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 A Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF OF CHRISTIAN LEGAL SOCIETY, ADMINISTER JUSTICE, NEW COVENANT LEGAL SERVICES, COMPASSIONATE COUNSEL, CHRISTIAN LEGAL AID OF ARIZONA, AND ACCESS JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Christian Legal Society (CLS), founded in 1961, ministers to Christian attorneys and law students, advocates for religious freedom, and supports legal aid clinics that serve the indigent with *pro bono* legal services. CLS's Christian Legal Aid program seeks to follow the biblical call to "defend the weak and the fatherless; uphold the cause of the poor and the oppressed" (*Psalms* 82:3).[2] CLS has one of the largest networks of faith-based legal aid clinics in the country, with 63 member clinics serving approximately 135 communities across the United States, including Open Door Legal Services with Seattle's Union Gospel Mission. CLS believes that legal issues faced by those in need are often intertwined with related emotional, relational, and spiritual issues that can best be addressed holistically through faith-based advice and counseling together with legal assistance.

Administer Justice (AJ), founded in 2000, is a national Christian Legal Aid ministry that empowers vulnerable neighbors with the help of a lawyer and the hope of God's love. AJ does this through churches

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[1] Pursuant to Rule 37.2(a), all parties' counsel of record received timely notice of the intent to file this brief and filed blanket written consents with the Clerk. Neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amicus curiae*, its members, or its counsel) made a monetary contribution intended to fund its preparation or submission.

[2] All Bible quotations are from the New International Version.

across the United States. While AJ is committed to serving all those of limited means without discrimination, it intentionally locates in churches and addresses legal, social, and spiritual issues. All staff must ascribe to a statement of faith which is critical for its work with churches. As an extension of church gospel justice ministry, AJ must be able to hire staff who align with Biblical standards. This is the only way for it to adhere to the Biblical mandate to "administer true justice, show mercy and compassion to one another" (*Zechariah* 7:9).

New Covenant Legal Services (NCLS) provides legal services to individuals in the St. Louis Metropolitan area who are on fixed incomes and who cannot afford legal services. The need is great as NCLS estimates that over 300 people a week go through St. Louis City Circuit Court in civil cases without legal counsel. NCLS provides attorneys to individuals in eviction cases, credit card debt, and other similar cases of financial exploitation. Our mission is to demonstrate that Jesus Christ's love and justice should be sovereign in the world. This mission is accomplished through a Christ-centered approach to solving legal problems and achieving justice in partnership with churches in the metropolitan St. Louis area.

Compassionate Counsel (CC) serves as a Christian legal aid ministry in response to the commands of Jesus and the obvious need of those unable to pay for legal services in Tennessee. Founded in 2011, CC offers free legal advice, guidance, and, in select cases, representation to those unable to pay for such services in

Nashville and Middle Tennessee. By partnering with churches and other Christian ministries, CC seeks to meet the legal needs of our vulnerable and hurting neighbors (*Luke* 10:25-37). By meeting immediate legal needs, it is our ministry's desire that we share about Jesus meeting a deeper spiritual need and that participants experience the life transforming and eternity changing power of the Gospel of Christ.

Christian Legal Aid of Arizona (CLAA) was formed in 2001 to provide legal and spiritual aid to the poor in Arizona. CLAA provides *pro bono* legal services through attorney volunteers at diverse locations primarily in Maricopa County. CLAA has served thousands of individuals at churches, schools, substance abuse programs, shelters, and rescue missions. CLAA provides spiritual aid by sharing the gospel of Jesus Christ with those it serves. CLAA's goal and desire is to bring glory to Jesus Christ in all that it does. Helping bring justice to people's lives with compassion fulfills that goal.

