

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;
MADISON IMIOLA,

Respondents.

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

**BRIEF OF FLORIDA AND 18 OTHER
STATES AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	3
I. Washington’s law violates the Free Exercise Clause.....	3
A. Washington’s law triggers strict scrutiny because it treats religious activity disfavorably compared to secular activity.	3
B. Washington’s antidiscrimination law cannot survive strict scrutiny because it is underinclusive.....	5
II. Washington’s law also violates the Establishment Clause’s commitment to denominational neutrality.....	6
III. Excluding men from spaces where women are nude is not discrimination.	9
CONCLUSION	11
ADDITIONAL SIGNATORIES.....	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bostock v. Clayton Cnty., Ga.</i> , 590 U.S. 644 (2020).....	9
<i>Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm’n</i> , 70 F.4th 914 (5th Cir. 2023)	6
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	5
<i>Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm’n</i> , 605 U.S. 238 (2025).....	5, 6, 7, 8
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	4, 5, 6
<i>Davis v. Beason</i> , 133 U.S. 333 (1890).....	3
<i>Fowler v. State of Rhode Island</i> , 345 U.S. 67 (1953).....	7
<i>Fulton v. City of Philadelphia</i> , 593 U.S. 522 (2021).....	4
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022).....	3
<i>Larson v. Valente</i> , 456 U.S. 228 (1982).....	7
<i>Michael M. v. Superior Ct. of Sonoma Cnty.</i> , 450 U.S. 464 (1981).....	9

<i>Midrash Sephardi, Inc. v. Town of Surfside</i> , 366 F.3d 1214 (11th Cir. 2004).....	6
<i>Olympus Spa v. Armstrong</i> , 169 F.4th 817 (9th Cir. 2026)	2, 5, 6, 11
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	4
<i>State v. Loe</i> , 692 S.W.3d 215 (Tex. 2024)	10
<i>Tandon v. Newsom</i> , 593 U.S. 61 (2021).....	4, 5
<i>Tuan Anh Nguyen v. I.N.S.</i> , 533 U.S. 53 (2001).....	10
<i>United States v. Skrmetti</i> , 605 U.S. 495 (2025).....	10
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	9
<i>Watson v. Jones</i> , 80 U.S. 679 (1872).....	8
<i>West Virginia v. B.P.J.</i> , 146 S. Ct. 2356 (2026).....	10

Statutes

42 U.S.C. § 12187	6
42 U.S.C. § 2000e-1(a).....	6
42 U.S.C. § 2000a(e)	6
Fla. Stat. § 800.03	11
Fla. Stat. § 810.14	11
Wash. Rev. Code § 49.60.040(2)	4, 7

Wash. Rev. Code § 9A.44.115.....	11
Wash. Rev. Code § 9A.88.010.....	11

Other Authorities

Akhil Reed Amar, <i>America's Unwritten Constitution: The Precedents and Principles We Live By</i> (2012) ..	9
1 Corinthians 6:18.....	8
Genesis 2:22.....	1
Genesis 1:27.....	1
James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> (1785), reprinted in 8 Papers of James Madison 295 (Robert A. Rutland et al. eds. 1973)	3

INTEREST OF *AMICI CURIAE**

Pursuant to Supreme Court Rule 37, the State of Florida, on behalf of 18 other states, respectfully submits this brief as *amici curiae* in support of Petitioners. Amici States bear the sovereign duty to protect women and children in their respective jurisdictions. And they have an obvious interest in ensuring that their citizens enjoy fundamental free exercise rights.

The Ninth Circuit’s opinion undermines these interests. Its misapplication of free-exercise doctrine in this case forces a small, Christian-owned spa to expose women and girls—some as young as 13—to the male genitalia of a man who claims to be a woman. That is wrong. And no amount of judicial flogging of First Amendment doctrine makes it right. Florida and 18 other states therefore urge this Court to grant certiorari on both questions presented.

