NO. 21-144

In the
Supreme Court of the United States

SEATTLE'S UNION GOSPEL MISSION,
Petitioner,

v.

MATTHEW S. WOODS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF OF ALABAMA AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the First Amendment protects a religious nonprofit's right to hire coreligionists.

2. Whether denying religious nonprofits an exemption from state non-discrimination law when the state grants a total exemption to secular, small businesses violates the Free Exercise Clause.

3. Whether the Washington Supreme Court violated the Free Exercise Clause by demonstrating hostility to Petitioner's religious beliefs.

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INTEREST OF *AMICI CURIAE*[1]

The *Amici* States—Alabama, Alaska, Arizona, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia—have a significant interest in preserving the rights of thousands of religious institutions and millions of religious individuals in their borders. The Constitution protects religious liberty, insulating certain rights from the political process. Yet current cultural and political trends have led many government actors to jeopardize these constitutional guarantees. Indeed, courts and political bodies alike have demonstrated an increasing willingness to ignore this Court's admonitions and punish institutions whose religious principles do not fully align with rapidly changing moral precepts. As a result, foundational principles of this Court's religious-liberty jurisprudence are being forgotten or cast aside, with the Washington Supreme Court's decision below representing a particularly troubling example of this trend. The trend is likely only to accelerate unless this Court again makes clear the limits on secular power over the sacred. The States therefore respectfully ask this Court to reverse the decision below and reaffirm the Constitution's protections for people seeking to exercise their faith together.

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[1] No parties' counsel authored this brief, in whole or in part. No person or entity other than *amici* made a monetary contribution to the brief's preparation or submission. The *Amici* States provided notice to the parties' counsel at least ten days before this brief was due of *amici*'s intention to file this brief.

SUMMARY OF ARGUMENT

In *Our Lady of Guadalupe School* v. *Morrissey-Berru*, this Court began by recognizing the well-established "right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." 140 S. Ct. 2049, 2060 (2020). The Court then addressed a particular manifestation of that right, the "ministerial exception," which requires that courts "stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* This case is about a different manifestation of the broader church-autonomy right that also undergirds the ministerial exception: a religious group's prerogative to hire people who share the group's faith.

The Washington Supreme Court's decision rests on an impoverished understanding of the First Amendment's protections for religious organizations and a basic logical fallacy. The court held that unless a religious organization's hiring decision involves a minister, the First Amendment extends *no* protection. But while this Court has recognized that ministerial employment decisions are protected by the First Amendment, the Court has never held the inverse—that non-ministerial decisions are never protected. By framing the ministerial exception as the extent, rather than just one example, of religious organizations' freedom from secular interference, the Washington Supreme Court tried to answer the wrong question and obliterated well-settled church-autonomy principles along the way.

The state court's disregard for this Court's precedent and this Nation's history is not unique. Rather,

the decision is the latest warning that previously uncontested religious liberties are at risk of being sidelined by an increasingly popular brand of religious intolerance. The States offer a condensed account of this troubling trend, revisiting the federal government's emphatic endorsement of religious liberty following *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 882 (1990), and then the government's sudden drift toward the religious intolerance it initially decried. That trend will undoubtedly accelerate if decisions like the one below are left uncorrected, for confusion about the scope of religious liberty has emboldened state actors to encroach further upon unpopular religious groups and practices.

Thus, now is the time for clarity. Sympathetic statements from this Court have proven inadequate to slow, much less halt, those who would be happy to read religious liberties out of the Constitution. If this Court does not say what the Constitution protects, then whoever holds the megaphone will. In a case like this, with the correct outcome so clear, and the stakes for religious groups so high, passivity is no virtue.

The stakes are high for the States as well. All 50 States benefit enormously from the religious activity in their borders. Without precedent binding lower courts and political actors, popular religious intolerance will continue to jeopardize religious individuals, institutions, and the States themselves. And no one on any side of the debate over the proper relation between religion and the state benefits when previously clear principles of law become clouded. Before more governments cross constitutional lines, the Court should affirm that the First Amendment removes

from the political process the question whether religious nonprofits may hire coreligionists.

