No. 21-144

In The Supreme Court of the United States

SEATTLE'S UNION GOSPEL MISSION,
Petitioner,

v.

MATTHEW S. WOODS,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE STATE OF MONTANA, MONTANA ATTORNEY GENERAL AUSTIN KNUDSEN, AND OTHER SENIOR MONTANA STATE ATTORNEYS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

The State of Montana, Montana Attorney General Austin Knudsen, Lieutenant General Kristin Hansen, Solicitor General David Dewhirst, and General Counsel Derek Oestreicher seek to preserve religious liberty and protect the conscience rights of attorneys who serve the citizens of Montana before its courts. The Attorney General is Montana's chief legal officer and proudly shoulders the duty and authority to represent the State before this Court. Montana's Attorney General and his subordinates bear unique duties to the State and to the practice of law. They are also people of faith who believe they have and can continue to fully honor their religious, professional, and civic obligations. Indeed, the practice of law is enriched—not compromised—by the participation of fully integrated lawyers. Amici therefore implore this Court to reject even subtle attempts to force ideological conformity upon members of the bar.[1]

[1] Pursuant to this Court's Rule 37.6, no counsel for any party authored this brief, in whole or in part. No person or entity other than Amicus Curiae contributed monetarily to its preparation or submission. All parties have consented to its filing.

SUMMARY OF THE ARGUMENT

This brief presents three arguments.

First, a person can act as both lawyer and minister.

To compel a person to purchase the practice of law by forfeiting the ability to practice as a minister imposes an unconstitutional decision. *See McDaniel v. Paty*, 435 U.S. 618, 628-29 (1978). Indeed, this Court has rejected similar attempts to prevent a lawyer with deeply held religious beliefs from acting as a minister out of fear that the attorney could not also adhere to their oath. *Id.* In so doing, it recognized that a person of religious faith is more than capable of adhering to a civil oath. *See id.* at 628-29 (legislators who are ministers can be trusted to follow their civil oaths); *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 (1968) (jurors with religious objections to the death penalty can be trusted to follow their oaths).

Additionally, legal ethics rules are subject to the Constitution. Specifically, State bar rules are forbidden from compelling a lawyer to associate or speak about something with which the lawyer disagrees. *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990).

Taken together, these twin premises render the Washington Supreme Court's opinion constitutionally deficient. It is also unwise. Preventing lawyers from also acting as ministers

would rid the legal profession of certain ideas, strategies, and perspectives, which would dilute the legal profession's marketplace of ideas and risk the independence of the profession. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *see Lathrop v. Donohue*, 367 U.S. 820, 876-77 (1961) (Black, J., dissenting).

Second, the legal aid position at issue here qualifies under this Court's ministerial-exception jurisprudence. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

Third, the Seattle Union Gospel Mission ("the Mission") has an associational right under the First Amendment to decide who is the best person to promulgate its message. This associational right is especially important for religious associations. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 201 (2012) (Alito, J., and Kagan, J., concurring). The Washington Supreme Court's opinion cannot be squared with this right.

INTRODUCTION

"I die the King's good servant, *and* God's first."[2]

Thomas More served King Henry VIII as a Royal Counselor in 1518. He was later knighted and, by 1529, served the King as Lord Chancellor. *See* Michael H. Hoeflich, *St. Thomas More and his Utopia in Antebellum American Lawyer's Thought*, at 64.[3] By all accounts, More served the Crown with absolute distinction while serving as his family's Catholic faith leader.

In 1531, King Henry rent the relationship between England and the Vatican by declaring himself Supreme Head of the Church in England. In 1532, More resigned as Lord Chancellor.[4] Two years later, Parliament formalized the schism by passing the Act of Supremacy, which declared King Henry VIII the Supreme Head of the Church in England. *Hosanna-Tabor*, 565 U.S. at 182.

Despite his position of prominence, More resigned as Lord Chancellor after King Henry commandeering of English Christendom reached

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[2] GERARD B. WEGEMER & STEPHEN W. SMITH, A THOMAS MORE SOURCE BOOK, 357 (Catholic Univ. Press 2004).

[3] *Available at* https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1009&context=utopia500 (last visited Sept. 1, 2021).

