NO. 21-144

IN THE

Supreme Court of the United States

SEATTLE'S UNION GOSPEL MISSION,
Petitioner,

v.

MATTHEW S. WOODS,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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INTRODUCTION

The petition is timely, and its three questions presented are all preserved. The Court should grant the petition because Woods does not meaningfully contest that (1) the constitution protects the hiring of co-religionists, (2) the judicially rewritten WLAD treats religious organizations less well than some secular counterparts, and (3) the Washington Supreme Court exhibited hostility toward the Mission's religious beliefs. The Mission should not be forced to choose between its faith and serving its homeless neighbors to share the Gospel message.

I. The petition is timely.

Woods admits the petition is timely under this Court's orders and rules but asserts a conflict between Rule 30.1 and 28 U.S.C. 2101(c). Br. in Opposition ("Opp.") at 11–12. No conflict exists. Generally, a petition in a civil case may be filed up to 150 days after the lower court's judgment. 28 U.S.C. 2101(c). Though the statute does not specify how to compute this period, Rule 30.1 does. It is this Court's authoritative construction of 28 U.S.C. 2101(c) and excludes from the last filing day weekends, federal holidays, and other days the Court closes its building. Because Rule 30.1 is "consistent" with the statute, it comports with the Rules Enabling Act. 28 U.S.C. 2071(a).

Congress has never questioned this Court's interpretation of 28 U.S.C. 2101(c). Woods merely cites a ruling that the Speedy Trial Act does not incorporate Fed. R. Crim. P. 45(a) because that criminal rule specified "that it applied to 'rules' and to 'orders,' but it *said nothing about statutes*." *United*

States v. *Tinklenberg*, 563 U.S. 647, 661 (2011) (emphasis added). The opposite is true here: Rule 30.1 defines how to compute time under "an applicable *statute*" like 28 U.S.C. 2101(c) (emphasis added). So *Tinklenberg* confirms the petition is timely.

In fact, when the *statutory* deadline for a cert. petition falls on a Sunday, as here, the petition is timely if it is filed "the next day which is not a . . . legal holiday." *Union Nat'l Bank of Wichita* v. *Lamb*, 337 U.S. 38, 40 (1949) (citing Fed. R. Civ. P. 6(a)). *Lamb* gave three justifications for this: (1) Fed. R. Civ. P. 6(a) excludes Sundays from the last day of a filing period and "had the concurrence of Congress," (2) that rule applies to "'any applicable statute,'" and (3) 28 U.S.C. 2101(c) expresses "no contrary policy." *Id*. at 41 (quoting Fed. R. Civ. P. 6(a). Rule 30.1 is valid—and the petition timely—for the same reasons.

II. The coreligionist argument was pressed and passed upon below.

Woods says the Mission did not press its co-religionist argument below. Opp.13–17. But he ignores the Mission's claims and the case's posture. The Washington Law Against Discrimination (WLAD) religious-nonprofit exemption and the Washington Supreme Court's ruling in *Ockletree* v. *Franciscan Health System*, 317 P.3d 1009 (Wash. 2014) (en banc), *protected* the Mission's right to hire coreligionists until eight Justices abruptly changed position and overrode the exemption below. There was no way to predict such an extreme result. Yet the Mission maintained its First Amendment defenses, which are clearly stated in its answer, App.104a–05a, and pressed the coreligionist doctrine at every stage.

Because *Ockletree* generally upheld the WLAD's exemption, the Mission's trial-court briefing sensibly focused on the worst-case scenario: the *Ockletree* dissent's take on the coreligionist doctrine. 317 P.3d at 1027 (Stephens, J., dissenting) (the WLAD exemption is constitutional when discrimination claims are "[ ]related to the employer's religious beliefs"). Summary judgment was appropriate because the Mission's "requirement that employees abstain from homosexual behavior is related to the Mission's religious beliefs." App.109a. In short, the Mission pressed the same arguments in the trial court that it urges here: (1) "*any* relationship between the alleged discrimination and religion . . . compels . . . judgment" in the Mission's favor, App.109a–10a, and (2) "it would violate the Mission's constitutional rights . . . to permit further discovery and trial." App.112a.