ARGUMENT

I. The Washington State Supreme Court Is Wrong.

The interaction of civil law with the Religion Clauses can sometimes present difficult questions. *See Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1882-83 (2021) (Barrett, J., concurring). But this case involves an easy one, for until just now, all sides of the ongoing religious-liberty discourse appeared to agree that the Constitution at least protected religious nonprofits' ability to hire solely coreligionists. And contra the decision below, this case need not even implicate "the so-called ministerial exception" that "finally reached this Court" in the last decade. *Our Lady of Guadalupe*, 140 S. Ct. at 2061 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171 (2012)). Nor does it present any concern over pretextual discrimination; all parties agree the Mission rejected the plaintiff's employment application on religious grounds. This case is about whether a religious nonprofit may choose to hire coreligionists rather than those who disagree with—and expressly seek to change—its theology. None of the issues that make religious-liberty cases difficult is present here. That religious institutions are due greater protection than merely that conferred by the ministerial exception is not controversial; as discussed below, even the plaintiffs in this Court's latest ministerial-exception decision repeatedly stated as much. This is the easy case.

This Court's precedent also shows that adjudication is appropriate now, notwithstanding the case's interlocutory nature. Not only is the court-ordered inquiry into the ministerial exception needless and invasive, but further proceedings will render precisely the sort of "case-by-case determination" Justices Brennan and Marshall cautioned would produce "entanglement" and a "chill on religious expression." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 345 (1987) (Brennan, J., concurring); *see also id.* at 344 (noting that "[t]he risk of chilling religious organizations is most likely to arise with respect to nonprofit activities"). What is more, the Washington Supreme Court has demonstrated flagrant hostility toward the Mission's religious beliefs, showing that any further proceedings are as repugnant to the First Amendment as they are futile. The Mission should not be subjected to the punishment of that process.

A. The First Amendment Allows Religious Nonprofits to Make Employment Decisions on Religious Grounds.

Open Door Legal Services—one of the Mission's many ministries—requires its staff attorneys to spread the Gospel. *See* Pet.App.117a, 173a, 200a. So it is unsurprising that the Mission hired an applicant who respected its religious tenets instead of one who rejected and openly sought to change them. There was—until this case—unanimous consensus among courts that the Constitution protects actions like those for which the Mission was sued. *See* Pet.26-29.

The plaintiffs' briefing in *Our Lady of Guadalupe* is illustrative. They explained that, "[u]nlike other

employers, religious organizations may give preference to workers of particular faiths," and "courts must generally accept" those hiring or firing decisions "without further inquiry." Brief for Respondents at 18, *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020) (No. 19-267) ("*OLG* Plaintiffs' Brief"). The plaintiffs thus sought to distinguish the ministerial exception from its historical predicates, arguing against the need to apply the ministerial-employment decisions to plaintiffs' case because "[o]ther doctrines … already adequately protect [a religious organization's] interests where, as here, the employment of designated spiritual leaders is not at stake." *Id.* at 49. By way of example, "where a religious entity asserts it took an employment action for religious—as opposed to discriminatory—reasons, a court's inquiry is limited to 'ascertain[ing] whether the ascribed religious-based reason was in fact the reason' for the action." *Id.* at 50 (quoting *Ohio Civil Rights Comm'n* v. *Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986)). Thus, the plaintiffs explained, "[i]f a 'proffered religious reason actually motivated the employment action,' then the case is at an end." *Id.* (quoting *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325 (3d Cir. 1993)).

Those "[o]ther doctrines" the plaintiffs referred to rest on sturdy ground. As early as 1871, this Court declared that "civil courts exercise no jurisdiction" over matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson* v. *Jones*, 13

Wall. 679, 733 (1871). And the church-autonomy doctrine well predates *Watson*. As this Court detailed in *Hosanna-Tabor*, the ministerial exception is not a recent innovation, but rather a particular exponent of church-autonomy principles stretching back through antiquity and refined since the Founding. 565 U.S. at 182-87.

