spa’s services, the spa is open only to women and girls, and only female employees are permitted to enter the spa and administer treatments to the spa’s female customers.

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1. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief under Rule 37.2.

Olympus Spa will not allow men to use the spa or partake in its services alongside naked women and girls—regardless of any “gender identity” that the man purports to assert. The only exception to the spa’s no-men-allowed policy is for transgender individuals whose biological sex is male but have undergone surgery to remove their genitals. Biological men who still have their genitals are categorically excluded from the spa, regardless of whether they identify or present themselves as a man or a woman.

The spa refuses to admit biological men with male genitals for three reasons. First, the spa is owned and operated by a Christian family, whose faith requires them to enforce rules of modesty between the sexes and protect their female patrons from encountering naked men.¹ Second, allowing naked men into the spa would violate Washington’s criminal laws against indecent exposure, which prohibit individuals from making an “open and obscene exposure” that is “likely to cause reasonable affront or alarm.”² Third, the spa’s female customers will not tolerate the presence of naked men with male genitals alongside them in the spa. On previous occasions in which biological men have entered the spa while claiming to be wo-

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1. See Declaration of Sun Lee at 3–4, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-2 (“According to our religion, man and woman are created differently. . . . [P]art of our religious belief [is] to protect the weak and defenseless by separating a gender group in a nude area.”).
 2. Wash. Rev. Code § 9A.88.010(1); see also *id.* (“A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.”).

men, it has left the spa’s female customers in a state of “shock” and “fear,” and some have “cried with anger.”³

On May 2, 2020, a transgender activist named Haven Wilvich filed a complaint with the Washington State Human Rights Commission. Wilvich claimed that Olympus Spa “denied me services” and told Wilvich that “transgender women without surgery are not welcome because it could make other customers and staff uncomfortable.”⁴ The Commission responded by launching a witch hunt against the spa. It falsely accused the spa of violating a Washington statute that bans places of public accommodations from discriminating because of “gender expression or identity” — even though Wilvich would have been turned away by the spa regardless of whether he identified or expressed himself as a man or a woman. And it bullied the spa into accepting a settlement that allows men to use and appear naked inside the spa whenever they claim

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3. Declaration of Sun Lee at 2, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-2 (“There were numerous incidents where a male entered our spa off-guarded, undressed his clothes in the locker room, and went into a pool area. Every time the incident occurred, it left so many customers in shock and with fear because they recognized a fully nude man with his genitals exposed entering a pool that was already occupied by all women. Some of our customers cried with anger complaining that our spa allowed men to sexually assault women at the spa including minors.”).
 4. Washington State Human Rights Commission Complaint (“Exhibit 1”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3.

to be women, regardless of whether they have undergone surgery to remove their genitals.⁵

The settlement allowed the spa to challenge the constitutionality of the agreement or the Commission’s interpretations of the relevant state anti-discrimination laws. But the Ninth Circuit rejected the spa’s free-exercise attacks on the Commission’s actions by citing *Employment Division, Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which allows states to prohibit the free exercise of religion so long as they do so pursuant to neutral, generally applicable laws. Pet. App. 18a–24a. This Court should grant certiorari and reverse.

The Commission did not act pursuant to a neutral, generally applicable law because the spa is not violating the Washington Law Against Discrimination. The spa did not discriminate “because of” anyone’s “gender expression or identity,” as uncastrated men are excluded from the spa regardless of whether they identify or present themselves as male or female. *See* Wash. Rev. Code § 49.60.030(1); Wash. Rev. Code § 49.60.040(29); Pet. App. 99a–101a (Collins, J., dissenting from denial of rehearing en banc). It is the Commission’s remedy that compels the spa to discriminate “because of” gender expression or identity, as it tells the spa to admit biological men whenever they identify as women but not when they identify as men. Pet. App. 102a. The Court should grant certiorari and hold that the rule of *Smith* applies only when religious exercise violates the actual terms of a neutral, generally

5. *See* Executed Settlement Agreement (“Exhibit 11”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3.

applicable law — not when it violates a rogue bureaucrat’s purported interpretation of statutory language. The Court should also grant certiorari and hold that Washington is violating the Equal Protection Clause by denying Olympus Spa’s patrons and employees the protections of Washington’s indecent-exposure laws.

