

In the Supreme Court of the United States

OLYMPUS SPA, *et al.*,

Petitioners,

v.

**ANDRETA ARMSTRONG, EXECUTIVE
OF THE WASHINGTON STATE HUMAN
RIGHTS COMMISSION, *et al.***

Respondents.

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

**BRIEF *AMICI CURIAE* OF THE NATIONAL LEGAL
FOUNDATION, THE FAMILY FOUNDATION,
MARYLAND FAMILY INSTITUTE, CHAPLAIN
ALLIANCE FOR RELIGIOUS LIBERTY, and
INTERNATIONAL CONFERENCE OF
EVANGELICAL CHAPLAIN ENDORSERS**

in Support of the Petitioners

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnston Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegal
foundation.org

Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

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STATEMENTS OF INTERESTS¹

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Washington, seek to ensure that the free exercise of religion and the autonomy of religious organizations is protected.

The Family Foundation (TFF) is a Virginia, non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The **Maryland Family Institute** (MFI) is a Maryland, faith-based, nonprofit organization seeking to promote a society where God is honored, life is cherished, families flourish, and religious freedom thrives. MFI's interest in this case stems from our efforts to support religious freedom and the moral foundation necessary to sustain the family and society.

¹ No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* gave 10-day written notice to both parties.

Chaplain Alliance for Religious Liberty (“CALL”) is an organization of chaplain endorsers, the faith groups that provide chaplains for the U.S. military and other agencies. CALL speaks for more than 2,600 chaplains serving the Armed Forces from many different denominations. Since 2011, we have led the effort to secure the religious liberties of chaplains and those whom they serve. We enable all chaplains to serve to the broadest extent of their constitutional mission and endorsement, and we nurture and support an environment that cherishes the role of chaplains in American culture. CALL exists to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. We join together to pursue a nation where all chaplains, and those whom they serve, freely exercise their God-given and constitutionally protected religious liberties without fear of reprisal.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

SUMMARY OF THE ARGUMENT

The proprietors of Olympus Spa, based in part on their religious convictions, believe that unclothed women should not mingle with men outside the marital bedroom. The Washington Civil Rights

Commission interprets its State law to require Olympus Spa to allow non-castrated men who assert they wish to be treated as women to enter and participate the same as if they were biological women. Demonstrating, once again, the malleability of *Employment Division v. Smith*, 494 U.S. 872 (1990), the Ninth Circuit held this law is neutral and generally applicable. Despite the fact that the law allows private clubs and some religious organizations to discriminate on the basis of sex, the circuit court held this did not affect neutrality and general applicability, because such exceptions in the law are mandatory, not discretionary, and because the spa is a commercial enterprise. *Olympus Spa v. Armstrong*, 169 F.4th 817, 831-34 (9th Cir. 2026) (amended opinion on recon.).²

This cannot be the proper reading of *Smith* or the Free Exercise Clause. Similar situations abound, and this Court should accept this petition to clarify how *Smith* is properly utilized and when it is misapplied. First, this Court should clarify that, by identifying some types of religious organizations for exception but not all, neutrality and general applicability are both fractured. This law does not have a general, across-the-board exception for religious organizations and enterprises acting pursuant to religious beliefs. It singles out certain types of religious organizations to the exclusion of others.

² Although the majority opinion did not explicitly use the commercial/non-commercial distinction in its Free Exercise analysis, it impliedly does so, as Judge VanDyke addresses in his opinion. *See id.* at 853-54 (VanDyke, J., dissenting from the denial of rehearing *en banc*).

Second, this Court should clarify that simply because the objecting enterprise is commercial does not remove it from free exercise protection and prevent its being compared for *Smith* purposes to private and non-commercial entities. This follows naturally from several of this Court's important precedents, from *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), to *Tandon v. Newsom*, 593 U.S. 61 (2021), to *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). The Ninth Circuit, though, hamstrung the free exercise of commercial entities, even family-run businesses like Olympus Spa.

ARGUMENT

I. Laws That Differentiate Among Religious Organizations Are Not Neutral and Generally Applicable Under *Smith*

The Washington anti-discrimination statute acknowledges on its face that certain types of businesses that are often secular can also be run on religious principles. Thus, it 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). But these types of organizations are often run on strictly secular principles as well. Other businesses not on this list may also be operated consistently with the religious principles of their owners. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (craft stores). Olympus Spa is such a business, but Washington does not grant its religious practice an exemption.