This respect for religious institutions—not just religion itself—is a hallmark of our Nation's history. The First Amendment's protection of "religion" rather than "conscience" "suggests that the government may not interfere with the activities of religious bodies, even when the interference has no direct relation to a claim of conscience." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1490 (1990). The States appeared to embrace this understanding, as "the authors and early enforcers of the Fourteenth Amendment—the vehicle for incorporating the Religion Clauses against the States—believed that discrimination laws cannot be applied to religious institutions." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J. L. & PUB. POL'Y 821, 832 (2012); *see also* Paul Horwitz, *Essay: Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1058 (2013) ("Church autonomy inheres *in the church* as a body and involves more than rights of individual conscience.") (emphasis added). This Court's church-autonomy precedent makes plain that a religious nonprofit may choose to hire only coreligionists—particularly where, as here, all parties agree the "*real reason* for" the nonprofit's decision was in fact a religious one. *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring).

Though the Religion Clauses make this an easy case, the First Amendment's associational protections are, even by themselves, enough to protect the Mission's desire to hire coreligionists. In *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, this Court concluded that the First Amendment prohibited Massachusetts from "requir[ing] private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." 515 U.S. 557, 559 (1995). The reasoning was straightforward: "a contingent marching behind the organization's banner" would convey a message, *id.* at 574; "[t]he parade's organizers may not believe these facts … or they may object," *id.*; "[b]ut whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control," *id.* at 575.

The Court reaffirmed these protections five years later in *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). Explaining that "[g]overnment actions that may unconstitutionally burden this freedom [to associate] may take many forms," the Court emphasized the impermissibility of "'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'" *Id.* at 647-48 (citing *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984)). "Forcing a group to accept certain members," the Court cautioned, "may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association ... plainly presupposes a freedom not to associate.'" *Id.* "The Boy Scouts [took] an official position with respect to homosexual conduct,

and that [was] sufficient for First Amendment purposes." *Id.* at 655.

Religious institutions are, of course, not (just) like the Boy Scouts, *see* Richard Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John's J. Legal Comment. 515 (2007); their religious character enhances their constitutional protections. History shows us as much, and "the text of the First Amendment … gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189; *see also id.* at 200 (Alito, J., concurring) (freedom-of-association principle "applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals"); *accord Smith*, 494 U.S. at 882 ("[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."). Through its Religion Clauses and its implied protection of association, the First Amendment protects the Mission's right to make hiring decisions based on an applicant's adherence to the group's religious tenets.

B. The Washington Supreme Court Made an Easy Case Difficult Through Legal Error and Religious Hostility.

The Washington Supreme Court complicated this straightforward case by committing several glaring errors. The court's initial explanation of "[t]he issue in this case" set the tone: "In enacting [the relevant state nondiscrimination law], the legislature created a *statutory* right for employees to be free from discrimination in the workplace while allowing employers to

retain their *constitutional* right … to choose workers who reflect the employers' beliefs when hiring ministers." Pet.App.2a. To say nothing of the court's implicit assertion that a state legislature "allow[ed]" the employers to "retain" a "*constitutional* right," the court's belief that this right—derived from historically protected principles of church autonomy embodied in the First Amendment—applies only when the Mission is "hiring ministers" made error inevitable.

The court apparently understood that the ministerial exception protects religious defendants from certain kinds of lawsuits. But from this premise the court concluded that if the ministerial exception did not apply then the Constitution did not protect the Mission's religious practices. *See* Pet.App.3a (explaining Constitution may bar nondiscrimination claim only "in a few limited circumstances, including where the employee in question is a minister"). The Constitution's protections for how a religious group constitutes itself are not, however, limited to the question of who will serve as ministers. As this Court explained in *Our Lady of Guadalupe*, the "so-called ministerial exception" arises from "the general principle of church autonomy to which [the Court] ha[s] already referred: independence in matters of faith and doctrine and in closely linked matters of internal government." 140 S. Ct. at 2061. The Washington Supreme Court ignored this "general principle" by treating the ministerial exception as the *only* protection the Constitution guarantees a religious institution in disputes over its composition, rather than merely one result that follows from the foundational principle of church autonomy.