Access Justice (AJ) is a legal aid ministry serving clients from Louisville and Southern Indiana. Its mission is to increase access to justice for all, but especially amongst the most vulnerable in our community. AJ hosts weekly and monthly clinics where volunteer attorneys provide 45-60 minutes of *pro bono* legal advice. It also offers education seminars to teach clients their general legal rights in various areas of law. By doing so, the most vulnerable in our society can be empowered to participate in the judicial system and resolve their legal troubles. AJ operates six legal clinics

in churches in the Louisville and Southern Indiana area. Its Christ-centered approach to assisting its neighbors with legal challenges opens doors of hope to many who have longed for the freedom that comes with escaping crippling legal issues. Each year we assist hundreds of individuals in finding access to justice. "But let justice roll on like a river, righteousness like a never-failing stream!" (*Amos* 5:24).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arose when the Mission decided not to select an applicant because he disagreed with both its religious beliefs and the religious practices that authenticate agreement with its beliefs. The applicant's disagreement with the Mission's religious beliefs signaled that he was unlikely to express the Mission's religious message, as the Mission understands its religious message, in his communication with its clients, co-workers, and the broader community.

The Washington Supreme Court denied the Mission the benefit of a religious exemption enacted seventy years ago by the Washington Legislature as an integral part of the Law Against Discrimination (LAD). The court below limited protection for a religious ministry's ability to require that its employees agree with its religious beliefs to only those positions that qualify for the First Amendment's ministerial exception. Without this Court's review, religious nonprofits' ability to

maintain their religious message and mission is at risk in every State, even where statutory exemptions exist.

Amici focus on two points:

I. Faith-based legal aid clinics have long-served the legal needs of the poor in America. Throughout Jewish and Christian scriptures, God commands people of faith to defend the vulnerable who cannot defend themselves and to seek justice for those being treated unjustly. *See*, *e.g.*, *Isaiah* 1:17 ("Seek justice. Defend the oppressed. Take up the cause of the fatherless; plead the case of the widow."); *Psalms* 82:3 ("Defend the weak and the fatherless; uphold the cause of the poor and the oppressed.").

Religious ministries, like the Mission, take these commands seriously and pour significant staff and financial resources into their legal aid programs. These programs are an integral part of their ministry. For persons overwhelmed by debt, eviction, or arrest, faith-based legal assistance often is a godsend.

II. a. It is essential that the Free Exercise Clause protect the right of a religious ministry to hire based on whether a prospective employee will commit to communicating the ministry's religious beliefs as the ministry defines its beliefs—regardless of the State in which the ministry is located. But *Employment Division v. Smith* removed this basic constitutional safety net for religious ministries thirty-one years ago. In order to restore federal protection for religious ministries' freedom to hire persons who will communicate their message and mission, *Smith* should be overruled.

Replacing the current *Smith* regime with a "compelling interest/least restrictive alternative" test would again bring federal and state free exercise rights into alignment. Religious institutions and individuals have been protected from *federal* laws and regulations by the compelling interest test under the Religious Freedom Restoration Act for nearly thirty years. And the test has worked well. The federal government has not been hobbled in achieving its compelling interests, and religious individuals and institutions have been able to live according to their deepest religious convictions. Because the federal government's interests often are of the most compelling nature (*e.g.*, national defense and international relations), it is hard to fathom why the compelling interest test cannot be applied to state and local governments' laws and regulations when they restrict religious exercise.

Furthermore, Title VII's religious exemption provides a categorical protection for religious employers that does not trigger the balancing that takes place under a compelling interest standard. Once a religious employer meets Title VII's definition of "religious employer," it has the right to hire "individuals of a particular religion," whether or not the government can show a compelling interest. In that sense, a post-*Smith* free exercise protection applied to the States would provide less protection for religious employers than Title VII provides at the federal level. But it would be far better than the current situation in which religious ministries are left to the mercy of State officials.

The Free Exercise Clause should set a floor below which States cannot go in restricting religious

ministries' employment decisions. That floor should be higher than the ministerial exception, especially given that many lower courts seem inclined to interpret the exception exceedingly narrowly.

b. Some States and localities provide exemptions for religious employers in their nondiscrimination laws. But these exemptions vary by State and locality. Furthermore, as the decision below demonstrates, these state and local exemptions may be drastically underenforced. The irony of this case is that the Washington Legislature provided a strong exemption for religious nonprofits when it enacted the LAD in 1949. But seventy years later, the Washington Supreme Court emasculated the exemption. Contrary to plain statutory text, the court below eviscerated the religious exemption upon which religious nonprofits have relied for seventy years.