INTEREST OF AMICUS CURIAE

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution and federal statutes.

STATEMENT

The lower courts dismissed the plaintiffs’ complaint for failure to state a claim,⁶ so the allegations of the complaint must be accepted as true at this stage of the proceedings. *See Christopher v. Harbury*, 536 U.S. 403, 406 (2002) (“Since we are reviewing a ruling on motion to dismiss, we accept [the plaintiff’s] factual allegations and take them in the light most favorable to her.”). We will recite the facts as alleged in the operative complaint and its supporting exhibits. *See* First Amended Complaint, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-1.

Olympus Spa is a Korean spa that requires its patrons to be fully nude. The services that it provides include a bath area containing multiple whirlpools, standing showers, sit-down showers, a steam room, a dry sauna, and a full-body scrub in an open communal space shared along-

6. Pet. App. 29a, 120a.

side other naked customers.⁷ Patrons must be fully naked when using these services and no towels or other coverings are provided or allowed,⁸ as nudity is required for all procedures called “seshin” according to Korean tradition.⁹ As Sun Lee, the president of Olympus Spa explained in his letter to the Washington Human Rights Commission:

The traditional body scrubs known as “seshin” cannot be undertaken while clothed because an inseparable and necessary component of this age-old body scrub technique requires lengthy soaking, fully nude, in a warm pool to soften skin in order to allow and enhance total skin exfoliation.

Letter from Sun Lee to Washington Human Rights Commission (March 25, 2021), attached as Exhibit 4 to First Amended Complaint, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3; *see also* Pet. App. 31a–33a (Lee, J., dissenting) (explaining the cultural traditions behind Korean spas and the need for nudity when receiving seshin).

Olympus Spa will allow biological men who identify as women to use the spa if (and only if) their genitals have

7. *See* First Amended Complaint, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-1, at ¶ 20.

8. *See id.* at ¶ 20 (“Patrons are required to be fully naked when using these sections of the spa and no towels or other coverings are provided/allowed.”).

9. *See id.* at ¶ 21 (“Nudity is required for all procedures called ‘Seshin’ according to Korean tradition.”).

been surgically removed.¹⁰ But the spa will not, under any circumstance, allow a biological man with male genitalia to enter the spa and expose himself to the spa's naked female patrons or receive services from the spa's all-female employees.¹¹

The spa has adopted this policy for three reasons. First, spa's owners are Christians, and the teachings of their faith forbid them to allow naked men to expose themselves to female patrons or employees. Sun Lee, the president of the spa, explains his family's religious convictions as follows:

According to our religion, man and woman are created differently. . . . 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, Philipians 4:3, Genesis 1:27, Proverbs 31:17, Phillipians 2:3 and more.

These verses highlight our goal and mission to provide a safe, private, and respectful environment for women. This is not at the expense of those with male genitalia but for the sanctity and protection of those with female genitalia. . . .

10. *See id.* at ¶ 26.

11. *See id.*

We have female minors coming with their mother, we certainly need to care for little children’s well-being mentally and physically. We are responsible to protect those younger customers from either half or fully undressed males approaching them from both a cultural and creed based stance. That’s part of our religious belief to protect the weak and defenseless by separating a gender group in a nude area. Traditional Korean spas do not treat men for ddemiri and seshin.

Declaration of Sun Lee at 3–4, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-2.

Second, Washington’s indecent-exposure laws prohibit the spa from allowing its patrons to make “any open and obscene exposure” that is “likely to cause reasonable affront or alarm”:

A person is guilty of 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.