Equally detrimental to the court's decision was its pronounced hostility toward the Mission and its religious beliefs. The majority opinion, for example, approvingly cited a concurrence, Pet.App.21a-22a & n.6, which denigrated the Mission's free exercise of religion as a "free exercise right to discriminate," *id.* at 24a. These comments received no qualification. In fact, one concurrence went further and asserted "it is simply not possible to simultaneously act as both an attorney and a minister while complying with the [Washington Rules of Professional Conduct]," *id.* at 29a (Yu, J., concurring). *But see* William H. Pryor Jr., *Moral Duty and the Rule of Law*, 31 HARV. J. L. & PUB. POL'Y 153, 156 (2008) ("Faith properly informs the religious lawyer or judge, and morality is not in tension with fidelity to the law."). Another partial concurrence deemed church autonomy itself mere "carte blanche to discriminate." Pet.App.47a (Stephens, J., dissenting in part and concurring in part). Such statements clearly constitute a "negative normative evaluation of the particular justification" for the Mission's hiring decision, in turn violating "the neutrality that the Free Exercise Clause requires." *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quotations omitted).

C. The Case's Interlocutory Nature Should Not Prevent This Court's Review.

Noting that "[w]hether ministerial responsibilities and functions discussed in *Our Lady of Guadalupe* are present in Woods' case was not decided below," the court "reverse[d] and remand[ed] the case to the trial court to determine whether [the Mission] meets the ministerial exception." Pet.App.3a. But "ministerial

responsibilities and functions" were not "decided below" because this case was never focused on the ministerial exception. *See* Pet.App.50a (Stephens, J., dissenting in part and concurring in part) ("SUGM does not advance any specific argument on direct review claiming that the ministerial exception applies and it does not explicitly argue its lawyers are ministers under *Hosanna-Tabor*."). The court's remand order thus reifies its faulty premise and, what is more, subjects the Mission to further litigation costs and uncertainty over its future.

These costs and uncertainty gut the Mission's First Amendment protections. *Cf. Amos*, 483 U.S. at 345 (Brennan, J., concurring) ("Th[e] substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities."). As lower courts have consistently explained, church autonomy presents a threshold issue, the resolution of which directly corresponds to the protection of religious organizations' First Amendment rights. *See, e.g.*, *Whole Woman's Health* v. *Smith*, 896 F.3d 362, 373 (5th Cir. 2018), as revised (July 17, 2018) ("Both free exercise and establishment clause problems seem inherent in the court's discovery order.… [C]ourts' involvement in attempting to parse the internal communications and discern which are 'facts' and which are 'religious' seems tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause."). Here, all parties agree the Mission's decision not to hire Woods was religiously motivated. The case should have ended there, and its

very continuation warrants review and reversal. *Accord OLG* Plaintiffs' Brief at 50.

There is no reason to wait. The Washington Supreme Court's confusion guarantees that further proceedings will not aid this Court's decision. "Dodging the question today guarantees it will recur tomorrow," *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring), and will subject the Mission and other religious groups in Washington to further hostility and deprivation of their constitutional rights.

II. The Decision Below Typifies An Increasingly Popular Brand Of Religious Intolerance.

So much for the decision itself. More interesting than the question of how the court erred is why. An increasingly pronounced cultural drift toward religious intolerance appears to have something to do with it. In the span of about one generation, enthusiastic protection for the church from the state has given way in many quarters to calls for the latter to subsume the former. Ever-evolving "rights" account for much of this recent conflict, placing traditional morals at loggerheads with new ones. Thus, prominent voices in culture and government are increasingly likely to characterize religion and its free exercise as obstacles to be leveled on our march toward equality.

The Washington Supreme Court's decision is emblematic of this new disposition, chiding a religious nonprofit for deigning to invoke "a free exercise right to discriminate." Pet.App.24a. While "[c]ontroversy between church and state over religious offices is

hardly new," *Hosanna-Tabor*, 565 U.S. at 182, the accelerating decline in mainstream tolerance toward religion warrants concern. An (abbreviated) account of this cultural shift helps explain why a state supreme court would unanimously stray so far from our founding principles, and why this Court should reaffirm those principles now.