Indeed, it is reasonable to question whether the Washington Legislature would have added "sexual orientation" as a protected class in 2006 were the 1949 religious exemption not already embedded in the statute. The decision below's dilution of the longstanding religious exemption has ramifications for other States' deliberations about adding "sexual orientation" as a statutorily protected class to their state nondiscrimination laws. Opponents of federal and state legislative proposals that would add "sexual orientation" to nondiscrimination laws in exchange for stronger statutory religious exemptions can point to the decision below as potent evidence that such compromises are futile because courts can underenforce—or eliminate—any religious exemptions.

c. The Mission should prevail under the Court's analysis in *Fulton v. City of Philadelphia*. The Washington LAD is not generally applicable because it exempts all secular employers with fewer than eight employees. It is hard to imagine a compelling government interest that justifies Washington State *allowing* secular employers to engage in invidious discrimination, so long as they stay below eight employees, while *denying* religious ministries an exemption for their religiously-based employment decisions.

Fulton's explication of the "general applicability" test, however, in the long-run, inadequately protects religious freedom from state and local officials' apathy—too frequently antipathy—toward religious beliefs in general or specific religious beliefs. Religious ministries will only be reasonably secure when a safety net of strict scrutiny is the federal constitutional standard. *See* Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 21 Cato Sup. Ct. Rev. (forthcoming), at *7-11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3893231 (calling for overruling *Smith*).

ARGUMENT

I. Faith-Based Legal Aid Clinics Perform a Vital Role in Addressing the Legal Needs of Many Americans Who Lack Access to Justice.

In 2017, the Legal Services Corporation ("LSC") reported that "71% of low-income households experienced

at least one civil legal problem, including problems with domestic violence, veterans' benefits, disability access, housing conditions, and health care." Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* 6 (June 2017), https://lsc-live.app.box.com/s/9wk0yy6o6akk7cx61zismr0v5d1dqxl8. Even with 133 LSC-funded legal aid organizations nationwide, LSC reported that it "will be able to fully address the civil legal needs of only about half" of "the estimated one million low-income Americans" who need help. *Id.* at 8. Faith-based legal aid clinics stand in the gap with their commitment to justice for the neediest of their neighbors.

Throughout the scriptures, God commands people of faith to defend the vulnerable who cannot defend themselves and to seek justice for those being treated unjustly. *See*, *e.g.*, *Proverbs* 31:8-9 ("Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy."); *Exodus* 23:6 ("Do not deny justice to your poor people in their lawsuits.").

Religious ministries, like the Mission, take these religious commands seriously and pour significant financial resources into their legal aid programs as an integral part of their ministry. A faith-based legal clinic may be a specific ministry of a church, or it may be an independent religious ministry supported by many churches and individuals. "Some faith-based legal services organizations are small and independent, others are part of national entities such as Catholic

Charities and Lutheran Family and Children's Services. Some employ staff while others are volunteer organizations. Some integrate religious activities into their legal assistance; others do not." Melanie D. Acevedo, *Client Choices, Community Values: Why Faith-Based Legal Services Providers are Good for Poverty Law*, 70 Fordham L. Rev. 1491, 1498 n.41 (2002) (citations omitted).

Often faith-based clinics have a small professional staff—perhaps just two or three attorneys—supplemented by volunteer lawyers and other support staff. These lawyers typically view their work as a religious calling to help those in need obtain justice.[3]

Indeed, the court below seems unaware of the "religious lawyering movement" of the past thirty years in which lawyers of all faiths have explored the integration of their faith with their legal practice. Jewish, Muslim, Catholic, Evangelical, Latter-Day Saint, and Buddhist lawyers, for example, have written thought-provoking books[4] and law review articles[5] in which

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[3] *See generally, e.g.*, Nitza Milagros Escalera, *A Christian Lawyer's Mandate to Provide Pro Bono Publico Service*, 66 Fordham L. Rev. 1393 (1998).

