**APPEAL NO. 23-2606**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNION GOSPEL MISSION OF YAKIMA WASHINGTON,

*Plaintiff-Appellant*,

v.

ROBERT FERGUSON, in his official capacity as Attorney General of Washington State; ANDRETA ARMSTRONG, in her official capacity as Executive Director of the Washington State Human Rights Commission; and DEBORAH COOK, GUADALUPE GAMBOA, JEFF SBAIH, and HAN TRAN, in their official capacities as Commissioners of the Washington State Human Rights Commission,

*Defendants-Appellees.*

On Appeal from the United States District Court
for the Eastern District of Washington
Case No. 1:23-cv-03027-MKD

# APPELLANT'S OPENING BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Union Gospel Mission of Yakima, Wash., is a religious 501(c)(3) not-for-profit corporation. It issues no stock and has no parent corporation.

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## JURISDICTIONAL STATEMENT

The Union Gospel Mission of Yakima, Washington ("the Mission") sued Washington Attorney General Robert Ferguson; Executive Director of the Washington State Human Rights Commission Andreta Armstrong; and State Human Rights Commissioners Deborah Cook, Guadalupe Gamboa, Jeff Sbaih, and Han Tran (collectively, "the State") in the United States District Court for the Eastern District of Washington under 42 U.S.C. § 1983, alleging violations of its rights under the First and Fourteenth Amendments to the United States Constitution. The district court properly exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On September 1, 2023, the district court denied the Mission's motion for a preliminary injunction and granted the State's motion to dismiss. 1-ER-030. The Mission timely filed its notice of appeal on September 29, 2023, within the 30-day period established in 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A). 3-ER-450–54. This appeal is from a final order that disposed of all the Mission's claims. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

The Washington Law Against Discrimination ("WLAD") prohibits employers from discriminating based on sexual orientation. As enacted by the state legislature, the WLAD exempted "religious or sectarian organization[s] not organized for private profit" by excluding them from

the definition of "employer." But in 2021, the Washington Supreme Court drastically narrowed this exemption by holding that religious organizations could be liable for "discriminating" against non-ministerial employees. *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021). Soon after, the Washington Attorney General launched an investigation against Seattle Pacific University ("SPU") because the school requires *all employees* to abide by its religious beliefs on sexual morality. The Mission holds nearly identical employment practices. And historically, Washington state has enforced the WLAD even in the face of religious objections. The Mission also has received third-party threats over its hiring practices.

So the Mission has chilled its religious speech and exercise by not filling two non-ministerial positions and not publishing its religious hiring statement. It sued to obtain protection before risking severe penalties from the State. But the district court dismissed on standing, concluding the Mission did not face any credible threat of enforcement nor could its harms be redressed.

The issues on appeal are:

1. Whether the Mission satisfies the injury-in-fact requirement for standing when it has suffered an actual injury and faces a credible threat of enforcement where the WLAD proscribes the Mission's religiously based employment practices, state officials have refused to disavow enforcement, and the state's top law enforcement official

recently investigated a Christian university for having nearly identical employment practices.

2. Whether the *Rooker-Feldman* doctrine bars the Mission's suit when the Mission was not a party to state court proceedings, accepts the Washington Supreme Court's decision as a binding matter of state law, and seeks to enjoin state officials from enforcing the WLAD as it sits today.

3. Whether the Mission is entitled to a preliminary injunction when the First Amendment protects its religious employment practices and speech about those practices.

## INTRODUCTION

The Mission has been faithfully serving the less-fortunate and struggling of south-central Washington for almost 90 years. What makes the Mission unique, however, is that it is not just any other social welfare organization feeding the hungry and housing the homeless. Rather, it is a Christian *ministry* that believes true healing and transformation starts with the heart and soul. To that end the Mission's foremost goal is to spread the Gospel of Jesus Christ, lead others into a relationship with Him, and exemplify what it means to be a light in this world.

To accomplish its religious calling the Mission must employ agents who agree with and adhere to the Mission's Christian beliefs, including those on biblical sexuality and marriage. Unfortunately, two

years ago the Washington Supreme Court held that religious organizations can be penalized for requiring their non-ministerial employees to share those beliefs. Soon after, state officials targeted a Christian university for having a nearly identical employment policy as the Mission. The Mission also received threats and hostile employment applications. With the threat of enforcement looming, the Mission had no choice but to chill its conduct and withhold filling two non-ministerial positions and publishing its Religious Hiring Policy. Rather than wait in line to be Washington's next target, the Mission sued to protect its constitutional rights.

The district court, relying almost exclusively on a lack of enforcement history (despite there being such a history) dismissed the Mission's case. This was error. The Mission need not "first expose" itself to "actual arrest or prosecution to be entitled to challenge a statute that [it] claims deters the exercise of [its] constitutional rights." *Steffel v. Thompson,* 415 U.S. 452, 459 (1974). Instead, the threat must only be "imminent," and all signs show that it is. Along with investigating the Christian university, the State has aggressively enforced the WLAD against Christian businesses, third parties regularly enforce the WLAD, and the State refuses to disavow possible enforcement against the Mission. In ruling otherwise, the district court effectively asked the ministry to "bet the farm" and hope the State decides never to come after it. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Precedent is clear the Mission need not take that risk. Besides, the Mission is suffering actual ongoing harm *today*. The Court should not only reverse the district court, but also issue a preliminary injunction to protect the Mission's First Amendment rights.

## STATEMENT OF THE CASE

### A. The Mission employs only coreligionists to advance its religious purpose.

The Mission is a Christian ministry founded in 1936 to "spread the Gospel of the Lord Jesus Christ." 3-ER-370, 419. For nearly nine decades, the Mission has advanced this purpose by serving the less-fortunate no matter who they are, what they believe, or how they identify. 3-ER-371–75. It does so through its homeless shelter, recovery programs, health clinics, and meal services. *Id.* The Mission's social-welfare services are incredibly impactful; in its 2021-2022 fiscal year, the Mission handed out 141,629 free meals, provided 30,167 nights of shelter, and helped dozens regain sobriety. 3-ER-372–73. Demonstrating love and compassion for vulnerable people's physical needs is the means by which it furthers its overarching goal to have every client develop a relationship with Jesus Christ. 3-ER-375.

The Mission's religious beliefs guide and permeate everything the Mission does. 3-ER-371. They compel the Mission to carry out its acts of service, share the Gospel with everyone at all times, and mentor and disciple one another to further these ends. 3-ER-371–78. And because

the Mission is an organization made up of individuals, it accomplishes its religious goals through its employees. 3-ER-379.

The Mission also adheres to Christian beliefs on marriage and sexuality. It believes "God created humans in His image"; that "He made humanity expressed in two complementary and immutable sexes, male and female, each displaying features of His nature"; and that "[f]or their joy and well-being, God commanded human sexual expression to be completely contained within the marriage of one man to one woman." 3-ER-378. Any sexual activity outside the confines of biblical marriage conflicts with the Mission's beliefs. *Id.*

To ensure the Mission remains true to its calling and presents a clear and consistent message to its clients and the world, it only employs coreligionists—those who both agree with the Mission's Christian beliefs and practices (internally) and who align their conduct with those beliefs (externally).[1] 3-ER-379–83. So the Mission expects its employees to abstain from sexual immorality, including adultery, non-married cohabitation, and homosexual conduct. 3-ER-378. Applicants interested in working at the Mission learn before and during the application process that they must share and live out these beliefs. 3-

[1] Although the State recognizes the ministerial exception protects the Mission's right to hire coreligionists for "ministerial" positions, it denies the Mission's freedom to hire only coreligionists for non-ministerial positions.

ER-380–83. All employees sign and agree to the Mission's Statement of Faith, core values, job description duties and requirements, and employee handbook. 3-ER-381.

The Mission routinely receives applications from people that openly disagree with—and sometimes express hostility to—its religious beliefs and hiring requirements. 3-ER-381–82. The Mission screens out such applicants that do not adhere to its beliefs. *Id.* This ensures all employees can properly be the hands, feet, and mouth of the Mission by: (1) doing Christ-centered acts of service; (2) sharing the Gospel and Christian teachings; and (3) engaging in Christian fellowship and discipleship within the Mission. 3-ER-379–80. Maintaining an internal community of likeminded believers also helps shield employees and clients from sinful habits, behaviors, and temptations. *Id.*

### B. The Washington Supreme Court guts the WLAD's statutory protection for religious employers.

***The WLAD***. Generally, the Washington Law Against Discrimination prohibits discrimination in employment, housing, public accommodations, and various transactions within the state. *See* Wash. Rev. Code Ann. § 49.60.010, *et seq*. Specifically, it is unlawful for employers to hire, fire, or otherwise discriminate in employment

"because of ... sexual orientation." *Id.* § 49.60.180(1), (2), (3)[2]. The WLAD's employment discrimination ban is buttressed by a "publication ban," which prohibits employers from posting statements and job applications that purport to limit employment based on sexual orientation, and it forbids asking about an applicant's sexual orientation. *Id.* § 49.60.180(4). Lastly, the WLAD's "disclosure provision" prevents employers from "[r]equir[ing] an employee to disclose his or her sincerely held religious affiliation or beliefs." *Id.* § 49.60.208(1).