A. From *Smith* to RFRA and (Partway) Back.

The early 1990s might constitute a recent high-water mark in mainstream religious tolerance, particularly from the federal government. The Court's decision in *Smith*, 494 U.S. 872, shook the nation, and Congress responded with the Religious Freedom and Restoration Act. Pub. L. No. 103-141, 107 State. 1488 (1993). Representative Charles Schumer introduced the bill, lamenting *Smith*'s destruction of "an exquisite balance, one of the times that it works out almost just right in Anglo-Saxon jurisprudence." 139 Cong. Rec. 9684 (May 11, 1993) (statement of Rep. Schumer). "[I]ncomprehensibly," he bemoaned, "Justice Scalia's decision explained that requiring the Government to accommodate religious practice was a luxury.… The Founders of our Nation, the American people today know that religious freedom is no luxury, but is a basic right of a free people." *Id.* Representative Jerrold Nadler was no less incensed, and promised that "[t]his landmark legislation will overturn the Supreme Court's disastrous decision, *Employment Division versus Smith*, which virtually eliminated the [F]irst [A]mendment's protection of the free exercise of religion." 139 Cong. Rec. 9683 (May 11, 1993) (statement of Rep. Nadler).

RFRA received unanimous approval in the House, H.R. Rep. No. 103-88 (1993), and passed the Senate on a 97-3 margin, S. Rep. No. 103-111 (1993). Signing the bill into law, President Clinton remarked that the "broad coalitions of Americans" who advocated for RFRA "all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom." Remarks on Signing the Religious Freedom Restoration Act of 1993, 1 Pub. Papers 2000 (Nov. 16, 1993). Noting the "[m]ore than 50 cases … decided against individuals making religious claims against Government action" after *Smith*, the President proclaimed "[t]his act will help to reverse that trend by honoring the principle that our laws and institutions should not impede or hinder but rather should protect and preserve fundamental religious liberties." *Id.* Indeed, he concluded, RFRA embodied the Founders' understanding that "religion helps to give our people the character without which a democracy cannot survive." *Id.*

That was 1993. Less than two decades passed before the federal government emphatically endorsed the precedent it had passed RFRA to stanch. In 2011, the Solicitor General of the United States asserted that under *Smith* this Court owes no "deference to religious authorities in church-related litigation where … neutral principles of law provide a rule of decision," and that "[t]he First Amendment right to expressive association likewise provides no defense to the claim of retaliation in this case." Brief for the Federal Respondent at 12, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171 (2012) (No. 10-553). The federal government even took the position that "[p]ure monetary relief" could

avoid entanglement concerns simply because "more intrusive forms of relief"—e.g., reinstatement—exist. *Id.* at 34-35. For the federal government at least, gone were the days when religious organizations had "power to decide for themselves, free from state interference, matters of church government." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (citing *Watson*, 13 Wall. at 727).

The Court emphatically and unanimously rejected "the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." *Hosanna-Tabor*, 565 U.S. at 189. The Court reminded the federal government that "a church's selection of its ministers is unlike an individual's ingestion of peyote," *id.* at 190, and prevented the government from using *Smith* to steamroll church autonomy.

Fortunately, *Smith* does not determine the outcome of this case either. But as this case demonstrates, *Smith* is still on the books; still "virtually eliminate[s] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," 42 U.S.C. §2000bb; still "threatens a fundamental freedom," *Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring); and still provides governments an excuse to prosecute anything they deem "discrimination … under the guise of religious freedom," *id.* at 1875.

B. Sympathetic Statements Have Not Adequately Protected Religious Liberty.

Conflicts between old rights and new ones continued to work their way through the courts. Perhaps the

most high-profile recent example was the debate over whether the federal Constitution guarantees a right to same-sex marriage. Three years after *Hosanna-Tabor*, the Court decided that it does. *Obergefell* v. *Hodges*, 576 U.S. 644 (2015). The Court, however, noted that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Id.* at 672. And the Court "emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned" because "[t]he First Amendment ensures that religious organizations and persons are given proper protection." *Id.* at 679-80.

The Court has offered similar assurances in more recent cases. In *Masterpiece Cakeshop*, for example, the Court reiterated that "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." 138 S. Ct. at 1727. By way of example, the Court explained, a member of the clergy's refusal to perform a gay wedding would be "well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Id.* And in *Bostock* v. *Clayton County*, the Court confessed that it, like employers throughout the country, was "also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." 140 S. Ct. 1731, 1754 (2020).