[4] GERARD B. WEGEMER, THOMAS MORE: A PORTRAIT OF COURAGE 235 (Scepter Publishers 1995).

fruition. He did so out of the conviction that Christ meant what he said to Saint Peter, the first Pope of the Catholic Church: "that Peter was the Rock and . . . that the Pope was the head of the Church." ANTONIN SCALIA ET AL., ON FAITH: LESSONS FROM AN AMERICAN BELIEVER 49 (2019) (Crown Forum). When More refused to acknowledge the King as the Supreme Head of the Church, King Henry had him indicted for High Treason. Hoeflich, *supra*, at 64. Five days after his indictment, More was executed on July 6, 1535. *Id*. More's dying words: "I die the King's good servant, *and* God's first," demonstrated the belief that he held until the moment his life was extinguished: that one can serve his deity *and* his country, and that one can do so at the highest echelon of the legal world.

More, who is now venerated as the Catholic Patron Saint of lawyers, statesmen, and politicians, did not utter his final words out of intransigence. Rather, More's actions—guided by his faith—were meant as a final service to his client, the King. Although the King certainly directed More, More, as the King's counselor, advised the King not only according to the rule of law but also according to More's conscience. Thomas More's example of serving both his client *and* God is the standard to which lawyers of all faiths aspire.

The Concurring Opinion below alarmingly suggests that Thomas More had it all wrong. In the view of the concurring Judge, lawyers *must* check their consciences, worldviews, and beliefs at the door

when representing clients. In other words, they may serve their King *or* their God, but never both. This position is irreconcilable with the text and the principles derived from our First Amendment.

The Framers knew of Thomas More. His great-grandson was instrumental in founding Maryland as a refuge for Catholics who faced persecution in England. *See* Hoeflich, *supra*, at 66. Thomas Jefferson and John Adams both owned copies of Thomas More's greatest work on statesmanship: *Utopia*. *Id*. at 68-69. Indeed, James Madison admired the work so deeply that he recommended that the Library of Congress purchase it. *Id*. at 69.

Our Country's first colonists sought a home that would allow them to serve both God and Country. *See Hosanna-Tabor*, 565 U.S. at 182. Similarly, the religion clauses of our First Amendment had as their "real object" the termination of both religious persecution and "the subversion of the rights of conscience." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871 (1833). The Washington Supreme Court's opinion, which, at its core, is that a lawyer can never function as a minister, cannot be squared with our history, our Constitution, or this Court's precedents. *See, e.g.*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049. The Court should grant the petition and make that clear.

ARGUMENT

I. Lawyers can be Ministers

This Court has already ruled that a preacher can also be a lawmaker. *McDaniel*, 435 U.S. at 628-29. In so doing, it rejected the State of Tennessee's argument that a religious person could not be trusted to both serve his religion and obey his oath of civil office. *Id.* This Court also ruled that a state cannot condition the constitutional right of serving as a minister on the forsaking of the right to run for office. *See id*. It would be odd if this Court ruled that a preacher cannot be a lawyer.

The Court has also held that a state cannot use its bar rules to deprive lawyers of their First Amendment rights. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (declaring unconstitutional under the First Amendment an Arizona State Bar rule prohibiting all truthful attorney advertising). For that reason, Washington cannot use its bar rules to compel attorneys to forsake the exercise of their religious convictions in exchange for practicing law. *Keller*, 496 U.S. at 14. Such a rule would rid the legal profession of certain ideas and arguments, harming the legal marketplace of ideas. *See Hicks*, 539 U.S. at 119. It also harms the treasured independence of lawyers. *See Lathrop*, 367 U.S. at 876-77 (Black, J., dissenting).

For these reasons, Washington's bar rules, according to Justice Yu's interpretation, violate the principles promulgated in *McDaniel*, *Keller*, *Hicks*, and Justice Black's dissent in *Lathrop*.

A. The First Amendment Prohibits States from Barring Ministers from Elective Office.

Washington is not the first State to artificially, and illegitimately, wall off civil service from servants of God. Until 1978, Tennessee's Constitution prohibited ministers from serving as legislators and in other elected positions. *McDaniel*, 435 U.S. at 621. Adopted in 1796, Tennessee had reasoned that ministers are, "by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions . . . ." *Id.* at 621 n.1.