Violating the WLAD carries heavy consequences. The Washington State Human Rights Commission ("the Commission") has broad authority to enforce the WLAD and does so through its administrative investigation process. *Id.* § 49.60.120; *see also id.* § 49.60.140 (noting Commission's various investigatory powers). An employer's compliance with a Commission investigation is mandatory on pain of contempt of court, *id.* § 49.60.160, and criminal penalties, *id.* § 49.60.310. When a complaint is filed, if the Commission cannot achieve voluntary conciliation, it prosecutes the complaint before an administrative law judge, who can order any remedy to "effectuate the purposes" of the WLAD—including paying back pay and forced hiring. *Id.* § 49.60.250. If an

[2] "Sexual orientation" is defined in the WLAD as "heterosexuality, homosexuality, bisexuality, and gender expression or identity." Wash. Rev. Code Ann. § 49.60.040(27).

employer does not comply, the Commission can enforce the ALJ's order in state court. *Id.* § 49.60.260(1).

Not only does Defendant Ferguson's office prosecute WLAD complaints on behalf of the Commission in administrative hearings, *see* 3-ER-386, but it also independently enforces the WLAD and can seek wide-ranging remedies, such as injunctions and the payment of damages, *see, e.g., Washington v. Matheson Flight Extenders, Inc.,* No. C17-1925-JCC, 2021 WL 489090, at *1 (W.D. Wash. Feb. 10, 2021).

Enforcement is not limited to state officials. Rather, "[a]ny person" who believes they were discriminated against can file a complaint with the Commission, setting in motion the investigatory process. Wash. Rev. Code Ann. § 49.60.230. Defendant Ferguson has even encouraged the public to file discrimination complaints with his office. 3-ER-390–91. The WLAD also provides a private right of action against an employer for alleged violations. Wash. Rev. Code Ann. § 49.60.030(2).

***The religious employer exemption.*** Before 2021, the WLAD posed no threat to the Mission because, as enacted by the state legislature, nonprofit religious organizations were exempt.[3] *Id.* § 49.60.040(11) ("'Employer' ... does not include any religious or sectarian organization not organized for private profit"). The legislature

[3] The WLAD also exempts employers with fewer than eight employees. Wash. Rev. Code Ann. § 49.60.040(11). The Mission employs more than 150 employees. 3-ER-379.

recognized the "potential entanglements between the state and religion that could occur in enforcing [the] WLAD against religious nonprofits," so it enacted the exemption to "relieve[ ] [religious nonprofits] of the burden of predicting when their religious beliefs would be regarded as sufficient justification for an employment decision." *Ockletree v. Franciscan Health Sys.*, 317 P.3d 1009, 1018 (Wash. 2014).

***Woods v. Seattle's Union Gospel Mission.*** All that changed after the state supreme court's decision in *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021), *cert. denied*, 142 S. Ct. 1094 (2022). There, Matthew Woods applied for a staff attorney position at Seattle's Union Gospel Mission and disclosed that he was in a same-sex relationship. *Woods*, 481 P.3d at 1063. The mission did not hire Woods because his relationship violated the mission's biblical beliefs and teachings, which every employee had to transmit. *Id*.

Woods sued the mission for sexual orientation discrimination under the WLAD. *Id.* The trial court granted summary judgment to the mission based on the WLAD's religious employer exemption, but the Washington Supreme Court granted review to decide whether that exemption violated the Washington Constitution's privileges or immunities clause. *Id*. at 1063–64; *see also* Wash. Const. art. I, § 12.

The court held the religious employer exemption violated the *state* constitution as applied to claims of sexual orientation discrimination, unless the First Amendment's ministerial exception applied, which it

found to be the "appropriate parameters" of the statutory exemption. *Woods*, 481 P.3d at 1067, 1070. To reach that conclusion, the court conducted a state law analysis, finding that Woods' claim implicated his "fundamental rights" to marriage and sexual orientation and there were no "reasonable grounds" to exempt religious organizations from the WLAD for non-ministerial positions. *Id.* at 1065–67. After listing several reasons why the ministerial exception should not apply, the court remanded for "the trial court to determine whether staff attorneys can qualify as ministers." *Id.* at 1070.

Seattle's Union Gospel Mission sought certiorari from the Supreme Court. The Court declined to grant review. *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094 (2022). Although they concurred in the denial given the lack of a final judgment, Justices Alito and Thomas explained that "forc[ing] religious organizations to hire messengers and other personnel who do not share their religious views would undermine not only [their] autonomy" but also "their continued viability." *Id.* at 1096 (Alito, J., statement respecting the denial of certiorari). In their view, "[t]he Washington Supreme Court's decision to narrowly construe th[e] [WLAD's] religious exemption to avoid conflict with the Washington Constitution may ... have created a conflict with the Federal Constitution." *Id.* On remand to the state trial court, Woods dismissed his case. 3-ER-389.

The result of *Woods* is this: the WLAD's religious employer exemption no longer protects religious organizations from claims of sexual orientation discrimination for non-ministerial positions. This effectively eviscerates the Mission's ability to engage in "the collective expression and propagation of shared religious ideals." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., concurring).

### C. The State enforces the WLAD against SPU for employing only coreligionists.

Any questions about what state officials would do with the WLAD following *Woods* were quickly answered. Just two months after the Supreme Court denied certiorari, following "numerous" complaints from students, faculty, and "others," Defendant Ferguson launched an investigation into Seattle Pacific University because the university required employees to follow its religious beliefs on sexual conduct. 3-ER-390–91, 434–37. Those beliefs—just like Seattle's Union Gospel Mission's and the Yakima Union Gospel Mission's here—require employees to abstain from sexual conduct outside of biblical marriage between one man and one woman. 3-ER-262.

Citing *Woods* and WLAD § 49.60.180, the Attorney General's letter stated his office learned that SPU may "utilize" employment practices "that permit or require discrimination on the basis of sexual orientation, including by prohibiting same-sex marriage and activity."

3-ER-434. So it was seeking "to determine whether the University [wa]s meeting its obligations under" the WLAD. *Id.* The Attorney General's Office then requested employment documents going back years, and demanded the university to sign and certify that it would retain all documents "pending completion of [its] investigation." 3-ER-434–37.

SPU sued. Compl., *Seattle Pac. Univ. v. Ferguson*, No. 3:22-cv-05540 (W.D. Wash. July 27, 2022). During the litigation, the Attorney General's Office "made clear" the purpose of its "investigation" was "*to determine which positions are ministerial and which are not*." Reply in Supp. of Mot. to Dismiss at 6, *Seattle Pac. Univ. v. Ferguson*, No. 3:22-cv-05540 (W.D. Wash. Oct. 14, 2022) (emphasis added). And the reason why was obvious: the "WLAD's prohibition of employment discrimination on the basis of sexual orientation" applied "against the University's non-ministerial employees" but the university required all employees (ministerial or not) to adhere to its religious beliefs about sexuality. Mot. to Dismiss at 17, *Seattle Pac. Univ. v. Ferguson*, No. 3:22-cv-05540 (W.D. Wash. Sept. 16, 2022); *see also* 3-ER-391–93 (noting similar statements made by the Attorney General's Office).

In moving to dismiss the case, the Attorney General also argued *Younger* abstention applied because the investigation constituted a "quasi-criminal" "ongoing civil enforcement action[ ]." Mot. to Dismiss at 15, *Seattle Pac. Univ.*, No. 3:22-cv-05540. Indeed, the Attorney General

admitted that "state enforcement action beg[an] with investigation into [SPU's] conduct." *Id.*

The district court dismissed SPU's case on redressability and *Younger* grounds from the bench. That case is pending before this Court. *Seattle Pac. Univ. v. Ferguson*, No. 22-35986 (Appeal docketed Nov. 25, 2022).

### D. The Mission faces ongoing and imminent harm for employing only coreligionists.

Following this enforcement action, the Mission grew increasingly concerned with its own coreligionist hiring and compliance (or lack thereof) with the WLAD. 3-ER-398–403. As explained, the Mission requires *all* employees to share and live out its religious beliefs, including beliefs that conflict with the WLAD's sexual orientation provision. And the Mission employs both ministerial and non-ministerial employees—an example of the latter being its IT technician and operations assistant, positions that are currently vacant. 3-ER-393–96; 3-ER-439–47 (job descriptions). After receiving an application that was antagonistic to its religious beliefs, the Mission removed its IT technician posting and did not list its operations assistant position because they would not fall under the ministerial exception, and thus would not be protected under the post-*Woods* WLAD. 3-ER-382, 400. These positions are still not posted as of the date of this filing and the

Mission continues to chill its religious exercise to avoid a WLAD violation and the severe penalties that follow.

The Mission also received significant public backlash because of its coreligionist hiring. After Defendant Ferguson began investigating SPU, *Newsweek* published an article on the Mission's religious hiring practices after an applicant posted the Mission's application questions about religious beliefs on *Reddit.com*. 3-ER-398–99, 273–336. That *Reddit* thread garnered over 1,600 comments, many of which showed pervasive and aggressive hostility to the Mission's beliefs and hiring practices. *Id.* Some commenters asked for the application link so they could apply and file discrimination complaints once turned down for not agreeing to abide by the Mission's religious beliefs. *Id.* The Mission was also threatened orally over the phone. 3-ER-399.