[4] *See*, *e.g.*, Thomas L. Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (1981); Joseph G. Allegretti, *The Lawyer's Calling: Christian Faith and Legal Practice* (1996); Michael W. McConnell, et al. eds., *Christian Perspectives on Legal Thought* (2001); Michael P. Schutt, *Redeeming Law: Christian Calling and the Legal Profession* (2007).

[5] *See*, *e.g.*, Daniel O. Conkle, *Professing Professionals: Christian Pilots on the River of Law*, 38 Cath. Law. 151, 155 (1998) ("[T]here is no single model of Christian lawyers. Just as there

they wrestle with synthesizing faith and the practice of law. This wrestling has led some attorneys to serve in faith-based legal clinics as a means of serving God by ministering to the legal needs of the poor.[6]

Interestingly, lawyers at secular clinics sometimes also "see and appreciate the underlying spirituality in the legal aid movement." Cromartie, *supra*, 27 Tex. Tech L. Rev. at 1064 ("[A]s the Biblical connections with the Hebrew prophets and the Biblical message of liberation to the poor and the oppressed were considered, suddenly the legal services network becomes a rich environment for exploring the issues of the connectedness to spirituality and faith development.").

Faith-based legal aid clinics, such as Cabrini Green Legal Aid begun in 1973 by LaSalle Street Church in Chicago, have long histories of serving their communities. Cynthia Cornelius, *The Reluctant Defender: An Interview Featuring Chuck Hogren,*

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are many types of Christianity, there are many types of Christian lawyers, and their religious understandings influence their professional lives in diverse ways."); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 Case W. Res. L. Rev. 127 (2004) (examining Jewish and Christian perspectives); *id.* at 131 nn.25 & 28 (listing articles by Buddhist, Muslim, Hindu, Native American, and Baha'i attorneys about integrating their faith and legal practice).

[6] Sometimes the journey goes in reverse when a legal aid lawyer finds faith because of his work. John L. Cromartie, Jr., *Reflections on Vocation, Calling, Spirituality and Justice*, 27 Tex. Tech L. Rev. 1061, 1062 (1996) ("In legal aid work, I got in touch with my deeper feelings about justice issues and . . . also began a pilgrimage back to the Church.").

a Christian Legal Aid Pioneer, 15 The Christian Lawyer 10 (Fall 2019), https://www.christianlegalsociety.org/sites/default/files/2019-10/TCL%20Fall%202019_low.pdf. Other faith-based clinics may have recently opened their doors. Sarah Eekhoff Zylstra, *Saturday Justice: How Church-Based Legal Aid is Growing*, The Gospel Coalition: Faith & Work (Aug. 30, 2021), https://www.thegospelcoalition.org/article/saturday-justice/ (describing the 20-year history of *amicus* Administer Justice with 58 current locations and plans for 10 more locations). The pandemic-fueled surge in legal needs, including debt, eviction, and employment issues, will further stretch faith-based clinics' resources. Bekah McNeel, *Christian Lawyers Fight COVID-19 Home Evictions*, Christianity Today (February 16, 2021), https://www.christianlegalaid.org/eviction_moratorium.

Faith-based clinics may integrate their faith with the services they provide to varying degrees. These differences often reflect the charities' theology. But as one comparative analysis of two models of faith-based legal aid clinics—the "faith-informed" and "faith-transformed" models—concluded, "each views its faith commitments as integral to the day to day interactions of attorneys and clients." Acevedo, *supra*, 70 Fordham L. Rev. at 1505; *id.* at 1498-1507. For many faith-based clinics, everything they do is infused with religious purpose. In those clinics where the role of lawyers includes "provid[ing] spiritual assistance to their clients," the attorneys must "necessarily share the religious views of the organization." *Id.* at 1506.