Rev. Paul A. McDaniel challenged this prohibition, and during the trial that ensued, he testified that his ministry *is* his profession and that he viewed his civil-service responsibilities to include the salvation of souls. *Paty v. McDaniel*, 547 S.W.2d 897, 901 (Tenn. 1977). The Tennessee Supreme Court upheld the prohibition, reasoning that because ministers have a "very special position in our society," they exert an outsized "influence upon many of their fellow men." *Id.* at 906. For this reason, the Tennessee Supreme Court feared that if ministers were permitted to serve in Tennessee's elected offices, these ministers would do everything in their power to sponsor, advocate, and vote for legislation that "could or might violate both the free exercise and establishment clauses of the First Amendment." *Id.* Stated bluntly, the Tennessee Supreme Court believed that ministers would forsake their public oaths and use their unique

influence over others to advance their religious objectives.

This Court disagreed.

First, the Court ruled that a State cannot condition a civil right on how a person may exercise their rights under the Free Exercise Clause. Although Tennessee recognized the petitioner's rights under the Free Exercise Clause to serve as a minister, and also recognized his right to campaign for and hold public office, Tennessee violated the former by conditioning his assertion of the latter on abandoning his ministry. *McDaniel*, 435 U.S. at 626. In other words, Tennessee punished McDaniel's work in "a religious profession with the privation of a civil right." *Id.* (quoting 5 WRITINGS OF JAMES MADISON 288 (G. Hunt ed. 1904); *see also id.* at 634 (Brennan, J., concurring) ("[B]ecause the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion."); *accord Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2021-22 (2017); *see also Citizens United v. FEC*, 558 U.S. 310, 351 (2010).

Second, and importantly, the Supreme Court rejected the Tennessee Supreme Court's view that ministers would necessarily violate their civil oaths and use their elected office to advance their religion while impeding the advancement of others. *McDaniel*, 435 U.S. at 628-29. The Court found "no persuasive support" for this proposition anywhere throughout the American experience. *See id*. at 629.

Nothing but rank conjecture supported the notion that ministers who hold public office would be any "less faithful to their oaths of civil office than their nonordained counterparts." *Id*. at 629.

In other words, this Court has already recognized that a minister can be a lawmaker. Similarly, there is no reason why ministry must stop where the practice of law commences. The opinion below offers no reason why the First Amendment rights of lawyers apply less fulsomely than those of legislators.

B. The First Amendment protects lawyers.

It should go without saying that the First Amendment limits the conduct that State bars can proscribe. Although the Constitution permits states to condition the practice of law on the payment of dues, the First Amendment nonetheless prohibits bar associations from compelling bar-due payments that fund political speech with which the lawyer disagrees. *Keller*, 496 U.S. at 14; *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (applying First Amendment strict scrutiny to Canon 7C(1) of Florida's Code of Judicial Conduct prohibiting judicial candidates from personally soliciting campaign funds and upholding it because judicial candidates could speak through their campaign committees).

The Washington Supreme Court oversees and enforces lawyer conduct in the State. App. 28-29a (Yu, J., concurring). The Free Exercise Clause of the

First Amendment applies to the States, including a state's bar rules, through the Fourteenth Amendment. *See McDaniel*, 435 U.S. at 620. For that reason, when the Free Exercise Clause and Washington's Rules of Professional Conduct conflict, it is the First Amendment that "has struck the balance for us." *Hosana-Tabor*, 565 U.S. at 196. A lawyer cannot be compelled to speak about that with which the attorney disagrees. *Keller*, 496 U.S. at 14.

C. Washington's Rules of Professional Conduct, as Interpreted by Justice Yu, Violate *McDaniel*.

According to the concurrence below, lawyers "must be guided by the client's interests," and not their own. App. 29a (Yu, J., concurring). In Justice Yu's view, this must be true because the client "has the ultimate authority to determine the purposes to be served by legal representation." *Id.* (citing Wash. R. of Prof. Conduct 1.2 cmt. 1). For this reason, Justice Yu believes that concurrent conflicts of interest may arise from the "lawyer's own interests." *Id*. (citing Wash. R. of Prof. Conduct 1.7 cmt. 1).

Based on these premises, Justice Yu concluded that concurrent conflicts of interests will likely arise if a lawyer in the Mission's legal aid clinic tries to minister to their clients. App. 29a. In her view, "the necessary legal advice" will inevitably "conflict[] with the religious message of the lawyer." App. 29a. She also believes that, as members of a "vulnerable population," clients of the Mission will "feel coerced into acquiescing to [the Mission's] religious

purposes" if an attorney "attempted to simultaneously play the dual roles of lawyer and minister." App. 30a.