Lastly, the Mission adopted a Religious Hiring Policy that it intends to publish on its employment webpage:

> Yakima Union Gospel Mission (YUGM) is a Christian ministry that serves the community in accordance with Christian doctrine, spreads the Gospel of Jesus Christ, and helps fellow believers grow in their faith. Because Yakima Union Gospel Mission seeks to collectively share its religious ideals, it can only hire employees (who are its hands and feet and its messengers) who agree with, adhere to, and live out the Mission's religious beliefs and practices. This includes the Mission's religious beliefs on biblical marriage and sexuality, as set forth in its Statement of Faith.

3-ER-400–401. The Mission believes being more transparent about its hiring requirements would help to self-filter applicants, but it has currently refrained from posting the statement because it violates the WLAD's publication ban. *Id.*; *see* Wash. Rev. Code Ann. § 49.60.180(4).

Because the Mission was (and is) violating the WLAD as interpreted by the Washington Supreme Court and as enforced by the State, it has been forced to self-censor, modify its behavior, and chill its speech to avoid punishment. 3-ER-401–403. It also intends to continue its coreligionist hiring for all positions but faces the strong likelihood of third-party complaints and government prosecution for doing so. *Id.*

**E. Proceedings below.**

Because the Mission was (and still is) suffering actual irreparable harm, and faces imminent future injury for hiring coreligionists, it sued

the Attorney General and the Commission in federal district court to protect its constitutional rights. *See* 3-ER-364–416. The Mission moved for a preliminary injunction, 3-ER-227–54 and the State moved to dismiss the case on standing and ripeness grounds, 3-ER-337–63. The district court held a hearing on both motions on May 31, 2023. 2-ER-032–107. The district court granted the State's motion, finding that the Mission did not face a credible threat of future enforcement of the WLAD and the Mission's injury was not redressable because the requested relief was barred by the *Rooker-Feldman* doctrine. 1-ER-002–030. The district court did not address the Mission's ongoing, actual injury. *Id.*

To be sure, the district court was correct on a few things. First, applying the standing test set forth in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) ("*SBA List*"), the court correctly found that the Mission's "pleadings [we]re sufficient to establish that [the Mission] has an intention to engage in a course of conduct arguably affected with a constitutional interest—the right to free exercise." 1-ER-017. Next, the court explained that the Mission intends to fill its IT technician and operations assistant openings—non-ministerial positions—with "coreligionists" and that "would be proscribed by the Washington Supreme Court's statutory interpretation of the WLAD's religious exemption in *Woods*." *Id.*

But the district court erred on the third *SBA List* factor: whether there was a credible threat of enforcement. The court again correctly concluded that the Mission had "a concrete plan to violate" the WLAD and that the Attorney General made "affirmative statements" that his office would enforce the WLAD precisely how the Mission feared. 1-ER-019–021. Those statements, plus his office's "fail[ure] to disavow enforcement" supported the Mission's standing. 1-ER-021. The court, however, found that the Commission's lack of similar statements weighed against the Mission, despite the Commission's "fail[ure] to disavow enforcement of the *Woods* interpretation." *Id*.

Yet none of this, the court said, could overcome the lack of past enforcement—even though the court recognized this factor should carry "little weight" when the challenged law is "relatively new." 1-ER-024[4]. In the district court's view, the State's investigation of SPU was not "enforcement" of the WLAD, but rather a "single inquiry" constituting only "*potential* enforcement." 1-ER-022–024. (emphasis in original).

Lastly, the district court held the *Rooker-Feldman* doctrine defeated redressability. 1-ER-026–029. Incorrectly, the court stated the Mission sought a declaration that the *Woods* decision was unconstitutional, a ruling the court lacked authority to grant. *Id.*

The Mission timely appealed. 3-ER-450–54.

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[4] As noted, the WLAD's reinterpretation occurred in 2021.

## SUMMARY OF ARGUMENT

The district court erred by concluding the Mission did not meet the injury-in-fact or redressability prongs for standing, and by denying the Mission a preliminary injunction.

First, the Mission meets the injury-in-fact prong because it is suffering an actual injury: it cannot fill its IT technician or operations assistant positions or publish its Religious Hiring Policy. The district court failed to address this actual, ongoing injury despite the Mission explicitly raising the argument in its briefing. *See* 2-ER-213–15. The Mission also faces imminent injuries because it engages in constitutionally protected conduct by requiring its employees to share and live out its religious beliefs about marriage and sexuality, that conduct is arguably (and actually) proscribed by the WLAD, and there is a credible threat of enforcement.

That fear of prosecution is reasonable for myriad reasons. For one, the State *has* enforced WLAD against religious employers. Just last year, in what it has self-styled a "quasi-criminal civil enforcement action," the Attorney General investigated SPU for doing exactly what the Mission does. And there are at least two recent instances of the State enforcing the WLAD's public accommodation provisions against Christian businesses that sought to operate according to their beliefs. The WLAD also contains third-party enforcement mechanisms and complaints and lawsuits against Christian employers are not

uncommon. *See, e.g. McMahon v. World Vision, Inc.*, No. C21-0920JLR, 2023 WL 3972060, at *1–5 (W.D. Wash. June 12, 2023), *opinion vacated on reconsideration*, No. C21-0920JLR, 2023 WL 4704711 (W.D. Wash. July 24, 2023). Finally, despite repeated opportunities, the State refuses to disavow enforcement of the WLAD against the Mission and fellow religious employers. Instead, the Attorney General has promised to enforce the WLAD precisely in the way the Mission fears. That all establishes a credible threat. *See, e.g., 303 Creative LLC v. Elenis,* 600 U.S. 570, 583 (2023).

Second, the Mission's injuries are redressable. The district court erred by applying the *Rooker-Feldman* doctrine because the Mission was not a party in *Woods*, does not seek to void or set aside the *Woods* decision (which was a *state* constitutional decision), and only mounts an independent attack on the *federal* constitutionality of the WLAD as now construed by the State and applied to the Mission. Enjoining the State from enforcing the WLAD's prohibition on sexual orientation discrimination against the Mission would give the Mission real relief by allowing it to post its job vacancies and continue requiring all employees to abide by its religious beliefs without fear of punishment.

Third, the Mission is entitled to a preliminary injunction because its coreligionist hiring and related speech are constitutionally protected. The Mission is likely to succeed on the merits of its church autonomy, free exercise, expressive association, and free speech claims. Because

the Mission will continue to suffer irreparable harm absent injunctive relief, this Court should enter a preliminary injunction to protect the Mission.

## STANDARD OF REVIEW

A district court's dismissal for lack of standing is reviewed de novo. *Tingley v. Ferguson,* 47 F.4th 1055, 1066 (9th Cir. 2022). This bar is low here because "unique standing considerations in the First Amendment context tilt *dramatically* toward a finding of standing when a plaintiff brings a pre-enforcement challenge." *Id*. at 1066–67 (emphasis added and quotation marks and citation omitted). At the "motion to dismiss stage" the Mission satisfies its standing burden by making "general factual allegations of injury." *Id.* at 1066 (citation omitted).

The district court's denial of a motion for preliminary injunction is reviewed for abuse of discretion. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam). "The district court's conclusions of law are reviewed de novo and its findings of fact for clear error." *Id.* (citation omitted).

# ARGUMENT

## I. The Mission has standing because it is suffering an actual injury, faces imminent future harm, and there is a credible threat of enforcement.

To have standing, a plaintiff must establish injury, causation, and redressability. *SBA List,* 573 U.S. at 158. The district court erred in holding the Mission failed to establish an injury because it did not face a credible threat of enforcement. 1-ER-025. The Mission has standing because it is suffering an actual, ongoing injury. Moreover, the Mission faces imminent future harm and has alleged (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) that is arguably "proscribed by" the WLAD, and (3) "there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

### A. The Mission is suffering actual, ongoing harm because the WLAD chills its speech and conduct.

The Mission first has standing because the WLAD chills its religious speech and exercise. Such a chilling effect on the exercise of First Amendment rights "is, itself, a constitutionally sufficient injury." *Tingley*, 47 F.4th at 1067 (quotation marks and citation omitted). In these situations, the Supreme Court has "dispensed with rigid standing requirements." *Id.* (quotation marks and citation omitted). Rather than require organizations to "speak first and take their chances with the consequences" they can "hold [their] tongue and challenge now." *Italian*

*Colors Rest. v. Becerra,* 878 F.3d 1165, 1171 (9th Cir. 2018) (citation omitted). That's because "it is not necessary that [a] petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel*, 415 U.S. at 459.

That is precisely what the Mission has done here. Yet the district court completely failed to address the WLAD's chilling effect on the Mission's free speech and free exercise rights and the fact that the Mission is being harmed today.

The WLAD's chill is threefold. First, the Mission desires to *post* its open IT technician and operations assistant positions. Second, the Mission desires to *fill* those positions. Third, the Mission desires to *publish* its Religious Hiring Policy. But the Mission has refrained from doing all of this to avoid punishment and onerous investigations under the WLAD. 3-ER-400–401.