SUMMARY OF ARGUMENT

As long as there have been societies, they have recognized the difference between man and woman. *See, e.g.*, Genesis 2:22. Unquestionably equal in dignity and worth, men and women are nevertheless fundamentally distinct—“male and female he created them.” Genesis 1:27. To be sure, in societies over time and across locations, that distinction has borne out in

* Counsel of Record for both parties were notified of Florida’s intent to file this amici curiae brief on September 29. Though notice was given fewer than 10 days before the filing of this brief, *see* Sup. Ct. R. 37.2, both Petitioners and Respondents have expressed that they do not object to this amici curiae brief. Nor will any delay in notifying the parties prejudice Respondents, as their deadline to file a response is still a month away on November 4, 2026.

various ways; some societies “denied [women] the opportunity to participate as equals in society.” *Olympus Spa v. Armstrong*, 169 F.4th 817, 858 (9th Cir. 2026) (VanDyke, J., dissenting from the denial of rehearing en banc). But no society had ever tried to completely erase the differences between man and woman.

Until now. That’s because “an elite caste of high-profile activists,” supercharged by ideology, “seek to erase sex as a coherent legal category.” *Id.* Taking advantage of antidiscrimination laws intended to protect women, these activists “threaten to destroy both the justification for and mechanism of protecting women,” by “denying the immutability, recognizability, and physical distinctions of sex as historically recognized for millennia.” *Id.* at 859. By reframing as “discrimination” the basic reality that women and men are different, these radicals have commandeered state police power to punish those who would simply defend a universal fact that was unremarkable only a few years ago.

This case ably demonstrates that the slippery slope is no fallacy. Washington seeks to force Petitioners, Christian small business owners operating a nude, women’s-only spa, to expose their customers—nude women and girls—to a nude man, complete with all the requisite trappings, in direct violation of Petitioners’ Christian beliefs. And the Ninth Circuit blessed it.

That result shocks the conscience, and it should. But it also violates the law. *First*, Washington’s anti-discrimination law triggers strict scrutiny under the

Free Exercise Clause because it exempts *secular* private clubs, but not *religious* organizations. That exception proves the law’s underinclusivity, which accordingly fails strict scrutiny. *Second*, Washington’s antidiscrimination law violates the First Amendment because it exempts some religious activities, but not Petitioners’, thereby betraying a forbidden denominational preference. *Third*, as this Court has recognized, merely separating women and men based on biological features isn’t discrimination. It’s common sense.

The Court should grant certiorari.

ARGUMENT

I. Washington’s law violates the Free Exercise Clause.

A. Washington’s law triggers strict scrutiny because it treats religious activity unfavorably compared to secular activity.

The Free Exercise Clause protects “not only the right to harbor religious beliefs inwardly and secretly,” but also the right of people “to live out their faiths in daily life.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). It stretches far beyond, in other words, the right to think as one wishes. This protection recognizes that one’s ultimate duty lies with “his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” *Davis v. Beason*, 133 U.S. 333, 342 (1890). This duty one bears to God “is precedent both in order of time and degree of obligation, to the claims of Civil Society,” James Madison,

Memorial and Remonstrance Against Religious Assessments (1785), reprinted in 8 Papers of James Madison 295, 299 (Robert A. Rutland et al. eds. 1973), which necessarily limits government’s jurisdiction over religious activity. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (limiting government prohibitions of religious action to those which “invariably posed some substantial threat to public safety, peace or order”); see also *Fulton v. City of Philadelphia*, 593 U.S. 522, 567 (2021) (Alito, J., concurring) (similar).

The First Amendment springs to action whenever the government creates a law that “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Though, under current doctrine, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest,” *id.* at 531, a law “lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton*, 593 U.S. at 534. Therefore, “government 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 (2021).

That is the case here. Washington’s antidiscrimination law specifically 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). Yet it offers

no corresponding exemption for religiously motivated organizations.¹ So a private club in Bellevue can exclude men from its female-only spa, no problem; but Olympus Spa, a small business operated according to Petitioners’ religious principles, receives no equivalent exemption. That means Washington’s antidiscrimination law treats secular activities more favorably than religious activities. The law is therefore subject to strict scrutiny. *Tandon*, 593 U.S. at 62.