Justice Yu's concurring opinion cannot be reconciled with either pillar undergirding this Court's *McDaniel* opinion.

First, Justice Yu imposes an unconstitutional condition on the Mission. App 30a. Either the Mission can enjoy its rights under the Free Exercise Clause (which allows it to evangelize to the homeless) or the Mission can provide a secular legal-services clinic and ignore the spiritual needs of the homeless. In Justice Yu's view, the Mission cannot do both. *See McDaniel*, 435 U.S. at 626 ("[U]nder the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other.").

As noted above, however, the Free Exercise Clause *prohibits* Washington from conditioning a lawyer's ability to practice law on surrendering his deeply held religious convictions. *See id.* at 626 (citing *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).[5]

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[5] Although *Sherbert v. Verner* was overruled in *Employment Division v. Smith,* 494 U.S. 872 (1990), this Court has continued to rule that the Free Exercise Clause prohibits the imposition of conditions requiring a person to choose between the acceptance of benefits or their religious convictions. *Trinity Lutheran Church of Columbia, Inc.,* 137 S. Ct. at 2021-22 (relying in part on *McDaniel*).

According to the choice Justice Yu envisions—unlike Thomas More—lawyers who adhere to the tenets of the Mission's faith and goals cannot be the King's good servant *and* God's first.[6] In her view, the "and" must be an "or."

Second, in *McDaniel*, the Tennessee Supreme Court expressed the very fears recounted in Justice Yu's concurring opinion—*i.e.*, that a minister cannot abide by an oath to uphold the Constitution given his religious vocation.[7] This Court rightly rejected that

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[6] Justice Yu's concurrence also conflicts with this Court's recent ruling in *Fulton v. City of Philadelphia*. *Compare* 141 S. Ct. 1868, 1881-82 (2021), which held that the Free Exercise Clause requires the City of Philadelphia to allow Catholic Social Services to participate in its foster-care system, even though Catholic Social Services declines to recommend same-sex couples as foster parents. Under Justice Yu's interpretation, it would appear that lawyers from a hypothetical Catholic Social Services legal aid clinic could be compelled by client demands to challenge the religious exemptions that the entity enjoys. This absurd result also counsels in favor of a certiorari grant in this case.

[7] *Compare Paty*, 547 S.W.2d at 906 (stating that priests and ministers "occupy a very special position in our society, and that by virtue of their position, they have an influence upon many of their fellow men, that others cannot exert" and further stating that if elected, ministers will use their spiritual and personal powers of persuasion to further the aims of their religion); *and McDaniel*, 435 U.S. at 628-29

argument, because experience showed that ministers could uphold their secular oaths as faithfully as their fellow nonordained citizens. *McDaniel*, 435 U.S. at 629; *see also Witherspoon*, 391 U.S. at 519-20 (declaring unconstitutional an Illinois law that excluded jurors who had religious objections to the death penalty because jurors "who oppose[] the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror"). Simply put, the Court has long—and correctly—emphasized that lawyers who serve their client's spiritual needs can be trusted to uphold their oaths and ethical obligations just as well as their fellow members of the bar. *Cf.* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 341 (1998) (stating that there is no good reason to assume that Catholic judges who are opposed to the death penalty would sabotage the legal system to achieve their religious objectives).

States—like Washington—may not bar access to the practice of law to those lawyers, law firms, or other organizations unwilling to forfeit their constitutional rights. *See Lathrop*, 367 U.S. at 876-77 (Black, J., dissenting); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709-10 (2014) (applying

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(same); *with* App 29-30a (stating that there is a very high risk that the Mission's clients might feel coerced into acquiescing to the Mission's religious purpose if the Mission's attorney plays a dual role of attorney and minister).

freedom of exercise protections to businesses). The reason for safeguarding the constitutional rights of attorneys while regulating the practice of law is to preserve "the independence of the individual against the Government and those acting for the Government." *Lathrop*, 367 U.S. at 876 (Black, J., dissenting). Indeed, the Bill of Rights "give[s] independence to those who must discharge important public responsibilities." *Id.* Because the legal profession bears a profound responsibility to the public, this independence must extend to lawyers. *See id.*