In considering a law's chilling effect, courts must decide whether the "circumstances suggest" that the plaintiff's fear is "reasonable." *Italian Colors,* 878 F.3d at 1173. Because "[s]uch fear exists if the intended speech arguably falls within the statute's reach," *Hum. Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1001 (9th Cir. 2010) (citation omitted), we start with "the scope of the statute." *Italian Colors,* 878 F.3d at 1172; *see also SBA List,* 573 U.S. at 162 (cleaned up) (asking whether conduct is "arguably proscribed by the [statute]"). Here, the

State admits the "WLAD's prohibition of employment discrimination on the basis of sexual orientation" applies to religious organizations' "non-ministerial employees." Mot. to Dismiss at 17, *Seattle Pac. Univ.*, No. 3:22-cv-05540. And the district court agreed that the WLAD proscribed the Mission from filling its non-ministerial IT technician and operations assistant positions with coreligionists. 1-ER-017.

This Court's decision in *Isaacson v. Mayes,* No. 23-15234, 2023 WL 7121091 (9th Cir. Oct. 30, 2023), is instructive. There abortion providers challenged an Arizona law that prohibited performing abortions because of genetic abnormalities. *Id.* at *2. The providers claimed an "actual" injury from having to "comply" with the law. *Id.* at *4–5. This Court held the providers had standing because their "business activities" were affected by the law, thereby resulting in an "actual injury." *Id.* Same thing here. The Mission's nonprofit "business activity"—hiring personnel consistent with its beliefs—is restricted by the WLAD, which has forced the Mission to freeze its hiring of two non-ministerial positions. If conduct that is not constitutionally protected (*Isaacson*) can create an "actual injury," certainly constitutionally protected conduct (here) can too. *See id.* at *4 ("We conclude that there is no reason to treat the business activity in this case ... differently."). Like the providers there, the Mission has suffered an actual injury stemming from the WLAD.

Moving from conduct to speech, the WLAD's publication ban prohibits the Mission from (1) "print[ing] or circulat[ing] … any statement, advertisement, or publication"; (2) "us[ing] any form of application for employment"; or (3) "mak[ing] any inquiry in connection with prospective employment" that expresses any limitation, specification, or discrimination as to … sexual orientation." Wash. Rev. Code Ann. § 49.60.180(4). The publication ban "sweeps broadly" and "covers," *SBA List*, 573 U.S. at 162, the Mission's Religious Hiring Policy, which specifies all Mission employees must agree with, adhere to, and live out the Mission's religious beliefs on biblical marriage and sexuality.

Because the Mission has been "forced to modify [its] speech and behavior to comply" with the WLAD, it is suffering an actual, ongoing injury sufficient for standing. *Italian Colors,* 878 F.3d at 1173.

### B. The Mission faces imminent harm because the WLAD prohibits its policy of hiring only coreligionists.

Together with the Mission's ongoing harm, it faces future injury in the form of Attorney General and Commission investigations and lawsuits and the arsenal of enforcement mechanisms available under them. To have standing, the Mission need only show a "substantial risk"—not a certainty—of WLAD enforcement. *SBA List*, 573 U.S. at 158. Simply put, the Mission need not sit and wait under the sword of Damocles before suing to protect its constitutional rights.

The Mission has pre-enforcement standing. No one disputes that its intended conduct—hiring coreligionists—is affected with its First Amendment rights. *See id.* at 161–62. And everyone agrees such conduct is "arguably proscribed" by the WLAD. *Id.* at 162. The Mission's requirement that all employees share and live out its religious beliefs runs headlong into the WLAD's sexual orientation provision.

Indeed, the Attorney General's Office has made repeated statements that the WLAD prohibits religious organizations from discriminating based on sexual orientation for non-ministerial positions. 3-ER-391–93. The Mission has conceded it employs non-ministers, and the district court found requiring these employees to be coreligionists "would be proscribed by the Washington Supreme Court's statutory interpretation of the WLAD's religious exemption." 1-ER-017.

Defendant Ferguson also vowed to enforce the WLAD against religious organizations, stating it was his "job" to "uphold Washington's law prohibiting discrimination, including on the basis of sexual orientation" and he encouraged Washingtonians to file complaints against SPU. *See* Press Release, Washington State Office of the Attorney General, Attorney General Ferguson Confirms Civil Rights Investigation of Seattle Pacific University (July 29, 2022), https://perma.cc/37NP-5Q72.

What's more, the State has confirmed to this Court that the WLAD applies to the Mission. In its answering brief in *Seattle Pacific*

*University v. Ferguson*, Case No. 22-35986, the State argued that SPU's religiously based hiring policy was "unlawful as applied to certain employees"—*i.e.*, non-ministers—and "[i]n the absence of any fact allegation by SPU of how it plans to refuse to hire, fire, or otherwise discriminate against non-ministerial employees because of their sexual orientation, SPU fails to show that it intends to act in a course of conduct proscribed by the WLAD." Appellee's Answering Br. at 25, *Seattle Pac. Univ. v. Ferguson*, No. 22-35986 (9th Cir. June 2, 2023) (emphasis deleted). Here, the Mission has alleged its non-ministerial employees must abide by its beliefs, and the State views this as sexual orientation discrimination.

In sum, the State has "notified the regulated community that it intends to enforce" the law in precisely the way the Mission fears and so it faces imminent future harm. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021).

### C. The Mission faces a credible threat of enforcement.

Both the Mission's ongoing and imminent future injuries satisfy the injury-in-fact requirement because the Mission faces a credible threat of WLAD enforcement. *SBA List*, 573 U.S. at 158; *Italian Colors,* 878 F.3d at 1171, 1173 (chilled First Amendment activity constitutes an injury-in-fact if a "fear of enforcement" is "reasonable").

In *SBA List*, the Supreme Court considered three factors to determine whether the threat of future enforcement was credible. *SBA*

*List*, 573 U.S. at 164–66. First, the Court looked to the "history of past enforcement." *Id.* at 164; *accord Tingley*, 47 F.4th at 1067 (same). Second, the Court considered whether only government officials could enforce the law or if "any person" could file complaints. *SBA List*, 573 U.S. at 164–65. Third, the Court asked whether government officials had "disavowed enforcement." *Id.* at 165. All three factors weigh in the Mission's favor and support a finding that the Mission's fear of enforcement is reasonable.

### 1. There is a history of enforcement.

Below, the district court held that there was no history of either the Attorney General or the Commission enforcing the WLAD, thus meaning there was no credible threat of future enforcement. 1-ER-022–25. That's error for three reasons.

#### a. Past enforcement against identical conduct.

*First*, there is "past enforcement against the same conduct" the Mission engages in, showing the "threat of enforcement is not chimerical." *SBA List*, 573 U.S. at 164 (cleaned up). Even "preliminary efforts" to enforce the WLAD in the way the Mission fears is "strong evidence ... that [the Mission] face[s] a credible threat of adverse state action." *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010). Just last year the Attorney General enforced the WLAD's sexual orientation provision against Seattle Pacific University for having a nearly identical employment policy as the Mission. The State indicated that SPU's

employment policies "permit or require discrimination on the basis of sexual orientation," and so it was "opening an inquiry to determine whether the University [wa]s meeting its obligations under [*Woods* and the WLAD]." 3-ER-434. The Attorney General's Office then requested broad categories of internal documents going back five years, and asked the university to sign a litigation hold under penalty of perjury, 3-ER-435—meaning the State saw "litigation [as] reasonably foreseeable," *Apex Abrasives, Inc. v. WGI Heavy Mins., Inc.*, 737 F. App'x 325, 327 (9th Cir. 2018).

Similarly, the Commission routinely uses its broad power to enforce the WLAD's sexual orientation provision, including by working alongside the Attorney General. 3-ER-386; *see Cases,* Washington State Office of the Attorney General, https://perma.cc/47T5-4SQT (listing multiple WLAD enforcement suits); *see also Wash. State Hum. Rts. Comm'n v. Agri-Pack, LLC,* WSHRC Case No. 11ESX-0050-11-2 (Wash. State Hum. Rts. Comm'n July 22, 2016) (administrative hearing resulting in settlement against employer for sexual orientation/gender identity discrimination); *Wash. State Hum. Rts. Comm'n v. Alaska Airlines, Inc.*, WSHRC Case No. 17EX-0549-20-1 (Wash. State Hum. Rts. Comm'n Dec. 12, 2022) (administrative hearing complaint alleging sexual orientation/gender identity discrimination under the WLAD).

Such burdensome investigations and administrative actions alone cause "harm sufficient to justify pre-enforcement review." *SBA List*, 573

U.S. at 165. This is especially so when investigating religious organizations because "[i]t is not only the conclusions" that "may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *N.L.R.B. v. Cath. Bishop of Chi.,* 440 U.S. 490, 502 (1979). Such investigations "force[ ]" the religious charities "to divert significant time and resources to hire legal counsel and respond to discovery requests" thereby hindering the overall operation and mission of those organizations. *SBA List*, 573 U.S. at 165.

To back all this up, the Attorney General's Office *itself* views the SPU investigation as "enforcement" of the WLAD. Throughout the SPU litigation, the Attorney General has argued that *Younger* abstention applies to its investigation of SPU. Mot. to Dismiss at 15, *Seattle Pac. Univ.*, No. 3:22-cv-05540 ("enforcement action beg[an] with investigation into [SPU's] conduct."). The State has admitted as much to this Court: "[t]he AGO's inquiry [into SPU] is an ongoing quasi-criminal *enforcement action*." Appellee's Answering Br. at 43, *Seattle Pac. Univ.*, No. 22-35986 (emphasis added). And the Attorney General continuously characterizes its inquiry into SPU as an "investigation"—one "brought on behalf of the state to vindicate state interests." *Id.* at 44.