Wash. Rev. Code § 9A.88.010(1). Allowing a naked man with male genitals to traipse through the spa and expose his genitals to female patrons and employees is both “open and obscene” and “likely to cause reasonable affront or

alarm”—and it subjects the spa and its owners and operators to potential criminal liability.¹²

Finally, the spa would lose business if it allowed customers with male genitals to use the spa alongside its female patrons—even if it were to limit this allowance to those who claim to be women or assert a gender identity that departs from their biological sex. In every previous instance in which a biological man with male genitals entered the spa after deceiving the spa’s management, the spa’s female customers reacted with fury. Sun Lee explained these incidents:

Generally speaking we have no idea if a preoperative transgender violates the policy of the spa until they are undressed. There were numerous incidents where a male entered our spa off-guarded, undressed his clothes in the locker room, and went into a pool area.

Every time the incident occurred, it left so many customers in shock and with fear because they recognized a fully nude man with his genitals exposed entering a pool that was already occupied by all women. Some of our customers cried with anger complaining that our spa allowed men to sexually assault women at the spa including minors. Exposing a male genital in a public setting can be a threat to people especially to the opposite sex.

12. *See id.* at ¶ 18.

As a result, it has tremendously damaged our business's reputation for many months. It caused us so much loss in financial opportunities and extreme psychological, mental, and even physical pain.

Declaration of Sun Lee at 3–4, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-2. Allowing biological men to use the spa whenever they claim a transgender identity would cost the spa even more business, as many if not most women are unwilling to appear naked in a spa where biological men can freely enter, expose their genitals, view the naked women using the spa, and roam around naked in full view of the spa's female customers and employees. It would also subject the spa to ruinous civil liability if a naked man were to sexually assault a female patron or employee while using the spa.

On May 2, 2020, Haven Wilvich filed a complaint with the Washington State Human Rights Commission, claiming that the spa had “denied” Wilvich “services” because of Wilvich’s gender identity, in violation of Washington’s Law Against Discrimination.¹³ The spa denies that Wilvich ever visited either of its two locations in Lynnwood or Tacoma, and its records show that Wilvich never came or

13. Washington State Human Rights Commission Complaint (“Exhibit 1”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3 (“In January 2020, I went to Respondent’s spa for services. Respondent Owner denied me services and stated that transgender women without surgery are not welcome because it could make other customers and staff uncomfortable.”).

sought entry to either venue.¹⁴ Wilvich has since admitted in interviews with Fox 13 and the Lynnwood Times that he never came to the spa,¹⁵ despite Wilvich’s sworn statement to the Commission that he “went to Respondent’s spa for services.”¹⁶ On August 3, 2020, three months after filing the complaint with the Commission, Wilvich under-

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14. See First Amended Complaint, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-1, at ¶ 40 (“Wilvich never set foot in either spa location[.]”); Declaration of Sun Lee at 2–3, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-2 (“We found no record of Haven Wilvich having been in either of our spas. 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, and being that Haven presents as feminine no one would have known otherwise until and unless Haven was nude.”).
 15. See First Amended Complaint, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-1, at ¶ 35; see also *Trans woman faces hate messages, death threats after identity revealed in Olympus Spa lawsuit*, FOX 13 Seattle (June 14, 2023), available at <http://bit.ly/4z188Eg> [<https://perma.cc/3VWV-VDAU>] (“‘I called ahead to see if I would be allowed to attend as a trans woman, unfortunately, I was told no,’ said Wilvich.”); Mario Lotmore, *Lynnwood’s Olympus Spa asks US Supreme Court to reverse Ninth Circuit ruling forcing men into women-only nude spa*, Lynnwood Times (August 12, 2026) available at <http://bit.ly/4jyh6Eq> [<https://perma.cc/YN63-7A59>] (“The dispute began in January 2020 when Haven Wilvich, a transgender woman who had not undergone bottom surgery and retained male genitalia, inquired by phone about attending a women’s group event at the spa Wilvich never visited the spa in person.”).
 16. See note 13, *supra*.

went vaginoplasty and no longer has male genitalia.¹⁷ So Wilvich is now welcome to use Olympus Spa and has been welcome at the spa for over six years.