As the Ninth Circuit judges dissenting from rehearing *en banc* explained, this amounts to Washington favoring certain religious groups and practices to the exclusion of others. *Olympus Spa*, 169 F.4th at 855-57 (VanDyke, J.); *id.* at 864-65 (Tung, J.). And this Court in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025), forbade just such differentiation, even when secular organizations with no religious motivation replicate the operations performed in accord with religious beliefs by the establishment in question. *Id.* at 247-51; *see also* *Larson v. Valente*, 456 U.S. 228 (1982); *Fowler v. R.I.*, 345 U.S. 67 (1953). By definition, such discrimination fails *Smith*'s neutrality and general applicability tests.

II. Laws That Differentiate Between Comparable Commercial and Non-commercial Enterprises Are Not Neutral and Generally Applicable Under *Smith*

State laws “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*, 593 U.S. at 62; *see generally*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (*per curiam*). Thus, in *Tandon* and *Diocese of Brooklyn* the comparators were not other houses of worship, but businesses where people assembled in a similar way. Comparability is determined by examination of the *interest* the statute seeks to further. *See Tandon*, 593 U.S. at 62. In *Tandon* and *Diocese of Brooklyn*, the interest involved was prevention of the spread of COVID-19; here, the State’s interest is prevention of the treatment of

individuals consistent with their birth sex when they want to be treated as the other gender. With that as the relevant interest, the suitable comparator to the spa is any gathering of individuals, public or private, secular or religious.

Washington's law fails this test. It exempts "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). The same interest is at stake, but Washington treats the organizations differently: Washington gives private clubs and fraternal organizations a pass, even if they have excluded the other sex for non-religious reasons; but it disregards the beliefs and practices of the spa owners (and undoubtedly some of their clientele), even though they are acting based on sincere religious convictions. This is not neutrality. It is discrimination against religion that demands strict scrutiny.

That leaves Washington's only defense as the distinction between commercial and non-commercial enterprises. The Ninth Circuit held that distinction made all the difference for free exercise purposes, *Olympus Spa*, 169 F.4th at 846-48, but that is inconsistent with this Court's case law. This Court has repeatedly compared religious (normally non-profit) and secular enterprises (normally for-profit) when assessing the neutrality and general applicability of a regulation. *See id.* at 852-55 (VanDyke, dissenting from denial of rehearing *en banc*) (collecting cases).

In *Tandon* itself, the comparison was between non-profit gatherings (home churches) and for-profit ones (e.g., retail stores, concerts). 593 U.S. at 62. In

Lukumi, the same was true, as the critical discrimination was between the slaughter of animals for later sale and consumption and the cult's sacrifice of them as part of its liturgy. 508 U.S. at 543-46. Even on its face, Washington's law fails the profit/non-profit distinction, as it exempts types of organizations that are often run on strictly secular principles, such as columbaria, crematoriums, mausoleums, and cemeteries, if they are operated by religious organizations. See Wash. Rev. Code § 49.60.040(2). Once again, the neutrality and general applicability prongs of *Smith* are not met in a situation like this, and the Ninth Circuit's contrary ruling should be corrected before it does more damage.

CONCLUSION

This case provides a disturbing example of the assault of transgender ideology on spaces historically segregated by sex for safety and privacy, especially for women and girls. Washington decrees that the sensibilities of a few men who retain their male genitalia but want both to exhibit as women and to frequent spaces reserved for women will take precedence over the sensibilities of many women who are offended and threatened by such exposure to what heretofore was private, protected space for them. The Ninth Circuit finds that the proprietors' religious beliefs that forbid such contact are overridden because the law meets the *Smith* tests of neutrality and general applicability. The Ninth Circuit misapplied *Smith*, but it is ironic that the inapplicability of *Smith* turns in part on Washington State having made exceptions for some religious organizations, when the result under *Smith* arguably would be different if Washington State had provided no relief for any

religious organizations. That irony only illustrates that *Smith* itself was wrongly decided. If *Smith* does apply in this or similar situations, it should be reconsidered by this Court.

This Court most recently in *Fulton v. Philadelphia*, 593 U.S. 522 (2021), and *Mahmoud v. Taylor*, 606 U.S. 522 (2025), has cautioned that *Smith* should be applied restrictively, if at all. *Any* discretion, whether or not exercised, eliminates application of *Smith*. *Any* discrimination among secular and religious organizations and *any* discrimination among religious organizations should disqualify *Smith*'s application, too. This Court should grant the petition to confirm those principles.

Respectfully submitted,
this 5th day of October, 2026,

/s/ Frederick W. Claybrook, Jr.

Frederick W. Claybrook, Jr.

(Counsel of Record)

Claybrook LLC

655 15th St., N.W., Ste. 425

Washington, D.C. 20005

(301) 622-0360

Steven W. Fitschen

James A. Davids

National Legal Foundation

524 Johnstown Road

Chesapeake, Va. 23322

(757) 650-9210

sfitschen@nationallegalfoundation.org

Counsel for *Amici Curiae*