B. Washington’s antidiscrimination law cannot survive strict scrutiny because it is underinclusive.

The law cannot survive strict scrutiny. Washington may have a compelling interest in preventing discrimination, but it must do so in a manner that is “narrowly tailored to advance that interest.” *Church of Lukumi*, 508 U.S. at 533. Exempting private clubs makes the law underinclusive, leaving “appreciable damage to the State’s supposedly vital interest unprohibited and therefore belies the State’s claim of narrow tailoring.” *Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 253

¹ True, Olympus Spa is a business, not a church or a religious charity. But that categorization doesn’t magically remove it from the Free Exercise Clause’s protection. “A corporation is simply a form of organization used by human beings to achieve desired ends. . . . [P]rotecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–07 (2014). And in both *Lukumi* and *Tandon*, this Court analyzed exemptions for comparable secular and religious activity without regard to whether the activities were commercial or not. 69 F.4th 817 at 853–54 (VanDyke, J., dissenting from the denial of rehearing en banc).

(2025). Washington cannot claim that its laws are narrowly tailored when it permits some alleged² discrimination at private clubs but unleashes its coercive power on Petitioners, who are motivated by religious conviction rather than club dues.³

Courts routinely invalidate these types of laws for underinclusivity. *See, e.g., Church of Lukumi*, 508 U.S. at 543; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004) (law restricting religious activity to maximize retail synergy is underinclusive because of private club exemption). This case should be no different.

II. Washington’s law also violates the Establishment Clause’s commitment to denominational neutrality.

Under the Establishment Clause, “the government may not ‘officially prefer one religious denomination over another.’” *Cath. Charities Bureau, Inc.*, 605 U.S.

² As explained below, maintaining separation based on biological sex, here, is not discrimination. *Infra* pp. 9–11.

³ The en banc majority also noted that, under this theory, strict scrutiny would apply to Title VII and the American with Disabilities Act because those statutes also grant exemptions for private clubs. *Olympus Spa*, 169 F.4th at 847 (McKeown, J., respecting the denial of rehearing en banc) (citing 42 U.S.C. §§ 2000a(e), 12187). That is likely true, but those statutes—unlike Washington’s—already provide robust protections for religious liberties. *See, e.g.,* 42 U.S.C. § 2000e-1(a) (permitting religious organizations to have preferences in religion while hiring). Moreover, the Religious Freedom Restoration Act affords robust protection against federal laws that abridge religious beliefs. *See Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm’n*, 70 F.4th 914, 937 (5th Cir. 2023). Washington’s anti-discrimination regime lacks these safeguards.

at 247 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)) (cleaned up). The government triggers strict scrutiny when it seeks to “justify differential treatment across religions on denominational lines.” *Cath. Charities Bureau, Inc.*, 605 U.S. at 248; *see also id.* at 241 (the “First Amendment mandates government neutrality between religions and subjects any state-sponsored denominational preference to strict scrutiny”).

Washington’s law differentiates between denominations because it offers varying degrees of protection across different categories of religious activity. Specifically, 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). These exemptions offer a good start, but they run a constitutional hazard by virtue of what they exclude. Washington’s law exempts only those more “ritualistic,” “orthodox,” and “formal” religious practices it believes merit protection. *Cath. Charities Bureau, Inc.*, 605 U.S. at 248–49. Put differently, Washington exempted those activities it deemed *sufficiently* religious—such as educational and burial activities—which reveals “a preference for certain religions based on the content of their religious doctrine.” *Id.*; *see also Fowler v. State of Rhode Island*, 345 U.S. 67, 69–70 (1953) (“[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment” even when the practice “is less ritualistic, more unorthodox, less formal than some.”).

Yet other religious practices and activities find no protection under Washington's selective exemptions. For instance, certain religions, such as the Jehovah's Witnesses, Church of Jesus Christ of Latter-day Saints, or Orthodox Judaism may feel no need to separate burials by sex, but may endorse separation by sex for certain obviously religious activities like proselytizing or outreach. Washington's law would prohibit those sex-separative practices and call them discrimination. The First Amendment doesn't allow that.