If a court revokes this independence, they reduce lawyers to little more than "parrots of the views of whatever group wields governmental power at the moment." *Id.* In other words, a lawyer deprived of his independence "has ceased to perform the highest duty of his calling *and* has lost the affection and even the respect of the people." *Id.* at 876-77 (emphasis added). Demanding that lawyers abandon their religious beliefs for the sake of the client's interest limits the advice a lawyer can give and the strategies a lawyer can pursue. The lawyer must not, as Justice Black said, "parrot" the views of the majority. Requiring a lawyer to surrender his religious beliefs at the bar of a court harms the marketplace of ideas as well as the bars of courts across the country. *See Hicks*, 539 U.S. at 119; *see also Witherspoon*, 391 U.S. at 520 (declaring unconstitutional Illinois's statute barring jurors with religious objections to the death penalty because

such a jury would not reflect the community and would be composed of only one side of the debate).

Lest we forget, moral convictions are a good thing. They shape the character of those endowed with the public trust. President Lyndon Johnson, for instance, appointed Thurgood Marshall to the Supreme Court *because of* his convictions in the fight for racial equality, and "[i]t would be odd if those principles kept him from sitting in school desegregation cases." Garvey & Coney, *supra*, at 341. What was true for Justice Marshall is likewise true for lawyers of faith. Our First Amendment allows room for lawyers who walk by sight, and for those who, like Thomas More, walk by faith.

It is not merely *possible* for lawyers to simultaneously honor their ethical obligations and religious convictions, although this possibility, without more, hollows out entirely any persuasive force of Justice Yu's concurrence. The legal profession is affirmatively enriched when they do so. Some lawyers, like Thomas More, see their clients' best interests through the eyes of faith. *See* SCALIA ET AL., *supra*, at 49. And the Free Exercise Clause preserves their right to do so.

History often repeats itself. But the lessons of 1536 need not be revisited. That is why this Court should reject Justice Yu's categorical rule.

II. The Mission's Legal Aid Attorney Satisfies This Court's Test for the Ministerial Exception.

The Mission seeks to evangelize Seattle, and any other work they do is "only taken so far as seems necessary or helpful to the spiritual work." App. 62a. In achieving this mission, "there can be no doubt that the messenger matters." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., and Kagan, J., concurring). The Mission, no less than a church, "cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses." *Id*. This is why the Mission must be selective in whom it chooses to be its voice to the faithful, including those chosen to serve in the Mission's legal-aid clinic. *See id*.

The Free Exercise Clause permits a religious group to choose those who may carry out the mission of the organization. *Id*. at 196. More specifically, the ministerial exception prevents courts from adjudicating employment disputes "involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. In determining who qualifies for the ministerial exception, this Court has rejected any bright-line test in favor of a more flexible analysis. *See id*. at 2063-64; *id*. at 2067. Bestowing the title "minister" onto an employee is neither a necessary condition nor a sufficient one. *Id*. at 2063-64. The same holds true for educational requirements; indeed, some religious

traditions reject all formal training requirements. *Id.* at 2064. The focus of the inquiry is on the duties of the employee in question. *Id.*

Justice Yu's concurrence substituted a flexible analysis of a variety of factors for what appears to be a black-letter, inflexible rule: lawyers can never be ministers. App. 29a. For at least three reasons, Justice Yu is profoundly mistaken.

First, this Court has already held that an employee may enjoy the ministerial exception while holding secular positions. In *Hosanna-Tabor*, the Court rejected an argument that the former employee was not a minister because she performed secular duties in addition to her religious duties. 565 U.S. at 193. It did so because even the "heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities." *Id.* Indeed, the employee at issue in *Hosanna-Tabor* spent just 45 minutes a day providing religious instruction and spent the remainder of the school day teaching secular subjects. *See id.* This imbalance did not matter.

Second, Justice Yu observed that legal aid lawyers do not undergo religious training. App. 28a. So what? Teaching children "in an elementary school does not demand the same formal religious education as teaching theology to divinity students," so the Court found this point irrelevant in *Our Lady of Guadalupe Schools*. 140 S. Ct. at 2064. Providing

spiritual guidance to a legal-aid client, praying, and worshiping with one's neighbor likewise do not require a degree in divinity.