The trial court understood the Mission's First Amendment arguments. It cited this Court's rationale for upholding Title VII's coreligionist exemption in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987), and this Court's demand for religious toleration in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1732 (2018), as requiring summary judgment for the Mission. App.65a–67a. Not once did the trial court cite the ministerial exception, because there was no need to reach that issue.

On appeal, the Mission defended the trial court's judgment on explicitly coreligionist grounds. The Mission's decision not to hire Woods was "based on religion" and necessarily protected because "Mr. Woods disagrees with the Mission's sincerely held

religious beliefs." App.82a; accord App.85a (the Mission cannot be forced "to hire employees who do not agree with or respect its religious beliefs"). Relying on this Court's First Amendment decisions, the Mission argued that it alone had the right to "determine whether Mr. Woods would fairly express [its] religious message." App.82a. Hiring someone who "reject[ed] . . . the Mission's beliefs" would eliminate "the Mission's ability to accomplish its expressive religious purposes for the reasons Justices Alito and Kagan described in their *Hosanna-Tabor* concurrence." App.83a; accord Pet.22, 24, 37.

The Mission (a) warned the Washington Supreme Court against "pretend[ing] the [WLAD] exemption did not exist" because that "would violate the Mission's rights under the First Amendment," App.84a; (b) faulted opposing amici for seeking to limit the Mission's ability "*to employ only co-religionists*," App.89a (emphasis added); (c) argued that making it unlawful for "religious nonprofits to hire employees *on the basis of religion*" would violate the First Amendment under *Hall* v. *Baptist Memorial Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) and *Little* v. *Wuerl*, 929 F.2d 944, 948 (3rd Cir. 1991), App.90a–91a; accord Pet.27–28; and (d) emphasized the coreligionist doctrine at oral argument, while distinguishing it from the ministerial exception. Wash. S. Ct. oral argument, No. 96132-8 (Oct. 10, 2019) at 34:56–36:55, 43:05–15, 45:09–19, 47:05–48:14, https://bit.ly/3bv29PB; accord Pet.24–25.

Given these arguments, the Washington Supreme Court majority's "focus[ ] on the state constitution, not the First Amendment" and refusal to discuss the Mission's "coreligionist exemption" argument is

untenable.[1] Opp.15–16. The majority limited the Mission's First Amendment rights to the ministerial exception without analysis. App.19a ("[T]he Supreme Court has fashioned the ministerial exception to the application of antidiscrimination laws in accord with the requirements of the First Amendment."). But Justices in concurrence and dissent explicitly addressed the Mission's asserted right to make faith-based decisions regarding its "choice of nonministers," App.25a, and rejected all the Mission's "asserted defenses under the First Amendment . . . except . . . the ministerial exemption," App.38a, meaning the coreligionist doctrine was pressed *and* passed on below.

III. The lower court's judgment is final.

Woods says there is no final judgment for the Court to review. Opp.20–22. That is wrong. In at least four scenarios, the Court "treat[s] the decision on the federal issue as a final judgment" and takes jurisdiction regardless of "additional proceedings anticipated in lower state courts." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). This case implicates all four.

First, even a looming state-court trial cannot defeat finality when "the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. The coreligionist doctrine is dispositive here: if the First Amendment safeguards the Mission's right to hire those who share and live out its beliefs,

[1] Woods's contention that no argument below fairly posed the coreligionist question, Opp.15, ignores the Mission's claims and an amicus brief filed below that detailed the coreligionist doctrine by summarizing federal appellate court precedent. Citygate Network Br. 9–18.

Woods's lawsuit fails. And the lower court prejudged the ministerial-exception question it purported to remand, suggesting strongly that lawyers cannot be ministers. App.21a–22a & n.6, 28a–30a.

Second, the coreligionist question "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. The First Amendment protects the Mission's ability to make faith-based hiring decisions *without* undergoing intrusive discovery and the disruption of a ministerial-exception probe. Even if the Mission prevails under the ministerial exception, its free exercise of religion will be chilled. Nothing "short of settlement . . . would foreclose or make unnecessary [a] decision on [the coreligionist] question." *Ibid.*

Third, the Mission's "federal claim has been finally decided." *Id.* at 481. If the Mission were to raise its coreligionist argument "in a new set of appeals, the courts below would simply reject the claim under the law-of-the-case doctrine." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 48 n.7 (1987); accord *id.* at 47–49 (applying *Cox*'s third category). The finality doctrine "would be ill served by" these "wasteful and time-consuming procedures," *id.* at 48 n.7, because "the harm that the [Mission] seeks to avoid," *i.e.*, secular courts trolling through its religious beliefs, practices, and reasoning, "will occur regardless of the result [of the ministerial-exception analysis] on remand." *Id.* at 49.