Petitioners unremarkably disallow men from receiving therapeutic traditional Korean body treatment at a women's-only facility where the patrons are customarily nude. That business decision is animated in part by religious beliefs, beliefs much older than our Constitution, beliefs that unmarried men and women shouldn't hang out together in the nude. *See, e.g.*, 1 Corinthians 6:18 ("Flee from sexual immorality."). This religious practice, according to Washington law, is less worthy of the protection afforded to religious education or burial. Washington's line-drawing offends the First Amendment. Its "official differentiation on theological lines is fundamentally foreign to our constitutional order, 'for the law knows no heresy, and is committed to the support of no dogma.'" *Cath. Charities Bureau, Inc.*, 605 U.S. at 249 (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1872)) (cleaned up).

III. Excluding men from spaces where women are nude is not discrimination.

Most fundamentally, Washington’s interest in “preventing discrimination” by compelling the admission of a nude man into a nude women’s spa is not compelling. It’s nonsensical.

This used to be common sense. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women, however, are enduring . . . ‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration.”) (cleaned up); *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (observing that the “Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances”); Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 148 (2012) (“It is logically possible to imagine forms of separation that are not unequal. For example, separate bathrooms for men and women today are not widely understood, by either men or women, as stigmatizing or subordinating.”).

To be sure, separating the sexes to subordinate or stigmatize likely would be discriminatory. But Petitioners’ desire to limit spa admission to women—because the traditional Korean therapeutic treatments are provided in a sex-separated, nude setting—does not stigmatize or subordinate men.

Even *Bostock* didn’t extend itself “to address bathrooms, locker rooms, or anything else of the kind.”

Bostock v. Clayton Cnty., Ga., 590 U.S. 644, 681 (2020). And any remaining doubt was definitively illuminated by this Court in *West Virginia v. B.P.J.*, 146 S. Ct. 2356, 2373 (2026).

In *B.P.J.*, this Court explained the obvious. The law need not “ignore the reality that there are real differences between men and women that may sometimes justify” classifications “based on sex.” *United States v. Skrmetti*, 605 U.S. 495, 573 (2025) (Alito, J., concurring in part) (quoting *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 66 (2001)) (cleaned up). It violated no one’s rights for states to “make distinctions based on sex—because of the inherent physical differences between women and men,” even if it limits a man who identifies as a woman from participating in his preferred activity. *B.P.J.*, 146 S. Ct. at 2376–77. If a state may separate women from men in the sports context, *id.* at 2375, surely the same concerns apply where women are nude in a private space. *See also id.* at 2383 (Gorsuch, J., concurring).

The reason is simple: “[O]ur identity as men and women is a brute fact of our existence. . . . [J]ust as men and women are ‘endowed by their Creator with certain unalienable Rights,’ we are also endowed by our Creator with certain unalienable genetic traits, ‘male and female.’” *State v. Loe*, 692 S.W.3d 215, 242 (Tex. 2024) (Blacklock, J., concurring). Washington’s law may be an “antidiscrimination” law, but there is no virtue in trying to erase these permanent, immutable truths.

All this leads to one simple conclusion: Christian spa owners shouldn’t be forced to subject their nude female patrons to the presence of a nude man,

whether the anatomical apparatus is “swinging” or not. *Olympus Spa*, 169 F.4th at 848 (VanDyke, J., dissenting from the denial of rehearing en banc). Especially so when, as here, the purpose of the spa is to offer therapy to women who are “victims of sexual assault, especially by men.” Cert. Pet. 27. No antidiscrimination law, nor any commitment to gender ideology, can justify a different result.

* * *

Almost every state punishes indecent exposure and voyeurism as crimes. *See, e.g.*, Fla. Stat. §§ 800.03, 810.14; Wash. Rev. Code §§ 9A.44.115, 9A.88.010. And it is no great secret that “[v]oyeurism and indecent exposure laws primarily protect women and girls from the predations of sexually deviant men.” *Olympus Spa*, 169 F.4th at 860 (VanDyke, J., dissenting from the denial of rehearing en banc). Here, by embracing the contorted view that separating the sexes in nude spaces amounts to “discrimination,” the state of Washington commands Petitioners to be accomplices to indecent exposure and voyeurism in violation of their Christian beliefs. Neither Washington nor its “antidiscrimination” law are the good guys here. Both must yield to the First Amendment.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

12

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