Many faith-based clinics expect their staff to provide their clients with spiritual as well as legal counsel in appropriate circumstances. Attorneys are trusted to discern whether a client wants only legal advice or desires spiritual counsel as well. Sometimes an attorney will simply connect a client with a church community to help her with housing, clothing, or transportation needs.

Many faith-based legal aid attorneys are guided by their faith in how they serve clients. Legal issues are steeped in judgments of fair versus unfair, good versus harmful, just and unjust. These determinations are by nature laden with values and cannot help but be informed by one's faith and worldview.[7] For faith-based legal clinics, this means the delivery of their legal services has a ministry purpose and function. Faith-based legal aid clinics seek to restore the person—in body and mind—so the person is able to overcome the environment that first created the underlying problem.

This is especially true for attorneys when they serve in their *counselor* role. Their advice is informed by religious values. This is appropriate because many clients' problems are not simply "legal." Clients' legal problems often arise from physical, mental, emotional, and spiritual needs. Treating the "legal" problem without holistically addressing the clients' other needs

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[7] *See*, *e.g.*, Thomas L. Shaffer, *The Biblical Prophets as Lawyers for the Poor*, 31 Fordham Urb. L.J. 15 (2003).

often does not provide a long-term solution to the legal needs.

When appropriate, faith-based attorneys can appeal to clients using specifically religious values and sharing religious concepts about the power of forgiveness and the hope of a God who cares. Often clients welcome spiritual counsel from a compassionate attorney. To be clear, "[c]lients are not chosen based on their religious faith." Acevedo, *supra*, 70 Fordham L. Rev. at 1501; *id.* at 1504, 1527 n.313. All are served.

Many clients come to a clinic full of anger, bitterness, or despondency, and their legal problems are often intertwined with a web of other problems that are relational, emotional, or spiritual in nature. As one legal aid attorney observes, too often "[s]hame hangs heavily over the heads of those in need, especially if they are bearing the weight of mistakes and failures." Anthony Bushnell, *The Gospel for Legal Aid: People Need More Than Hands and Feet,* 7 J. of Christian Legal Thought 8, 10 (Winter 2017), http://www.christianlegalsociety.org/journal-christian-legal-thought-winter-2017. Faith-based legal aid attorneys strive to provide clients with hope through words of comfort and respect. Certainly, secular legal aid can address technical legal issues, but providing spiritual ministry can be an important means of helping clients holistically. *See* Katina R. Werner, *The Case for "Low Bono" in Addressing the Access to Justice Crisis*, 15 The Christian Lawyer 17, 22 (Fall 2019), http://www.christianlegalsociety.org/fall-2019-issue.

Because their lawyers may wear two hats in order to better serve their clients, faith-based clinics need the freedom to choose their staff. Faith qualifications and spiritual maturity are powerful predictors of the ability of an attorney to serve in these emotionally draining positions and perform job duties that require spiritual acumen as well as legal knowledge.

II. It Is Essential that the Free Exercise Clause Protect the Right of a Religious Ministry to Require Its Employees to Agree with the Ministry's Religious Beliefs as the Ministry Defines Its Beliefs—Regardless of the State in which It Is Located.

The Free Exercise Clause needs to protect a religious ministry's ability to hire based on whether a prospective employee will commit to communicating the ministry's religious beliefs as the ministry defines its beliefs—regardless of the State in which it is located. But *Employment Division v. Smith*, 474 U.S. 872 (1990), removed this basic constitutional safety net thirty-one years ago.

As a result, Americans' religious freedom depends on a patchwork of protections scattered throughout federal and state laws. Religious freedom is protected to a limited degree by the Free Exercise Clause; to a much greater degree, but only at the federal level, by the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*; and to various degrees by

specific religious exemptions tucked here and there into federal and state statutes and regulations.