Last, "[a]djudicating the proper scope of First Amendment protections . . . merits application of an exception to the general finality rule." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989). The

Washington Supreme Court's holding "restricts [religious nonprofits'] present exercise of [their] First Amendment rights." *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974). The "possible limits the First Amendment places on" the application of state employment nondiscrimination laws to religious organizations "should not remain in doubt." *Fort Wayne Books*, 489 U.S. at 56. If the First Amendment bars Washington from holding the Mission liable for declining to hire Woods, "this litigation ends." *Cox*, 420 U.S. at 486. Failure to review the lower court's ruling now would have the "intolerable" result of leaving every religious nonprofit in Washington "operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt." *Id.* at 485–86 (quotation omitted).

The Washington Supreme Court's judgment is final under any one of these justifications. The *Cox* analysis places an exclamation mark on the urgent need for this Court's review.

IV. The conflicts are undeniable and severe.

Woods spends less than four pages addressing the merits of the conflicts that the petition outlines. Opp.17–20. He does not dispute that the coreligionist doctrine is recognized and enforced by all three branches of the federal government. Pet.18–25. Rather, Woods simply ignores the Mission's coreligionist argument, never addressing the myriad cases in which this Court has suggested that the First Amendment protects a religious organization's right to employ those who share and live out its beliefs. Pet.22–25; Alabama Br. 5–9

Woods counters only that "[n]one of petitioner's cases [squarely] holds that the First Amendment requires a coreligionist exemption." Opp.18. But this reflects the extreme and unprecedented nature of the Washington Supreme Court's decision. As far as Petitioner is aware, *no state* had *ever tried* to force a religious nonprofit to hire an employee who rejected its sincerely held beliefs before now. That the lower court shattered this universal consensus is a reason to grant review, not deny the petition.

It is also why Woods fails to distinguish the situation in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012). Opp.19–20. For decades, the government sought to limit religious organizations' choice of ministers, resulting in dozens of lawsuits and court decisions. But the government has never challenged religious nonprofits' right to employ coreligionists until now. Indeed, the "foundation" of the coreligionist exemption is stronger than that of the ministerial exception: hardly any litigants ever questioned it, so court proceedings rarely arose. Opp.20.

The conflict remains between the Washington Supreme Court's decision and the rulings of six federal courts of appeal. The lower court judicially narrowed the WLAD's religious exemption to the smallest protection that court believed that the First Amendment required. App.14a–15a. In other words, religious nonprofits *must* be subject to the WLAD *unless* the ministerial exception applies. The lower court incorrectly viewed that exception as the full extent of the First Amendment's protection of religious nonprofits in the employment context. App.19a; contra Seventh-Day Adventists Br. 5–12;

First Liberty Institute Br. 5–8. Accordingly, the court reduced the WLAD's blanket religious-nonprofit exemption to "the federal ministerial exception test established in *Hosanna-Tabor* and clarified in *Our Lady of Guadalupe*." App.22a.

The notion that the First Amendment provides zero protection to religious organizations' choice of non-ministers is shocking and diametrically opposed to federal precedent. Six courts of appeal recognize that religious groups have a "constitutionally-protected interest . . . in making religiously-motivated employment decisions." *Hall*, 215 F.3d at 623. They deem no "area of the employment relationship *less* fit for scrutiny by secular courts" than the question of whether the plaintiff's "beliefs or practices make her unfit to advance" religious nonprofit's mission. *Little*, 929 F.2d at 949. That is why federal appellate courts refuse to (1) "meddl[e]" in a religious organization's definition of "orthodoxy," *Curay-Cramer* v. *Ursuline Acad.* of *Wilmington*, 450 F.3d 130, 141 (3d Cir. 2006); *accord EEOC* v. *Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980), and (2) forbid secular courts from telling "religious institutions how to carry out their religious missions or how to enforce their religious practices." *Hall*, 215 F.3d at 626.