Rather than declaring Wilvich’s complaint moot on account of the surgery, the Commission demanded that the spa submit a written response to Wilvich’s complaint by March 29, 2021.¹⁸ On March 25, 2021, Sun Lee wrote to the Commission and denied that the spa’s policies violated Washington’s Law Against Discrimination.¹⁹ On April 14, 2021, the Commission responded to Sun Lee’s letter and falsely accused the spa of discriminating because of “gender expression or identity”—even though the spa turns away biological men with male genitalia regardless of any “gender expression or identity” that those individuals might assert:

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17. See First Amended Complaint, *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-1, at ¶ 35; Mario Lotmore, *Lynnwood’s Olympus Spa asks US Supreme Court to reverse Ninth Circuit ruling forcing men into women-only nude spa*, Lynnwood Times (August 12, 2026) available at <http://bit.ly/4jyh6Eq> [<https://perma.cc/YN63-7A59>] (“Wilvich later underwent vaginoplasty on August 3, 2020, to create a vagina. ‘I’m now the proud owner of a brand spanking new neovagina,’ Wilvich wrote on her blog post titled, ‘V Day.’”); see also Haven Wilvich, *V Day*, Finding Haven (August 3, 2020), archived at <http://bit.ly/4AwTVR3> [<https://perma.cc/P8QD-VTQD>].
 18. See Notice of Complaint of Discrimination (“Exhibit 3”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3.
 19. See Letter from Sun Lee of March 25, 2021 (“Exhibit 4”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3.

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 [C]isgender 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. This practice is clearly discriminatory and violates the WLAD.

Letter from Madison Imiola of April 14, 2021 ("Exhibit 5"), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3.

But the Washington Law Against Discrimination does not say that places of public accommodation must "allow[] transgender women to access . . . facilities based on their gender identity." *Id.* It prohibits places of public accommodation from discriminating "because of" a patron's "gender expression or identity"²⁰—and the spa did not exclude Wilvich (or other uncastrated men) because they identify or express themselves as women rather than men. Wilvich was banned from the spa before his surgery because: (1) his biological sex is male; and (2) he had not (at that time) undergone surgery to remove his genitals. Wilvich would have been just as unwelcome in the spa if he had identified or expressed himself as a man rather than a woman, so neither Wilvich nor anyone else has

20. See Wash. Rev. Code § 49.60.030(1)(b); Wash. Rev. Code § 49.60.040(29).

been excluded from the spa “because of” their “gender expression or identity.”²¹

The Commission pressured Olympus Spa to enter a settlement that requires the spa to:

1. Undergo “training” on Washington’s Law Against Discrimination (RCW 49.60) “with an emphasis on gender identity and equal treatment of transgender individuals in places of public accommodation”;²²
2. Adopt and implement a new company policy that will allow naked men to use the spa whenever they claim to be women, regardless of whether they have undergone surgery to remove their genitals;²³ and
3. Post on its website a “nondiscriminatory policy” that “affirms equal access, services and treatment for all customers . . . without regard to . . . sexual orientation or gender identity.”²⁴

The settlement preserved the spa’s right to challenge the constitutionality of the Commission’s actions,²⁵ and the spa sued after signing the agreement and argued (among other things) that the Commission violated its

21. See note 20, *supra*.

22. Executed Settlement Agreement ¶ I.B.i (“Exhibit 11”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3.

23. *Id.* at ¶ I.B.ii.

24. *Id.*

25. *Id.* at ¶ II.C.

rights under the Free Exercise Clause. The Ninth Circuit, however, rejected the free-exercise claim by invoking *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which allows states to prohibit the free exercise of religion whenever they do so pursuant to neutral laws of general applicability. Pet. App. 18a–24a; *see also id.* at 19a (“WLAD is both neutral and generally applicable.”).