While state constitutions, as well as some state and local statutes, pay homage to religious freedom, the results when state courts apply them frequently tend to be less robust than their language promises, as this case exemplifies. The Washington LAD provides broad protection for religious nonprofits, and its post-*Smith* caselaw promises strict scrutiny under the Washington State Constitution, art. I, § 11. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992). But both statutory text and precedent proved illusory.

Smith has severely impaired the religious freedom of religious ministries at the state and local levels. Americans' religious freedom should not entirely depend on the State in which they live.

A. In Order to Restore Federal Constitutional Protection for Religious Ministries' Freedom to Employ Persons Who Will Communicate Their Message and Mission, *Employment Division v. Smith* Should Be Overruled.

In *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753-54 (2020), the Court offered reassurance that RFRA, Title VII's religious exemption (42 U.S.C. § 2000e-1(a)), and the ministerial exception would suffice to protect religious individuals and institutions in the wake of its interpretation of Title VII to include sexual orientation

and gender identity as protected classes. But neither RFRA nor Title VII applies to state nondiscrimination laws. The ministerial exception applies to state law claims, but its coverage is limited. If religious ministries are to survive, the remedy is for the federal Free Exercise Clause to again require strict scrutiny of state and local restrictions on religious exercise.

1. Support for *Smith* is sparse.

Smith unexpectedly and dramatically weakened the constitutional protection for religious freedom across the board, including for religious ministries' employment decisions in the face of state and local nondiscrimination laws. The *Smith* decision substituted rational basis review—or possibly, no review at all—for strict scrutiny review whenever a burden on the free exercise of religion is imposed by a neutral and generally applicable law. It is still not clear whether *Smith* completely gutted the First Amendment's protection for religious freedom whenever a law is neutral and generally applicable, or merely shrank it considerably and made it much more complicated and confused as to when a law meets the criteria of neutrality and general applicability.

As Justice Alito recently warned, this Court "should reconsider *Smith* without further delay" because "[t]he correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend." *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring in judgment, with two

justices). That counsel applies particularly strongly in this case where a religious ministry faces costly liability for its decision not to hire a person because he disagrees with its religious beliefs and religious message.

Justice Alito catalogues the many reasons for overruling *Smith*. But also persuasive is *Fulton*'s silence—a unanimous decision in which no word in defense of the *Smith* regime was written. *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring in judgment, with two justices) ("And not a single Justice has lifted a pen to defend the [*Smith*] decision.") Even more remarkably, out of 47 amicus briefs supporting the City, only three "explicitly argued for retention of *Smith*," along with one in support of neither side. Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, American Constitution Society, Supreme Court Review (5th ed., 2020-21) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3888375, *12. As Professors Lupu and Tuttle observe, "the reticence on the Court to defend *Smith* is mirrored in the larger society of scholars, lawyers, and concerned citizens." *Id.* at *10. Even those who favor the diminution of free exercise that *Smith* enables in the States find its harsh impact on religious minorities—throwing them upon the mercy of majoritarian political sentiment—difficult to defend.

2. The Religious Freedom Restoration Act protects free exercise at the federal level, but not at state or local levels, and is itself under attack.

In response to *Smith*, Congress passed RFRA, by a nearly unanimous, bipartisan vote, and President Clinton enthusiastically signed it. The coalition of 68 organizations from across the religious and political spectrum that urged RFRA's passage had one overriding principle: RFRA would protect *all* Americans' religious freedom. Anticipating RFRA's main task to be protecting minority faiths, few proponents foresaw the day when Catholic nuns would be denied a modest religious exemption by a popularly-elected Administration, and so need RFRA's protection.

RFRA, rather than the First Amendment, has provided the primary protection for Americans' religious freedom at the federal level for 28 years. RFRA ensures a level playing field for Americans of all faiths by putting minority faiths and unpopular religious beliefs on an equal footing with faiths that are politically popular. *See*, *e.g.*, *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (RFRA may provide damages for Muslims placed on "No Fly" list allegedly for refusing to become FBI informants within their congregations); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (RFRA authorized federal religious exemption that protects nuns and other religious dissenters who object to providing contraceptive insurance coverage).