The State cannot have it both ways. The SPU investigation cannot be an "enforcement action" there and a mere "inquiry" here. This Court

should reject such doublespeak and judicially estop the State from "taking inconsistent positions" and playing "fast and loose with th[is] [C]ourt[ ]" to gain an advantage. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (quotation marks and citation omitted).

At bottom, the Attorney General's investigation into SPU was enforcement of the WLAD. *See Lopez*, 630 F.3d at 786 ("threatened state action need not necessarily be a prosecution"). And investigations of similar religious organizations makes the Mission's "[f]ear of potential liability" especially reasonable because government investigators will likely "not understand its religious tenets and sense of mission," thereby "affect[ing] the way" the Mission "carrie[s] out what it underst[ands] to be its religious mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987). This history of enforcement against nearly identical conduct favors the Mission.

#### b. The State prosecutes Christian organizations.

*Second*, the State has enforced—and fiercely prosecuted—the WLAD's sexual orientation provisions against religious organizations that raised constitutional defenses.

Start with the Commission. Recently, the Commission enforced the WLAD's public accommodation provision against a Christian

business, forcing it to change its religiously based policies. *Olympus Spa v. Armstrong*, No. 22-CV-00340-BJR, 2023 WL 3818536 (W.D. Wash. June 5, 2023). *Olympus Spa* involved a traditional Korean spa that held a "female-only" policy because of its "theologically conservative Christian values." *Id.* at *3. A biological male identifying as a female sought services at the spa, was denied, and filed a discrimination complaint with the Commission. *Id.* at *4. The Commission then investigated the spa for a year, concluded the spa's female-only policy violated the WLAD, and threatened the spa to settle on pain of referring the case to "the Attorney General's Office for prosecution." *Id.* at *3–5. Ultimately, the spa settled and revoked its religiously based policy to avoid further prosecution. *Id.* After the spa filed a pre-enforcement suit against the Commission, the district court held the spa had standing, in part, because the Commission's prior investigation *was enforcement* of the WLAD. *Id.* at *9.

Next look at the Attorney General's Office. The Attorney General has prosecuted a Christian florist all the way to the Washington and United States Supreme Courts (twice) for sexual orientation discrimination under the WLAD. *See State v. Arlene's Flowers, Inc.,* 441 P.3d 1203, 1210 (Wash. 2019); *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). In *Arlene's Flowers*, Barronelle Stutzman declined to create floral arrangements for a same-sex wedding because of her Christian beliefs about marriage. 441 P.3d at 1211. As a result, Stutzman

received threats and disparaging messages (like the Mission here) eventually leading the Attorney General to send Stutzman a cease-and-desist letter. *Id.* at 1212. When she refused to sign, the Attorney General sued her for violating the WLAD, litigating that case for over eight years.

It makes no difference that *Olympus Spa* and *Arlene's Flowers* both involved enforcement of the WLAD's prohibition on discrimination by places of public accommodations. The ultimate issue is whether the Mission "reasonably fear[s] prosecution." *Isaacson*, 2023 WL 7121091, at *7. Given this enforcement history, it would be *un*reasonable to think the Commission and Attorney General will not enforce the WLAD's employment provisions "as [they] enforce[ ] other restrictions" under the WLAD. *Tingley*, 47 F.4th at 1068.

#### c. Enforcement history alone is not dispositive.

*Third*, the history of enforcement "carries little weight when the challenged law is relatively new and the record contains little information as to enforcement." *Id.* at 1069 (internal quotation marks and citation omitted). Indeed, "enforcement history alone is not dispositive" and "[c]ourts have found standing where no one had ever been prosecuted under the challenged provision." *LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1155 (9th Cir. 2000). But here the district court *solely* relied on this factor to dismiss the case against the Attorney General. And

although the WLAD was enacted in 1949, "the Washington Supreme Court's interpretation of the religious exemption was rendered in 2021." 1-ER-022. So before 2021 the State could not have enforced the WLAD against religious organizations; they were exempt. Because the district court gave this factor dispositive—instead of minimal—weight, it erred.

#### 2. Third parties can, and often do, enforce the WLAD.

Next the Supreme Court considered whether enforcement authority was "limited to a prosecutor or an agency" because the possibility of third-party complaints independently "bolster[s]" the threat of enforcement. *SBA List*, 573 U.S. at 164; *accord Italian Colors,* 878 F.3d at 1173 (law that gave "private citizens a right of action to sue for damages" supported threat of enforcement).

Here, third parties can (and do) enforce the WLAD both by filing discrimination complaints with the Commission and the Attorney General's Office, and by directly suing employers. Wash. Rev. Code Ann. §§ 49.060.230, 49.060.030(2); *see also* 3-ER-391 (Attorney General accepts civil rights complaints). Just like in *SBA List*, "any person claiming to be aggrieved" may file a complaint. Wash. Rev. Code Ann. § 49.060.230.

While the mere existence of a third-party enforcement mechanism alone bolsters standing, *SBA List*, 573 U.S. at 164, third-party enforcement is common here. Most obviously, *Woods* involved private

enforcement of the WLAD's prohibition on sexual orientation discrimination against a religious employer. There, the plaintiff specifically applied for a position to "change" Seattle Union Gospel Mission's beliefs about marriage and sexuality. *Seattle's Union Gospel Mission*, 142 S. Ct. at 1095 (Alito, J., statement respecting the denial of certiorari).

More recently, World Vision—a Christian humanitarian outreach ministry—was sued for sexual orientation discrimination under the WLAD for declining to hire a woman who was in a same-sex marriage. *McMahon*, 2023 WL 3972060, at *1–5. World Vision did not hire the woman because—just like the Mission—it requires all employees to abide by the ministry's Christian beliefs about marriage and sexuality. *Id.* Had that case been filed before *Woods*, World Vision could have asserted the WLAD's religious employer exemption, but now, it is left only with constitutional defenses—the exact situation the Mission faces.

The SPU investigation was also triggered by third parties. There, "numerous complaints" were filed against the university for retaining its policy that requires all staff to adhere to its beliefs on marriage and sexuality. Press Release, Washington State Office of the Attorney General, Attorney General Ferguson Confirms Civil Rights Investigation of Seattle Pacific University (July 29, 2022), https://perma.cc/37NP-5Q72.

Seattle's Union Gospel Mission, World Vision, SPU, and the Mission all have at least two things in common: (1) they are Christian ministries who believe sexual conduct and relationships are only proper within the context of biblical marriage between one biological man and one biological woman, and (2) they require all employees to share and live out that belief. *See Woods*, 481 P.3d at 1063; *McMahon*, 2023 WL 3972060, at *2. Because those ministries have faced third-party complaints or lawsuits targeting this practice, there is a credible threat the Mission could be next.

This is particularly so considering (1) the Mission has received hostile applications, *see* 3-ER-381–82, and (2) discrimination complaints have been filed against it with the Commission and the Attorney General's Office, 2-ER-169–92 (four discrimination complaints filed with the Commission since 2014) and 2-ER-193–98 (email to Attorney General's Office alleging prior employee was fired for violating sexual morality standards of conduct).[5] In short, "[a] history of past enforcement against parties similarly situated to [the Mission] cuts in

[5] Although these complaints did not specifically allege *sexual orientation* discrimination, they show that discrimination complaints against the Mission "are not a rare occurrence." *SBA List,* 573 U.S. at 164. And two of these complaints were submitted after this lawsuit became public, further proving there is "a real risk" of complaints from those who disagree with the Mission's religious beliefs. *Id.*

favor of a conclusion that a threat is specific and credible." *Lopez*, 630 F.3d at 786–87.

#### 3. The State continues to refuse to disavow enforcement.

The Mission's fear of future enforcement is all the more reasonable because the State refuses to disavow enforcement of the WLAD against the Mission. *SBA List,* 573 U.S. at 164; *accord Tingley*, 47 F.4th at 1068 (failure to disavow "weigh[s] in favor of standing"); *accord LSO, Ltd.*, 205 F.3d at 1155 (same); *Italian Colors*, 878 F.3d at 1173 (same).

In fact, the Attorney General has "communicated a specific warning" that it will enforce the WLAD. *Thomas v. Anchorage Equal Rts. Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000). As explained above, the Attorney General has repeatedly vowed to enforce the WLAD's prohibition on sexual orientation discrimination against religious charities as to non-ministerial employees. "These affirmative statements, combined with his failure to disavow, is sufficient to demonstrate" a credible threat. 1-ER-021.

The district court erred by holding otherwise. 1-ER-021. In so doing, the court pointed to *Tingley*, 47 F.4th 1055, *Cal. Trucking*, 996 F.3d 644, and *Arizona v. Yellen*, 34 F.4th 841 (9th Cir. 2022), for the proposition that a failure to disavow only supports standing *if combined* with affirmative statements to enforce. 1-ER-021. But that's wrong under this Court's precedents. In *Tingley*, the State did not "issue[ ] a

warning or threat of enforcement" but its "failure to *disavow* enforcement of the law ... weigh[ed] in favor of standing." 47 F.4th at 1068 (emphasis in original). *California Trucking* explained "the state's refusal to disavow enforcement of [the law] against motor carriers during this litigation is strong evidence that the state intends to enforce the law and that [plaintiffs] face a credible threat." 996 F.3d at 653. And *Arizona v. Yellen* posited that the government's failure to disavow enforcement of the challenged law "is evidence of an intent to enforce it." 34 F.4th at 850.