Third, Justice Yu notes that the Mission does not present its attorneys as "ministers." App. 28a. Although relevant, this is not dispositive. *Our Lady of Guadalupe Schools*, 140 S. Ct. at 2063-64. The proper focus of judicial inquiry is on the duties of the job, *id*. at 2064, and the duties for which the Mission's lawyers are responsible underscore the fatal flaws in Justice Yu's reasoning.

Broadly speaking, the Mission describes its legal aid clinic "as a ministry" with an "evangelical purpose." App. 27a. The legal aid attorneys "show the love of God by loving the client holistically, not just attending to [the client's] legal needs." App. 27a. To this end, all job applicants for the legal aid position are required to accept the Mission's Statement of Faith. App. 65a (trial court opinion).

The Statement includes several Evangelical Christian doctrines to which all lawyer applicants must agree. App. 65a. For instance, a legal aid lawyer must work to accomplish the goals of the Mission. They must additionally "practice law in a manner that honors and glorifies God . . . ." App. 65a. Critically, a legal aid attorney must "love others and *share the gospel of Jesus Christ*." App. 65a (emphasis added).

Lest this appear to be lip service, the job duties of the legal aid attorney include the provision of spiritual guidance. App. 64a. In fact, legal aid

lawyers are "encouraged to talk openly about [their] faith and ask [their] clients about their religious beliefs." App. 64a. The faith of the legal aid lawyers is expected to "strongly influence[]" their positions concerning, *e.g.*, family law, domestic violence, and immigration. App. 64a.

Under the framework outlined in *Hosanna-Tabor* and *Our Lady of Guadalupe Schools*, the Mission's legal aid lawyers unquestionably qualify for the ministerial exception.

The "ministerial exception" is mere shorthand. *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., and Kagan, J., concurring). As discussed in *Hosanna-Tabor* and reiterated by the Court in *Our Lady of Guadalupe Schools*, the "ministerial exception" not only applies to "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals," but also to an individual who "serves as a messenger or teacher of its faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., and Kagan, J., concurring); *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063. This broader application of the exception to a "messenger" or "teacher" of a faith was ignored by the Washington Supreme Court in its opinion below.

As discussed *supra*, all job applicants for the legal aid position are required to accept the Mission's Statement of Faith. App. 65a (trial court opinion). The legal aid attorneys "show the love of God by loving the client holistically, not just attending to [the client's] legal needs." App. 27a. The attorney

must "practice law in a manner that honors and glorifies God . . . ." App. 65a. Importantly, the legal aid attorney must "love others and *share the gospel of Jesus Christ*." App. 65a (emphasis added). The legal aid attorney is "encouraged to talk openly about her faith and ask her clients about their religious beliefs." App. 64a.

The mere fact that the legal aid attorney is not required to have specialized religious training or discuss the scriptures with a classroom or congregation of people does not disqualify the position from protection under the "ministerial exception." For example, when Jesus tells Peter "to put out into the deep" (Luke 5:4), Jesus is exhorting all Christians to proclaim the Gospel and be missionaries for Christ to all. *Cf.* Pope John Paul II, Apostolic Letter Novo Millennio Ineunte, ¶ 40 (Jan. 6, 2001) (calling on all members of "the People of God," and not just specialists, to proclaim the Gospel to all).[8]

Attorneys don't just file lawsuits and make for intriguing television characters. Attorneys meet with individuals during their worst times—one-on-one—and counsel them; they provide hope. The Mission's legal aid lawyers go beyond even that; in addition to providing legal clarity, the legal aid lawyer seeks to provide hope through "shar[ing] the gospel of Jesus

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[8] *Available at* https://www.vatican.va/content/john-paul-ii/en/apost_letters/2001/documents/hf_jp-ii_apl_20010106_novo-millennio-ineunte.html (last visited Sept. 1, 2021).

Christ." App. 65a. The Mission has decided that their lawyers are better able to do this when they accept the Mission's Statement of Faith. App. 65a. And the First Amendment gives the Mission discretion to reach this conclusion.

Whether you are an elementary school teacher with special training and a religious title, *Hosanna-Tabor*, 565 U.S. at 191-92, an elementary school teacher without special religious training or title, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055-60, an engineer at a nonprofit gym owned by a religious organization, *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330-34 (1987) (religious employment case involving the Civil Rights Act), or an attorney at a nonprofit legal aid clinic run by a church, the government and the courts should have no say regarding these hiring practices. All that matters in these hiring decisions is that the religious organizations, no matter how mainstream, determined that the particular requirement was essential to further its mission. "[C]ivil courts are in no position to second-guess that assessment." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., and Kagan, J., concurring).