Unfortunately, RFRA and its sister statute that applies in limited contexts to state and local laws, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, "do not apply to most state action, and they leave huge gaps." *Fulton*, 141 S. Ct. at 1889 (Alito, J., concurring in judgment, with two justices). Of course, as originally enacted, RFRA applied to state and local governments; however, Congress followed this Court's ruling in *City of Boerne v. Flores*, 521 U.S. 507 (1997), by amending RFRA to apply only to the federal government. *See* RLUIPA, Pub. L. 106-274, § 7 (Sept. 22, 2000).

Finally, *Smith* should be overruled because Congress is under considerable pressure to eviscerate RFRA's protections. The Equality Act, H.R. 5, passed the House of Representatives in May 2019 by a vote of 236-173, and again in May 2020 by a vote of 224-206, with provisions expressly reducing RFRA's protections. H.R. 5, § 9(2)(b)(3) ("Sec. 1107. Claims").

3. Twenty-eight years of the Religious Freedom Restoration Act's protection for religious exercise demonstrate that *Smith*'s fears regarding the compelling interest test were unfounded.

Replacing the current *Smith* regime with RFRA's familiar "least restrictive means of furthering [a]

compelling governmental interest" standard[8] would bring federal, state, and local free exercise into alignment. Religious institutions and individuals have been protected from federal laws and regulations by RFRA's robust compelling interest test for nearly thirty years. And the test has worked remarkably well. The federal government has not been hobbled in achieving its interests, and religious individuals and institutions have been able to live according to their deepest religious convictions. *See* Laycock and Berg, *supra*, at *7-11.

As Justice Alito observed, "*Smith* has not provided a clear-cut rule that is easy to apply, and experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to 'anarchy.'" *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring in the judgment, with two justices) (*quoting Smith*, 494 U.S. at 888); *id.* at 1922-23 (same). A unanimous Court fifteen years ago observed that "Congress recognized that 'laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,' and legislated 'the compelling interest test' as the means for the courts to 'strike[e] sensible balances between religious liberty and competing prior governmental interests.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,

[8] "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—**(1)** is in furtherance of a compelling governmental interest; and **(2)** is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.A. § 2000bb-1(b).

546 U.S. 418, 439 (2006) (*quoting* 42 U.S.C. §§ 2000bb(a)(2), (5)).

Because the federal government's interests frequently are more compelling than state interests (for example, national defense and international relations), it is hard to understand why the compelling interest test would be more problematic when applied to state regulations.

4. Title VII offers no protection for claims brought under state nondiscrimination laws.

In contrast to RFRA, Title VII's religious exemption provides a categorical protection for religious employers that does not trigger the balancing that takes place under a compelling interest standard. Once Title VII's definition of "religious employer" is met, a religious employer has the right to hire "individuals of a particular religion," regardless of whether the government has a compelling interest. For that reason, a post-*Smith* free exercise protection applied to the States would provide less protection against state claims than Title VII's religious exemption provides against federal claims. Nonetheless, the compelling interest test would greatly improve upon the current situation.

5. The ministerial exception itself illustrates why *Smith* should be overruled.

Neither RFRA nor Title VII's religious exemption apply to state and local governments. As a result, the

only federal constraint that the court below observed was the ministerial exception. While the attorney position at issue eventually may be found to come within the ministerial exception, the court below sent troubling signals suggesting the Mission may be denied refuge in the ministerial exception.

In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court strongly reaffirmed not only the ministerial exception but also the importance of preserving many religious ministries' employment decisions from governmental interference. 140 U.S. 2049 (2020). But *Our Lady*'s protection was available only because, eight years earlier, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Court set *Smith* to one side. 565 U.S. 171, 189-90 (2012). In *Hosanna-Tabor*, the United States Government had argued that the Free Exercise Clause offered no protection to a religious congregation's decisions regarding who would be its minister or teach its faith. Brief for Federal Respondent, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012) (No. 11-553), 2011 WL 3319555, at *11, *21-29. The Government relied on *Smith* for this proposition, only to find its reliance rejected by a unanimous Court. 565 U.S. at 189-190; *see Fulton*, 141 S. Ct. at 1916 (Alito, J., concurring in judgment, with two concurring justices). By requiring the Court continually to cabin it or create workarounds, *Smith* works distinctive institutional damage to the Court's reputation.