In sum, failure to disavow enforcement is important regardless of any affirmative government statement that enforcement is imminent. The generalized statement in *Tingley* and letters in *California Trucking* and *Yellen* added to the credibility of a threat of enforcement, but they were not needed to show those plaintiffs faced a credible threat. "Although a specific threat or warning of prosecution is relevant," this Court has never "'held that a specific threat is *necessary* to demonstrate standing.'" *Isaacson*, 2023 WL 7121091, at *7 (emphasis added) (quoting *Valle del Sol v. Whiting*, 732 F.3d 1006, 1015 n.5 (9th Cir. 2013)). That's because "a plaintiff may reasonably fear prosecution even if enforcement authorities have not communicated an explicit warning to the plaintiff." *Id.* The State has had every opportunity to disavow enforcing the WLAD's sexual orientation provision against the Mission, including at the hearing before the district court. See 2-ER-075

(Mission's counsel explaining the State's counsel had the opportunity to disavow enforcement, but did not). It has continually refused.

All of these circumstances—(1) the State's enforcement against identical conduct in the SPU matter; (2) the State's prosecution of Olympus Spa and Arlene's Flowers for violating the WLAD despite religious objections; (3) the fact that the WLAD's religious exemption was only recently narrowed; (4) the availability and use of third-party enforcement; and (5) the State's continued refusal to disavow enforcement—all show that the Mission's fear of enforcement is reasonable, legitimate, well-founded, and credible. *See Isaacson*, 2023 WL 7121091, at *8 (a "combination" of "potential threats ... is sufficient to allege an imminent future injury"); *303 Creative*, 600 U.S. at 583 (history of enforcement, third-party enforcement, and failure to disavow supported credible threat). The Mission has sufficiently alleged an injury-in-fact and has standing.

## II. The Mission's injury is redressable by a favorable court decision and the *Rooker-Feldman* doctrine does not apply.

The district court also erred by applying the *Rooker-Feldman* doctrine and holding that the Mission's requested relief was an "attempt to seek appellate review from *Woods*" and thus outside the court's "authority." 1-ER-027; *see Rooker v. Fid. Tr. Co.,* 263 U.S. 413, 416 (1923)*; D.C. Ct. of Appeals v. Feldman,* 460 U.S. 462, 482 (1983). But the *Rooker-Feldman* doctrine simply does not apply. And the

district court can remedy the Mission's injuries through declaratory and injunctive relief.

### A. *Rooker-Feldman* does not apply because the Mission was not a party to—and does not seek to void—*Woods*.

To start, *Rooker-Feldman* is inapplicable because the Mission was not a party in *Woods*. The *Rooker-Feldman* doctrine "has no application to a federal suit brought by a nonparty to the state suit." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 287 (2005) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994); *accord Noel v. Hall*, 341 F.3d 1148, 1159 (9th Cir. 2003) (same). The doctrine is "confined to ... cases brought by *state-court losers* complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil*, 544 U.S. at 284 (emphasis added); *Skinner v. Switzer,* 562 U.S. 521, 531 (2011) (same). The Mission did not lose in state court and that alone is cause for reversal.

Additionally, this case falls well outside "the narrow ground occupied by *Rooker-Feldman*." *Exxon Mobil*, 544 U.S. at 284. The Mission does not seek *review* of the Washington Supreme Court's decision in *Woods*, nor does it seek relief from that judgment. *See Cooper v. Ramos,* 704 F.3d 772, 778 (9th Cir. 2012) (doctrine prohibits "de facto" appeals). *Woods* dealt purely with state law issues: whether the WLAD's religious employer exemption violated the Washington

constitution's privileges or immunities clause when applied to claims of sexual orientation discrimination. 481 P.3d at 1063–64. The court did not rule on any federal law issues, and only addressed the ministerial exception to draw what it saw as the "appropriate parameters" of the WLAD's religious employer exemption. *Id.* at 1067. Below, the Mission did not ask the district court to review the state court's state constitutional analysis, nor did it seek to declare that result "null and void." *Rooker*, 263 U.S. at 414.

Perhaps the Washington Supreme Court's decision was correct as a matter of state law. But analysis of state law isn't the issue here. The issue is whether the State's enforcement of the WLAD, as it stands today, against the Mission violates its *federal* constitutional rights. *See Seattle's Union Gospel Mission*, 142 S. Ct. at 1096–97 ("Washington Supreme Court's decision to narrowly construe [Washington's] religious exemption" may "have created a conflict with the Federal Constitution.") (Alito, J., statement respecting the denial of certiorari).

After *Woods*, the State could have determined that applying the WLAD against religious nonprofits violated the First Amendment and declined to enforce the law as such. It didn't. Instead, within months of the Supreme Court denying certiorari in *Woods*, the Attorney General's Office launched an investigation against a religious school. Because the Mission does not "complain of a legal injury caused by [the *Woods*] judgment, but rather of a legal injury caused by an adverse party"—*i.e.*,

enforcement of the law by the State—"*Rooker-Feldman* does not bar jurisdiction." *Noel*, 341 F.3d at 1163; *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 644 n.3 (2002) (*Rooker-Feldman* does not apply to "judicial review of executive action").

This tracks the Supreme Court's and this Circuit's *Rooker-Feldman* precedents. Both hold that the doctrine is inapplicable to "independent claim[s]" that do not "challenge the [state court] decisions themselves." *Skinner,* 562 U.S. at 532; *Cooper,* 704 F.3d at 778 ("The doctrine does not preclude a plaintiff from bringing an 'independent claim' that, though similar or even identical to issues aired in state court, was not the subject of a previous judgment by the state court."). Nothing prohibits the Mission from "target[ing] as unconstitutional" the WLAD's application just because that law's scope "govern[ed] the decision" in *Woods*. *Skinner,* 562 U.S. at 532; *see also id.* at 530 (*Rooker-Feldman* did not bar constitutional attack to postconviction DNA statute "as construed" by the Texas courts). This "general attack on the constitutionality" of an underlying law "do[es] not require review of a judicial decision in a particular case." *Feldman*, 460 U.S. at 487.

One last point on this front. The district court held that *Rooker-Feldman* applied because the Mission's claims were "'inextricably intertwined with the state court's' holding." 1-ER-028 (quoting *Feldman*, 460 U.S. at 482 n.16). This put the cart before the horse. "The premise for the operation of the 'inextricably intertwined' test in

*Feldman* is that the federal plaintiff is seeking to bring a forbidden de facto appeal. The federal suit *is not a forbidden de facto appeal because it is 'inextricably intertwined' with something*." *Noel*, 341 F.3d at 1158 (emphasis added). Intertwinement only "come[s] into play" if the court determines first that the federal plaintiff seeks review and reversal of the state court judgment. *Id.* Because the Mission's suit is not a de facto appeal, the "inextricably intertwined" test does not apply at all. And in addition to it not applying, the Mission's claims are not intertwined with the *Woods* holding because the Mission's requested relief—enjoining enforcement of the WLAD—would not "effectively reverse the state court decision or void its ruling"—which was purely on state constitutional grounds. *Cooper*, 704 F.3d at 779 (quotation marks and citation omitted). The Mission can succeed on its federal claims without disturbing the *Woods* holding. *Cf. Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 25 (1987) (Marshall, J., concurring) ("the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it").

But again, the Court need not reach any of this: *Rooker-Feldman* "has no application to a federal suit brought by a nonparty to the state suit." *Exxon Mobil,* 544 U.S. at 284 (citation omitted).

### B. The Mission's injuries are redressable by enjoining the State from using the WLAD to interfere with the Mission's hiring.

With *Rooker-Feldman* out of the way, the Mission's injuries are redressable. To establish redressability, the Mission must only show that "it is likely," not "guarantee[d]," that its "injury will be redressed by a favorable decision." *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care,* 968 F.3d 738, 749 (9th Cir. 2020) (quotation marks and citation omitted). And the Mission "satisfies the redressability requirement" by showing "that a favorable decision will relieve a discrete injury to himself. [It] need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente,* 456 U.S. 228, 243 n.15 (1982).

At bottom, the Mission asked the district court to hold that federal law trumps state law. That is unremarkable. No state anti-discrimination law "is immune from the demands of the Constitution." *303 Creative*, 600 U.S. at 592. The Mission's remedy could look like this:

> The Court DECLARES that the State's enforcement of the WLAD's prohibition on sexual orientation discrimination as applied to the Mission's employment criteria violates the Mission's First Amendment rights to religious autonomy, free exercise of religion, expressive association, free speech, and to be free from excessive government entanglement; and
>
> The Court ENJOINS the State from enforcing the WLAD's prohibition on sexual orientation discrimination in employment against the Mission.

*See also* 3-ER-413–14 ("Prayer for Relief"). That relief would give the Mission the "freedom to engage in certain activities"—its employing of only coreligionists—"without fear of punishment." *Wolfson v. Brammer,* 616 F.3d 1045, 1056 (9th Cir. 2010). The Mission "need not obtain a [WLAD] revision" to "obtain a measure of relief." *Id.*; *see also Skyline,* 968 F.3d at 749–51 (enjoining the enforcement of California's abortion coverage requirement, regardless of its "source in state law," would redress a church's constitutional injury). So the Mission's requested relief provides real relief from a discrete injury traceable to the State.