This is no mere matter of constitutional avoidance. Opp.18–19. If the Washington Supreme Court is correct, and the ministerial employment is all the First Amendment protects, *none* of the concerns cited by six federal courts of appeal are even hypothetically valid. A sea change in our nations' understanding of religious liberty is at stake.

V. The Mission's religious discrimination and hostility claims also warrant review.

1. Woods says that the Mission's religious discrimination claim is waived. Opp.22–23. Not so. That claim arises from the Washington Supreme Court's decision to judicially rewrite the WLAD's religious-nonprofit exemption. It was impossible for the Mission to raise this claim *before* the lower court's unprecedented action. Inability to raise a "then non-existent issue" below does not waive a claim "once it [does] come into existence." *N.L.R.B.* v. *Jones & Laughlin Steel Corp.,* 331 U.S. 416, 427– 28 (1947).

All employers implicate the WLAD's non-discrimination goals in exactly the same way. Wash. Rev. Code 49.60.010 (denouncing "discrimination against any of [the state's] inhabitants"); Pet. 30–31. Washington cannot deem those goals worth pursuing against larger religious nonprofits but not against smaller secular businesses. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021). (And treating smaller religious nonprofits better than larger ones raises constitutional problems of its own. *Larson* v. *Valente*, 456 U.S. 228, 252 (1982).) The lower court's decision results in a Free Exercise violation.

2. Regarding hostility, Woods concedes the lower court "invalidat[ed] a state statutory provision," Opp.24, and transformed the legislature's religious exemption for coreligionist hiring. Woods never disputes that the court's logic would prohibit *even houses of worship* from employing coreligionists in non-ministerial roles. Pet.34. Though the Washington Justices did not label religion "despicable," Opp.23 (quotation omitted), they conveyed the same by

(1) characterizing religious autonomy as a "license to discriminate," App.24a–25a; (2) pressuring religious organizations not to exercise their beliefs, even when hiring *ministers*; (3) threatening lawyers who share the Gospel with losing their law license; and (4) treating the Mission worse than a religious employer accused of *race discrimination*. Pet.35–36. The lower court did not provide the neutral adjudication that the First Amendment requires.

VI. Immediate review is warranted.

The petition presents a "well-developed conflict" and a case that is "exceptionally important." Samaritan's Purse Br. 23. The Washington Supreme Court's comments about attorneys who work for religious legal-aid clinics are shocking, Christian Legal Soc'y Br. 4–15; its decision "typifies an increasingly popular brand of religious intolerance" that "jeopardizes the States and their religious institutions," Alabama Br. 13–24; and the result will chill religious-hiring practices and harm those served by religious organizations, Samaritan's Purse Br. 5, 23; Billy Graham Evangelistic Assoc. Br. 2, 10–11; Gospel Rescue Mission Fellowship Br. 25–26; Nat'l Hispanic Christian Leadership Conf. Br. 8; Westminster Theological Seminary Br. 2–4, 7–9. This chill is not hypothetical: the decision below has already resulted in serial litigation against Seattle Pacific University for insisting on hiring a coreligionist. Santi Quiroga Medina, *New year, new lawsuit*, The Falcon (Nov. 2, 2021), https://bit.ly/3EWQaXy.

The purpose of the WLAD's religious-nonprofit exemption was twofold: to protect religious freedom guaranteed by the First Amendment, and to protect the resources of religious nonprofits who derive much of their funding from coreligionists. Wash. State Legislators Br. 14–25. Yet the decision below invites judicial second-guessing into religious groups' determinations of which roles are best filled by coreligionists, a result that has "an especially deleterious effect on minority religions." Islam and Religious Freedom Action Team Br. 10.

As 17 states explain, calls "for more dialogue and understanding will not, without more, halt attempts to use state power to shape religious practice." Alabama Br. 23. Most Americans recognize that our nation is "'built upon the promise of religious liberty,'" and "that this promise allows religious groups to select their employees based on religion." *Id.* at 24 (quotation omitted). "But confusion sown by decisions like the one below erode that shared understanding and embolden actors in government and beyond to press on further." *Ibid.* This Court should grant the petition and hold that the First Amendment protects religious organizations' right to hire coreligionists. Citygate Network Br. 18.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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