But these sympathetic statements have done little to shield those caught in the crosshairs of the zeitgeist. Officials in Colorado government "who believe allowing same-sex marriage is proper" could have "engage[d]" Jack Phillips "in an open and searching debate," *Obergefell*, 576 U.S. at 680, but they opted instead for coercion. Phillips escaped once, but his victory in *Masterpiece Cakeshop* turned entirely on the plaintiffs' foot fault; had they kept anti-religious sentiment out of the record, one is left to guess whether they could have continued to force Phillips to choose between his livelihood and his conscience. And with government officials "now presumably more careful about admitting their motives," *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring), that narrow constitutional protection becomes narrower still. Indeed, Phillips was recently dragged back into litigation on a substantively identical fact pattern (this time, the cake he refused to bake would have celebrated the plaintiff's gender transition). Phillips lost at trial and appealed the decision just last month. *See Scardina* v. *Masterpiece Cakeshop*, No. 2021CA1142 (Colo. App. filed August 2, 2021). "A nine-year odyssey thus barrels on." *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring).

Furthermore, despite the *Bostock* Court's deep concern for employers' religious convictions, 140 S. Ct. at 1754, on his first day in office President Biden issued an executive order declaring his administration would apply *Bostock*'s understanding of sex discrimination beyond Title VII, never once engaging the inevitable conflict this creates with the Religion Clauses' guarantees. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

And, sure enough, the Washington Supreme Court's decision to override the Mission's self-governance rested on "the fundamental rights to … sexual orientation" espoused in "*Lawrence*, *Obergefell*, and Justice Stevens' dissent in *Bowers*." Pet.App.11a.; *see also id.* at 58a (Stephens, J., concurring) (interpreting *Masterpiece Cakeshop* to constrict church autonomy to the ministerial exception).

"Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice." *Obergefell*, 576 U.S. at 734 (Thomas, J., dissenting). Without unequivocal legal holdings, statements approving of religious exercise—even from this Court—will do little to protect religious individuals and institutions from increasingly prevalent civil restraints.

C. Toward Equality.

The latest iteration of the "Equality Act" previews where the trend is taking us. Equality Act of 2021, H.R. 5, 117th Cong. (2021). The Act begins by expanding characteristics protected under the Civil Rights Act to include "sex (including sexual orientation and gender identity)," *id.* §3, and then broadens the definition of "public accommodation" to reach "any establishment that provides a good, service, or program" and any "individual whose operations affect commerce and who is a provider of a good, service, or program," *id.* And at the same time the Act would expand rights in ways likely to conflict with some traditional religious beliefs and practices, the Equality Act expressly states that RFRA "shall not provide a claim concerning, or a defense to a claim under, a

covered title, or provide a basis for challenging the application or enforcement of a covered title." *Id.* §9. Thus, if an institution's religious convictions compel it to reject the federal government's views of sex, gender, or sexual orientation, the Equality Act renders the institution defenseless against federal prosecution so long as a court concludes the institution falls outside the Civil Rights Act's narrow exemption for religious employers. *See* 42 U.S.C. §2000e-1. And, of course, any *individual* who heeds similar religious convictions and "who is a provider of a good, service or program," H.R. 5, 117th Cong. §3—bakers, florists, and web designers come to mind—does not even have the prospect of religious exemption.

So it is that, in less than 30 years, the federal government finds itself on the precipice of dramatically curtailing the very law it enacted "to protect perhaps the most precious of all American liberties, religious freedom." Remarks on Signing the Religious Freedom Restoration Act of 1993, 1 Pub. Papers 2000 (Nov. 16, 1993). Indeed, the President recently "urge[d] Congress to swiftly pass this historic legislation." Statement by President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress, The White House (Feb. 19, 2021), https://perma.cc/R5CR-Q23T. It should therefore come as little surprise that, amidst a cultural push to expand new rights and contract old ones, the Washington Supreme Court deployed state law to hamstring the Mission's First Amendment guarantees.

III. This Intolerance Jeopardizes The States And Their Religious Institutions.

Why do the *Amici* States care about what happens in Washington? In addition to a duty to protect their citizens' rights, the States benefit tremendously from the religious activity the Constitution protects. And beyond the potential federal encroachments addressed above, religious groups and individuals are facing increasing threats from local governments across the country.