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari and review whether the Commission’s actions against Olympus Spa were taken pursuant to a neutral law of general applicability. It should also grant certiorari to consider whether Washington is violating the Equal Protection Clause by selectively withholding the protections of its indecent-exposure laws from the female patrons and employees of Olympus Spa.

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE NINTH CIRCUIT’S HOLDING THAT THE COMMISSION ACTED PURSUANT TO A NEUTRAL LAW OF GENERAL APPLICABILITY

The Ninth Circuit insisted that the Commission’s actions passed muster under *Smith*. Pet. App. 18a–24a. It reached this conclusion by declaring Olympus Spa had violated the Washington Law Against Discrimination,²⁶ and by characterizing the Washington Law Against Discrimination as a neutral, generally applicable law.²⁷ The Court should grant certiorari to review this holding.

26. Pet. App. 10a.

27. *Id.* at 19a (“WLAD is both neutral and generally applicable.”).

The courts cannot uphold the Commission’s actions under *Smith* unless the spa was actually violating the terms of the “neutral” and “generally applicable” laws that the Commission purports to rely upon. Yet the spa’s policies were entirely consistent with Washington’s statutory enactments. That is because: (1) A spa does not discriminate “because of” a patron’s “gender expression or identity”²⁸ when it categorically bans uncastrated men from spaces reserved for naked women; and (2) Washington’s indecent-exposure laws require spas and places of public accommodation to keep uncastrated men from appearing naked in spaces reserved for naked women.

And even if the Commission could somehow show that the spa’s policies were incompatible with the Washington Law Against Discrimination, the Court should still grant certiorari to review whether WLAD can qualify as a neutral law of “general applicability” when it provides statutory exemptions for private clubs and religious or sectarian “educational facilities.” *Cf. Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (“[G]overnment regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise.”).

28. *See* Wash. Rev. Code § 49.60.030(1)(b); Wash. Rev. Code § 49.60.040(29).

A. A Policy That Bans Uncastrated Men From Spaces Reserved For Naked Women Does Not Discriminate Against Its Patrons “Because Of” Their “Gender Expression Or Identity”

The Washington Law Against Discrimination (WLAD) prohibits places of public accommodations from discriminating against patrons “because of” their “gender expression or identity.” *See* Wash. Rev. Code § 49.60.030(1)(b); Wash. Rev. Code § 49.60.040(29) (defining “sexual orientation” to include “gender expression or identity”); *id.* (defining “gender expression or identity” 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.”); Pet. App. 8a–9a (quoting the relevant statutory provisions of WLAD).

The Commission claims that the spa violated this statutory command by preventing uncastrated men from using the spa alongside its naked female customers. *See* Letter from Madison Imiola of April 14, 2021 (“Exhibit 5”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3. But a spa does not discriminate against a patron “because of” that individual’s “gender expression or identity” when it bans *all* uncastrated men—regardless of their “gender expression” or “gender identity”—from entering spaces reserved for naked women. An uncastrated man who identifies as a man would be just as unwelcome in the spa as an uncastrated man who identifies as a woman. *Every* biological

man—whether transgender or non-transgender—is barred from the spa unless and until they undergo surgery to remove their genitals.

This is not discrimination “because of” a patron’s “gender expression or identity.” *See Bostock v. Clayton County*, 590 U.S. 644, 656 (2020) (“[T]he ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’” (citation and internal quotation marks omitted)). Admission to the spa depends not on a patron’s “gender expression or identity,” but on whether they have undergone the surgery needed to prevent violations of Washington’s indecent-exposure laws. *See id.* (“[A] ‘because of’ test incorporates the simple and ‘traditional’ standard of but-for causation In other words, a but-for test directs us to change one thing at a time and see if the outcome changes.” (citations and some internal quotation marks omitted)). Wilvich is welcome to use the spa now that he has surgically removed his genitals—even though his “gender expression and identity” remains unchanged since the time he filed his complaint with the Commission on May 2, 2020.