## III. The Mission is entitled to a preliminary injunction and this Court should order one without delay.

On the merits, the Mission is entitled to a preliminary injunction. 1-ER-030 (denying motion for preliminary injunction "as moot"). This Court can—and should—grant one because "injustice [will] otherwise result." *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 946 F.3d 1100, 1110 (9th Cir. 2020) (quotation marks and citation omitted). In considering the risk that injustice might result, this Court "must be more concerned about the possible unjust deprivation of [the Mission's] liberty than about any other source of injustice." *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986); *see id.* (considering "[t]he delay that could result from a remand"). That standard is met here where the Mission has open positions it is needing to fill and has been forced to chill

speech and religious conduct to avoid prosecution—irreparable harm that has already lasted over eight months.

The Court should grant the Mission's request for a preliminary injunction because: (1) it is likely to succeed on the merits of its claims; (2) it is suffering and will suffer irreparable harm; (3) the balance of equities tip in its favor; and (4) an injunction is in the public interest. *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 754 (9th Cir. 2019). This Court "evaluate[s] these factors on a sliding scale, such that a stronger showing of one element may offset a weaker showing of another." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 684 (9th Cir. 2023) (en banc) (internal quotation marks and citation omitted) ("*FCA*").

### A. The Mission is likely to succeed on the merits of its claims.

#### 1. The WLAD infringes the Mission's autonomy to hire coreligionists.

The First Amendment's Religion Clauses protect the autonomy of religious organizations (sometimes called "church autonomy"). This includes the right to form "voluntary religious associations to assist in the expression and dissemination of any religious doctrine" and to adopt rules requiring "conformity of the members ... to the standard of morals required of them." *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 728–29, 733 (1871). And it includes the "independence" to decide "free from state

interference, matters of [internal] government." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

The ministerial exception is a "component" of church autonomy. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). But the protection does not end there. *E.g.*, *Seattle's Union Gospel Mission*, 142 S. Ct. at 1096 (Alito, J. statement respecting denial of certiorari) ("our precedents suggest that the guarantee of church autonomy is not so narrowly confined"). The ministerial exception bars any interference with, or liability for, a ministry's decision to hire or fire one of its "ministers," whatever the reason. *See generally Our Lady,* 140 S. Ct. at 2060; *Hosanna-Tabor*, 565 U.S. 171. The coreligionist exemption, on the other hand, protects ministries' freedom to make employment decisions rooted in religious practice, observance, adherence, and belief—for *all* positions. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002); *Butler v. St. Stanislaus Kostka Cath. Acad.*, 609 F. Supp. 3d 184, 198 (E.D.N.Y. 2022).

The coreligionist exemption is well recognized by most states and the federal government. In fact, nearly every state exempts religious organizations from state employment nondiscrimination laws. *See, e.g.*, Alaska Stat. § 18.80.300(5); Cal. Gov't Code § 12926(d). And Title VII permits religious organizations to employ "individuals of a particular

religion." 42 U.S.C. § 2000e-1(a); *see also* 42 U.S.C. § 2000e(j) (defining "religion" as including "all aspects of religious observance and practice, as well as belief").

In upholding Title VII's religious employer exemption, the Supreme Court at least implicitly recognized the coreligionist exemption. *Amos*, 483 U.S. at 334–39. There the Court explained how—absent an exemption for religious organizations—Title VII would force religious groups to alter the way they "carry out their religious missions" to avoid "potential liability," *id.* at 335–36, thereby "burden[ing] the exercise of religion," *id.* at 338; *see also Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) (noting Title VII's religious employer exemption is a "legislative application[ ] of the church-autonomy doctrine").

Likewise acknowledging Title VII's constitutional infirmities as applied to religious organizations, "the courts of appeals have generally protected the autonomy of religious organizations to hire personnel who share their beliefs." *Seattle's Union Gospel Mission*, 142 S. Ct. at 1094 (Alito, J., statement respecting the denial of certiorari); *see, e.g. Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) (religious groups have a "constitutionally-protected interest . . . in making religiously motivated employment decisions"); *Little v. Wuerl,* 929 F.2d 944, 947, 951 (3d Cir. 1991) (penalizing a Catholic school for deciding to "employ only persons whose beliefs and conduct are

consistent with [its] religious precepts" "would arguably violate both [Religion Clauses]"); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (Title VII's religious exemption avoids "conflicts [with] the religion clauses"); *Killinger v. Samford Univ.*, 113 F.3d 196, 201 (11th Cir. 1997) (same).

That includes this Court. In discussing the scope of Title VII's religious employer exemption, the Court in *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 n.13 (9th Cir. 1988), explained that "even without [the religious employer exemption], the First Amendment would limit Title VII's ability to regulate the employment relationships within churches and similar organizations."

And in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam), Judge O'Scannlain concluded that a "cramped reading" of Title VII's religious exemption "raises serious questions under both the Free Exercise Clause and the Establishment Clause." *Id.* at 729 (O'Scannlain, J., concurring). So he refused to wade into "the constitutional briar patch of distinguishing between the sacred and the secular" when a religious nonprofit's "humanitarian relief efforts" were concerned. *Id.* at 731–732. Concurring, Judge Kleinfeld succinctly framed the exact issue the Mission faces today: "If the government coerced staffing of religious institutions by persons who rejected or even were hostile to the religions the institutions were intended to advance, then the shield against discrimination would destroy the freedom of

Americans to practice their religions." *Id.* at 742 (Kleinfeld, J., concurring); *accord Seattle's Union Gospel Mission*, 142 S. Ct. at 1096 (Alito, J., statement respecting the denial of certiorari).

Here, everyone agrees the Mission is protected for decisions made about its ministerial employees. The problem is the WLAD's sexual orientation provision restricts the Mission's freedom to require non-ministerial employees to adhere to its beliefs on marriage and sexuality. The Mission's purpose is to "spread the Gospel of the Lord Jesus Christ" to every single person it encounters, *see* 3-ER-370, and every single employee is essential to this mission. After all, the Mission is an organization made up of individuals who the Mission depends on to live out the faith, put belief into action, and to aid one another in their spiritual growth. Employees who reject, disagree, or live a life contrary to that faith cannot credibly demonstrate it to others. Instead, they would actively undermine it.

Yet the WLAD forces the Mission "to hire messengers and other personnel who do not share [its] religious views," threatening its "autonomy" and "continued viability." *Seattle's Union Gospel Mission*, 142 S. Ct. at 1096 (Alito, J., statement respecting the denial of certiorari). The State's commandeering of the Mission's employment decisions leads to the forced inclusion of employees "who fundamentally disagree" with the Mission, "infring[ing] [its] right[ ] to freely exercise religion." *Id.* Because the WLAD no longer protects the Mission's right

to hire coreligionists for non-ministerial positions, the First Amendment must step in.

#### 2. The WLAD is not neutral or generally applicable and fails strict scrutiny.

The Mission is also likely to succeed on the merits of its stand-alone free exercise claim because the WLAD is not neutral or generally applicable and cannot satisfy strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). Laws typically fail the general applicability requirement in one of two ways. First, if the law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877. Second, if the law "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (cleaned up). The WLAD—and the State's application of the WLAD—does both.

The WLAD contains categorical exemptions that treat comparable employers better than the Mission. In *Tandon v. Newsom*, the Supreme Court held that laws "are not neutral and generally applicable ... whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021) (per curiam). And conduct is "comparable" by "judg[ing] [it] against the asserted government interest that justifies the regulation at issue." *Id.* So the Court should first view the State's "asserted interest" to determine

whether the Mission's conduct is comparable to the favored, exempted conduct. *FCA*, 82 F.4th at 689.

It is. The "purpose" of the WLAD is to "eliminat[e] and prevent[ ] discrimination." Wash. Rev. Code Ann. § 49.60.010. But small—even for-profit—employers with fewer than eight employees remain totally exempt from the WLAD, *id.* § 49.60.040(11), and can "discriminate expressly—even on otherwise protected grounds," *FCA*, 82 F.4th at 689. Whereas the Mission is now subject to the WLAD for non-ministerial employees and is thus treated worse than at least some non-religious employers. *See Tandon*, 141 S. Ct. at 1296 ("It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.").

The WLAD also exempts "distinctly private" organizations from the WLAD's public accommodation provision, Wash. Rev. Code Ann. § 49.60.040(2), and permits public or private educational institutions to separate and give preferential treatment based on sex, *id.* § 49.60.222(3). As a result, the WLAD is woefully underinclusive to achieving its goal of eliminating and preventing discrimination. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 543 (1993).

And the State's enforcement of the WLAD uses a "mechanism for individualized exemptions" in two ways. *Fulton*, 141 S. Ct. at 1877 (cleaned up). First, the WLAD's employment provision authorizes the

Commission to permit differential employment conditions "by regulation or ruling in a particular instance" if the Commission finds the practice "to be appropriate for the practical realization of equality of opportunity between the sexes." Wash. Rev. Code Ann. § 49.60.180(3). "[T]he mere existence" of a "discretionary mechanism" like this renders the WLAD not generally applicable. *FCA*, 82 F.4th at 687–88.