A. Religious Intolerance Harms the States, Their Religious Institutions, and Their People.

Not only are the States profoundly dedicated to preserving their citizens' and institutions' constitutional liberties, but they also have sovereign interests in the benefits bestowed by religious activity. Alabama, for example, has over 4,000 religious organizations and churches which collectively employ thousands of people and provide services to the State's most vulnerable communities. *See* Cause IQ, Alabama Religious Organizations https://perma.cc/DLJ3-7Y4E (last visited September 2, 2021). Other States share similar characteristics and derive similar benefits from these beneficent groups. *See, e.g.*, Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. OF RES. ON RELIGION 27 (2016) (estimating economic value of America's "faith sector" at $1.2 trillion); Nancy T. Kinney & Todd Bryan Combs, *Changes in Religious Ecology and Socioeconomic Correlates for Neighborhoods in a Metropolitan Region*, 38 J. URB. AFF. 409

(2015) (analyzing economic collapse following inner-city congregation's closing).

Even so, in recent years, several of the *Amici* States have seen religious liberty placed in jeopardy by their own political subdivisions. In Alaska, for example, a religious nonprofit shelter for battered women denied entry to a violent, inebriated biological male who "self-identifie[d] as 'female and transgender,'" so the city of Anchorage filed multiple discrimination complaints threatening the shelter with legal liability. *Downtown Soup Kitchen* v. *Mun. of Anchorage*, 406 F. Supp. 3d 776, 783-86 (D. Alaska 2019). Though the shelter initially prevailed, the municipality has since amended specific ordinances to punish the religious nonprofit for its "religious beliefs about whether to admit biological males into its women's shelter." Verified Complaint at 1-5, *Downtown Soup Kitchen* v. *Mun. of Anchorage*, No. 3:21-cv-00155 (D. Alaska filed July 1, 2021), ECF No. 1. The municipality shows no signs of slowing down.

This trend of hostility threatens religious individuals, too. In Arizona, Christian artists specializing in custom wedding invitations fell on the wrong side of a Phoenix ordinance; following initial court losses—and the threat of jail time—they were able to vindicate their beliefs only by the grace of the Arizona Supreme Court. *See Brush & Nib Studio, LC* v. *City of Phoenix*, 247 Ariz. 269, 448 P.3d 890, 894 (2019). A substantively similar case out of Kentucky also forced religious individuals to defend their consciences before the state's highest court. *See Lexington-Fayette Urb. Cty. Hum. Rts. Comm'n* v. *Hands On Originals*, 592 S.W.3d 291 (Ky. 2019). And in Georgia, an Atlanta fire chief faced suspension, compulsory

"sensitivity training," and eventual termination after the mayor discovered a devotional "inspired by a men's Bible study at [the fire chief's] church" that the chief had written in his spare time. *See Cochran* v. *City of Atlanta*, 289 F. Supp. 3d 1276, 1282 (N.D. Ga. 2017).

B. This Court Must Speak Clearly on Religious Liberty.

There is (and will be) much more where these came from. Calls from this Court for more dialogue and understanding will not, without more, halt attempts to use state power to shape religious practice. Political entities and courts thus need to be reminded that expanding concepts of dignity cannot displace the Constitution's "special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189.

Balancing the evolving demands of civil equality with religious liberty is no easy task. Minds on the order of "Hobbes, Bodin, Spinoza, Locke, Hume, Bayle, Voltaire, Montesquieu, Montaigne, Smith, and Burke … influenced the American solution to the problem." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430 (1990). That the problem endures despite these efforts is a testament to its intractability, and the States hardly purport to solve it here.

But, thanks to the Framers, they don't have to. The First Amendment guarantees that religious nonprofits may choose to hire only their coreligionists, removing at least the question presented here from the political fray. That proposition isn't controversial.

Most Americans still recognize that ours "is a Nation built upon the promise of religious liberty," *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting), and that this promise allows religious groups to select their employees based on religion. But confusion sown by decisions like the one below erode that shared understanding and embolden actors in government and beyond to press on further.

This Court, by making explicit what is implicit in its prior rulings, can and should halt that deleterious process. In so doing, the Court will both preserve space for "open and searching debate" between proponents of rights old and new, and "ensure that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Obergefell*, 576 U.S. at 679-80.

CONCLUSION

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

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