III. Religious Organizations Have Free Association Rights.

In addition to the fatal free-exercise flaw that plagues the Washington Supreme Court's holding, the notion that religious organizations cannot hire lawyers of a shared creed violates the First Amendment's freedom of association principle. Members of this Court have reiterated that

"[t]hroughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'" *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., and Kagan, J., concurring) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)). Religious bodies, in turn, benefit from the inclusion of like-minded lawyers. Foreclosing the ability of lawyers to participate fully in ministry—which is the necessary implication of the Washington Supreme Court's opinion (and the explicit premise adopted by the concurrence)—cannot be reconciled with the First Amendment's associational right.

Freedom of association is as straightforward as it is integral to the basic notions of liberty that buttress our Constitution. For more than six decades, this Court has foreclosed debate over the notion "'that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.'" *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). "'[I]mplicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Boy Scouts of Am.*, 530 U.S. at 647 (quoting *Roberts*, 468 U.S. at 622).

The fundamental freedom to work with other like-minded individuals toward a common vocation necessarily includes the right to select for membership those who have a shared interest in advancing the mission. Thus, "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express." *Id.* at 648. In other words, "'[f]reedom of association . . . plainly presupposes a freedom not to associate.'" *Id.* For that reason, the Government violates an association's rights by compelling it to accept members that impact its ability to express its message. *See id.*

This risk is especially acute with respect to religious organizations, a point that this Court has previously acknowledged. Most recently, the Court underscored that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. Indeed, the freedom-of-association principle "applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals." *Id.* at 200 (Alito, J. and Kagan, J., concurring) (citing *Employment Div. v. Smith*, 494 U.S. at 882 (freedom of association may be "reinforced by Free Exercise Clause concerns").

The inclusion of like-minded lawyers (and exclusion of lawyers who ascribe to principles

incompatible with an organization's mission) is more, not less, critical for purposes of religious associational freedom. While it may be "easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws," *id.* at 199 (Alito, J. and Kagan, J., concurring) it remains true that religious associations have often served as the tip of the spear in courts throughout the Nation. Just as "[t]he Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith," so, too, should "the collective conscience of each religious group" dictate which person is best suited to zealously advocate for the collective when the need arises. *Id.* at 202 (Alito, J. and Kagan, J., concurring).

Nor are the associational rights of religious organizations the only fundamental liberties jeopardized by the Washington Supreme Court's opinion. Lawyers have associational freedom rights as well, and theirs are similarly endangered. Because "[i]ndividuals have a[] . . . right to 'eschew association for expressive purposes,'" *McDonald v. Longley*, No. 20-50448, 2021 U.S. App. LEXIS 19882, at *20 (5th Cir. July 2, 2021) (quoting *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018)), courts have recognized that "compelling a lawyer to join a bar association engaged in non-germane activities burdens his or her First Amendment right to freedom of association," *id.* at *21; *accord Crowe v. Or. State Bar*, 989 F.3d 714, 729 (9th Cir. 2021).

Indeed, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460 (quoted in *Crowe*, 989 F.3d at 729). And, as noted above, *see supra* at 8-9 Washington may not condition the practice of law on the abandonment of a fundamental constitutional right (at least not without satisfying strict scrutiny, *see Williams-Yulee*, 575 U.S. at 444).

To be certain, the free-association right enshrined in the First Amendment does not give lawyers license to provide sub-standard or sub-ethical client service. But contrary to Justice Yu's conclusion, *see* App. 28a-30a, safeguarding the associational freedom rights of religious organizations and the lawyers they wish to hire *enhances* the provision of legal services. Some of the best and most renowned lawyers throughout history have litigated their biggest cases on behalf of organizations that animated the principles they held most dear. This was true of Thurgood Marshall and his work on behalf of the NAACP. It was true of Ruth Bader Ginsburg's work on behalf of the Women's Rights Project at the ACLU. It is true of the lawyers litigating this case on behalf of the Mission. And, should this Court extend to the Washington Supreme Court the course correction that this case necessitates, it will be true of the staff attorneys serving the needs of the individuals seeking legal assistance from the Mission.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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