B. As the Decision Below Demonstrates, Religious Exemptions in State Nondiscrimination Laws Cannot Be Relied Upon to Provide Adequate Protection for Religious Ministries.

RFRA's protection for religious freedom at the federal level requires reinforcement: The Free Exercise Clause needs to fix a floor below which States cannot go in restricting religious ministries' employment decisions. The floor needs to be set higher than the ministerial exception because many lower courts seem eager to interpret the exception exceedingly narrowly.

Some States and localities provide exemptions for religious employers in their nondiscrimination laws. But these exemptions vary from State to State, and locality to locality.

And, as the decision below demonstrates, these religious exemptions may be drastically underenforced. The irony of this case is that the Washington State Legislature provided a strong exemption for religious employers when it enacted the LAD in 1949. But seventy years later, the Washington Supreme Court emasculated that exemption in this case. The decision below reduces the state exemption's protection, upon which religious employers in Washington State have relied for seven decades, to the bare minimum that the court below believes the federal Free Exercise Clause protects, *i.e.*, the ministerial exception. Its decision contradicts the plain statutory text and, until 2021, was

inconsistent with Washington Supreme Court precedent.

It is questionable whether the Washington Legislature would have added "sexual orientation" as a protected class in 2006 had the religious exemption not already been on the books. At a minimum, the Legislature likely would have included a corresponding religious exemption.

As a practical matter, the Washington Supreme Court's elimination of the state religious exemption has ramifications for other States' attempts to add "sexual orientation" as a protected class to their nondiscrimination laws. Nearly half of the state nondiscrimination laws do not include "sexual orientation" as a protected class. Opponents of federal and state legislative proposals that would add "sexual orientation" as protected classes to nondiscrimination laws in exchange for stronger religious exemptions can point to the decision below as convincing evidence that religious individuals and institutions cannot trust state supreme courts to honor any religious exemptions that their legislatures enact. Restoring the "compelling interest/least restrictive means" test as the floor for free exercise claims in the States seems a necessary precondition to any legislative compromises.

C. Application of the Washington Nondiscrimination Law to the Mission in This Case Violates the Free Exercise Clause under *Fulton*.

The Washington LAD is not generally applicable because it exempts secular employers with fewer than eight employees. What compelling government interest justifies the State allowing secular employers to engage in invidious discrimination, so long as they stay below eight employees, yet denying a religious ministry an exemption to employ persons who agree with its religious beliefs and message?

But even if the Mission wins under the *Fulton* analysis, as it should, the "generally applicable" analysis fails in the long-run to provide adequate protection for religious ministries. Personnel is policy, and under-resourced religious ministries cannot sustain years of litigation to defend their personnel decisions against challenges brought under state and local nondiscrimination laws.

The *Fulton* explication of the "general applicability" test is welcome. But the "general applicability" standard is inadequate to protect religious freedom from state and local officials' apathy—and too often their antipathy—to religion in general or specific religious beliefs. *See* Laycock and Berg, *supra*, at *4-7. Incremental free exercise decisions "treat[] the symptoms, not the underlying ailment" of *Smith*. *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring, with two justices). "[R]eligious believers" and "the lower courts"

are "owe[d]" a "cure [to] the problem this Court created." *Id.*

The cost to the Mission has been high, and its service to Seattle's most vulnerable citizens has suffered as this litigation has been prolonged. *See id.* at 1930 ("Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties."). While the Mission should win under current caselaw, the decision below conclusively demonstrates that the Free Exercise Clause needs strict scrutiny to be restored in order to provide the essential protections that religious ministries require in order to continue their faithful service to their communities.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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