To be sure, the Washington Human Rights Commission *interprets* the Washington Law Against Discrimination to require the spa to admit uncastrated biological men whenever they assert a female “identity” or “expression.” *See* pp. 12–13, *supra* (quoting Letter from Madison Imiola of April 14, 2021 (“Exhibit 5”), *Olympus Spa v. Armstrong*, No. 2:22-cv-00340-BJR (W.D. Wash. July 6, 2023), ECF No. 24-3); *see also* Wash. Admin. Code § 162-32-060(1) (“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.”). But the holding of *Smith* applies only if the spa is violating the enacted language of a neutral, generally applicable law—not a cockamamie interpretation adopted by an administrative agency. Washington law does not vest agencies with authority to interpret statutes in a manner that binds the judiciary,²⁹ and it does not allow agencies to depart from unambiguous statutory language.³⁰ Yet the Commission's “interpretation” of the Washington Law Against Discrimination requires the spa to engage in the very discriminatory practices that the statutory text forbids, as it compels the spa to admit uncastrated men but only when they identify as female, while allowing the spa to continue excluding the uncastrated men who identify as men. *This* is discrimination “because of” gender identity, not the spa's policy of excluding all uncastrated biological men regardless of any gender identity they might assert. Pet. App. 102a (Collins, J., dissenting from denial of rehearing en banc).

29. See *Waste Management of Seattle, Inc. v. Utilities & Transportation Comm'n*, 869 P.2d 1034, 1038 (Wash. 1994) (“The courts retain the ultimate authority to interpret a statute.”).

30. See *id.* (“Absent ambiguity . . . there is no need for the agency's expertise in construing the statute. Furthermore, we will not defer to an agency determination which conflicts with the statute.” (citation omitted)).

B. Washington's Indecent-Exposure Laws Require Olympus Spa To Prevent Uncastated Men From Exposing Their Genitals In Places Reserved For Naked Women, And The Washington Law Against Discrimination Did Not Impliedly Repeal That Law

There is a second reason why the Commission's interpretation of the Washington Law Against Discrimination does not reflect the requirements of a neutral, generally applicable state law: It contradicts Washington's indecent-exposure statute, which imposes criminal liability on any person who "intentionally makes any open and obscene exposure of his or her person . . . knowing that such conduct is likely to cause reasonable affront or alarm." Wash. Rev. Code § 9A.88.010(1). A spa that intentionally allows an uncastated man to appear naked in places reserved for naked women is violating Washington's indecent-exposure statute, regardless of whether the patron with male genitals identifies as a man or a woman. The exposure of a man's genitals in a spa occupied by naked women is no less "obscene" and no less "likely to cause reasonable affront or alarm" when committed by a person who claims to be a woman but has not yet undergone surgery to remove his genitals. *See* pp. 9–10, *supra*.

Washington has not amended its indecent-exposure statute to exempt or accommodate transgender individuals who expose their male genitals to women. *See* Wash. Rev. Code § 9A.88.010(1). And the Washington Law Against Discrimination does not repeal by implication these criminal prohibitions. *See Paulson v. Pierce County*, 664 P.2d 1202, 1205 (Wash. 1983) ("Implied repeals of statutes are disfavored by Washington courts."). The courts cannot find that the spa violated a neutral, generally

applicable law when the Commission’s interpretation of the Washington Law Against Discrimination contradicts not only the text of the statute but also the state’s separate criminal prohibitions on indecent exposure.