Second, the Attorney General makes individualized assessments by parsing employees position-by-position to determine whether they are ministerial and thereby exempt from WLAD applicability. The Attorney General admitted the purpose of the SPU investigation was to "sort[ ] out" and "categor[ize]" Seattle Pacific's employees to "determine which positions are ministerial and which are not." Reply in Supp. of Mot. to Dismiss at 6, *Seattle Pac. Univ.*, No. 3:22-cv-05540; Appellee's Answering Br. at 1, *Seattle Pac. Univ.*, No. 22-35986 (investigation sought "to determine whether SPU was ... otherwise qualified for a ministerial exception to the law"). This mechanism allows the Attorney General—as the sole arbiter—to "'decide which reasons for not complying with the [WLAD] are worthy of solicitude[,]'" which "renders the policy not 'generally applicable.'" *FCA*, 82 F.4th at 687 (quoting *Fulton,* 141 S. Ct. at 1879).

So strict scrutiny applies to the WLAD. *Id*. The State must prove enforcement of the WLAD specifically against the Mission serves a

compelling interest and is narrowly tailored to achieve that interest. *Fulton*, 141 S. Ct. at 1881. It cannot.

"Rather than rely on broadly formulated interests, courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 141 S. Ct. at 1881–82 (cleaned up and citation omitted). The State cannot offer a compelling reason to deny the Mission an exemption because the WLAD's other exemptions undermine any contention that its "non-discrimination policies can brook no departures." *Id*. at 1882. The WLAD "cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to [its] supposedly vital interest[s]" in nondiscrimination "unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up).

Nor is the WLAD narrowly tailored to achieve any interest in nondiscrimination or otherwise. If the government "can achieve its interests in a manner that does not burden religion, it must do so." *Fulton,* 141 S. Ct. at 1881. The Washington Legislature did by exempting religious employers from the WLAD. But *Woods* gutted that exemption. The existence of both individualized and categorical exemptions in the WLAD shows that there are less restrictive alternatives that still accomplish the State's asserted interests.

#### 3. The WLAD violates the Mission's right to expressive association.

By prohibiting the Mission from hiring only coreligionists, the WLAD also violates the Mission's First Amendment right "to associate with others in pursuit of . . . religious ... ends," including its "freedom not to associate" with people who "may impair [its] ability" to express its views. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000). The right applies because (1) the Mission "engages in 'expressive association,'" and (2) "[t]he forced inclusion" of a nonbeliever "affects in a significant way [the Mission's] ability to advocate public or private viewpoints." *Id.*

The Mission is an expressive association. "Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith." *Hosanna-Tabor*, 565 U.S. at 200–201 (Alito, J., concurring). The Mission's central purpose is to *share* the Gospel with the rest of the world, including with shelter guests, recovery program participants, thrift store shoppers, and the homeless on the streets.

Of course, "there can be no doubt that the messenger matters" in the Mission's religious expression. *Hosanna-Tabor*, 565 U.S. at 200–201 (Alito, J., concurring). The Court must "give deference to an association's view of what would impair its expression," *Dale*, 530 U.S.

at 653, and the Mission believes that employing those who hold and display differing views on marriage and sexuality would diminish the effectiveness of spreading its religious beliefs and views with others, 3-ER-379–81. But the State threatens the Mission with myriad penalties under the WLAD for rejecting an applicant who disagrees with—or acts contrary to—the Mission's beliefs about marriage and sexuality. That forces the Mission to hire people who "would significantly affect" its ability to convey its religious message, and so violates the Mission's right to expressive association. *Dale,* 530 U.S. at 650.

The Second Circuit's recent decision in *Slattery v. Hochul*, 61 F.4th 278 (2d Cir. 2023), is on point. There, a New York state law prohibited employment discrimination based on a person's "reproductive health decision making." *Id.* at 283 (quoting N.Y. Lab. L. § 203-e(2)(a)). A pro-life pregnancy center filed a pre-enforcement suit arguing the law violated its freedom of expressive association "by preventing it from disassociating itself from employees who, among other things, seek abortions," which would "undermine[ ] its anti-abortion message." *Id.*

The Second Circuit agreed, holding the center's "right to expressive association allows [it] to determine that its message will be effectively conveyed only by employees who sincerely share its views." *Id.* at 288. In deciding whether someone "holds certain views," the pregnancy center asked "whether that person has engaged or will

engage in conduct antithetical to those views." *Id.* If the applicant's answer was "yes," the center would not hire that person. Yet because the law "force[d]" the center to employ such "individuals who act or have acted against the very mission of its organization," it infringed the center's rights. *Id.* Nor did it matter that the law forced association in *employment*: "compelled hiring, like compelled membership, may be a way in which a government mandate can affect in a significant way a group's ability to advocate public or private viewpoints." *Id.* (cleaned up) (quoting *New Hope Family Servs. v. Poole*, 966 F.3d 145, 179 (2d Cir. 2020)).

Same here. The WLAD "foreclos[es] [the Mission's] ability to reject employees whose actions suggest that it believes the opposite of the message it is trying to convey." *Slattery*, 61 F.4th at 288; *see also Green v. Miss United States of Am.*, LLC, 52 F.4th 773, 804–05 (9th Cir. 2022) (Vandyke, J., concurring) (explaining that expressive association protects a female beauty pageant's freedom to reject male participants).

#### 4. The WLAD regulates the Mission's speech based on content and viewpoint.

The WLAD's publication ban, Wash. Rev. Code Ann. § 49.60.180, and disclosure provision, *id.* § 49.60.208(1), prohibit the Mission's speech based on its content and viewpoint and are presumptively unconstitutional. *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015).

Start with the publication ban. That provision makes it unlawful to "*express*[ ] any limitation, specification, or discrimination as to ... sexual orientation" through (1) "any statement, advertisement, or publication," (2) "any form of application for employment," or (3) "any inquiry in connection with prospective employment." Wash. Rev. Code Ann. § 49.60.180(4) (emphasis added). It explicitly regulates *speech* by limiting "express[ion]." And it does so by viewpoint: employers can publish ads, statements, application forms, and other speech encouraging people of all sexual orientations to apply; they cannot publish statements like the Mission's Religious Hiring Policy that tells applicants they must live out the belief that "God commanded human sexual expression to be completely contained within the marriage of one man to one woman." 3-ER-449, 424. Such statements "express a[ ] limitation" based on sexual orientation and are barred by the WLAD. Wash. Rev. Code Ann. § 49.60.180(4).

Next consider the disclosure provision, which forbids the Mission from "[r]equiring an employee to disclose his or her sincerely held religious affiliation or beliefs" unless the disclosure is to accommodate the employee. Wash. Rev. Code Ann. § 49.60.208(1). This provision necessarily regulates speech: how else would an employer "require" a "disclosure" without *asking* the employee? *See Yim v. City of Seattle,* 63 F.4th 783, 789 (9th Cir. 2023) (city ordinance that prohibited landlords from "requiring disclosure or inquiring about" criminal history of

prospective tenants regulated protected speech). And so this prevents the Mission—a *religious* charity—from asking non-ministerial employees about *religion*. That unconstitutionally shuts off an entire category of speech. *Reed*, 576 U.S. at 169.

Because the provisions ban the Mission's speech based on its viewpoint (biblical views on marriage and sexuality) and content (asking about non-ministerial employees' religious beliefs), they trigger—and fail strict scrutiny. *Reed,* 576 U.S. at 171; *see supra* pp. 53–54.

**B. The Mission satisfies the other preliminary injunction factors.**

The other preliminary injunction factors also warrant an injunction. "It is axiomatic that [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *FCA*, 82 F.4th at 694 (internal quotation marks and citation omitted). Indeed, the Mission "need only demonstrate the existence of a colorable First Amendment claim," and has done more here. *Id.* at 694–95 (citation omitted). Absent an injunction, the Mission will continue to suffer actual harm by being unable to fill its IT technician and operations assistant positions or publish its Religious Hiring Policy.

The public interest and balance of equities factors "merge" when the State opposes an injunction. *Id.* at 695. The balance of hardships

"tip[ ] sharply" in the Mission's favor because it has "raised serious First Amendment questions," and likewise, a preliminary injunction benefits the public for "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (citations omitted). A preliminary injunction would simply permit the Mission to continue its longstanding religious hiring practices without the sword of Damocles hanging over its head. Meanwhile, the State could continue to enforce the WLAD against most secular employers, precisely as it did from 1949 until *Woods* was decided in 2021.

## CONCLUSION

The Mission simply aspires to continue the work it believes God has ordained it to do. If it cannot hire employees of the same mind to do that work, it will be reduced to a secular social welfare organization. But the Gospel is what makes the Mission different. The Mission need not sit and wait in fear for the government to come knocking before safeguarding its religious calling.

The Court should reverse the district court's order granting the State's Motion to Dismiss and enter a preliminary injunction enjoining the State from applying the WLAD to bar the Mission from employing only coreligionists.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

*Seattle Pacific University v. Ferguson*, Case No. 22-35986, is pending before this Court. That case involves closely related issues pertaining to the Washington Law Against Discrimination as applied to religious organizations. But the underlying facts differ in that case.

## CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2023, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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November 8, 2023

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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