C. The Court Should Grant Certiorari To Review Whether The Statutory Exemptions In The Washington Law Against Discrimination Disqualify It From Serving As A “Generally Applicable” Law

The Washington Law Against Discrimination exempts “bona fide clubs” and certain entities operated by religious or sectarian institutions from its definition of public accommodation:

[N]othing 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

Wash. Rev. Code § 49.60.040(2). The spa and some dissenting Ninth Circuit judges contend that these statutory exemptions defeat any attempt to characterize the Law Against Discrimination as “generally applicable.” Pet. 18–24; Pet App. 72a (VanDyke, J., dissenting from denial of rehearing en banc); Pet. App. 89a–95a (Tung, J., dissent-

ing from denial of rehearing en banc). The Court should grant certiorari to resolve this question.

This Court has held that “government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). The Ninth Circuit interpreted *Tandon* narrowly,³¹ and Judge McKeown’s opinion respecting the denial of rehearing en banc defended the court of appeals’ holding by arguing that bona fide clubs are not “comparable” to businesses that serve the public,³² and suggesting that the statutory exemptions for some (but not all) entities operated or maintained by religious or sectarian institutions might be required by the church-autonomy doctrine.³³

But this Court has not yet ruled on whether or to what extent a statute’s accommodations for some (but not all) religious objectors destroys the “generally applicable” character of the law. Judge McKeown’s opinion correctly observes that statutory exemptions for “entities controlled by religious organizations” are commonplace in antidiscrimination statutes,³⁴ but why is that a reason to characterize a state law as “generally applicable” when its applicability is less than universal? If anything, one would

31. Pet. App. 21a–22a.

32. Pet. App. 52a–55a (McKeown, J., respecting the denial of rehearing en banc) (emphasis omitted).

33. Pet. App. 56a (McKeown, J., respecting the denial of rehearing en banc).

34. *See id.* (“[E]xemptions for “entities controlled by religious organizations” are common features of antidiscrimination statutes that have existed for decades without courts batting an eye.”).

think that a statute or regulation’s willingness to exempt certain types of religious institutions but not others from its reach should call for more searching judicial scrutiny than the rational-basis test of *Smith*. Cf. *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021) (faulting the city for “offer[ing] no compelling reason why it has a particular interest in denying an exception to [Catholic Social Services] while making them available to others.”). A neutral law of “general applicability” trumps free-exercise claims because its universal nature is presumed to embody a governmental interest that can “brook no departures.” *Id.* No such presumption can attach to the Washington Law Against Discrimination when it readily exempts some (but not all) religious entities from its statutory reach.

II. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT WASHINGTON IS VIOLATING THE EQUAL PROTECTION CLAUSE BY DENYING OLYMPUS SPA’S PATRONS AND EMPLOYEES THE PROTECTIONS OF WASHINGTON’S INDECENT-EXPOSURE LAWS

The Commission’s actions are not only violating the free-exercise rights of Olympus Spa. They are also violating the equal-protection rights of Olympus Spa’s female patrons and employees. The petitioners in this case include a patron and three employees of Olympus Spa who are constitutionally entitled to the equal protection of Washington’s indecent-exposure statute, which protects everyone in Washington from those who intentionally make an “open and obscene exposure” of their genitals while knowing that the exposure is “likely to cause reason-

able affront or alarm.” Wash. Rev. Code § 9A.88.010(1). Washington does not exempt transgender individuals from its prohibitions on indecent exposure, and its criminal laws make no allowance for biological men who identify as women to display their genitals in female-only spaces.

The Commission’s actions are squarely prohibited by the text of the Equal Protections Clause, which says:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Washington’s criminal prohibitions on indecent exposure qualify as “laws” that “protect,” and the Commission is selectively withdrawing the “protection” of those “laws” from “person[s] within its jurisdiction,” *i.e.*, the female customers and employees of Olympus Spa. This is a paradigmatic violation of the Equal Protection Clause. When a state’s enacted laws purport to protect all people from murder, violence, indecent exposure, or other harms, the state cannot withhold the equal protection of those laws by giving transgender individuals (or any other preferred group) a license to commit criminal acts that harm others within the state’s jurisdiction.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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