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 LUC JASMIN, CHELSEA DIMAS, 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 REPLY BRIEF

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INTRODUCTION

Appellees, Washington's Attorney General and Human Rights Commission ("the State"), urge this Court to adopt a new theory of standing that would effectively eliminate pre-enforcement lawsuits. That theory goes like this: a plaintiff cannot challenge an unconstitutional law in federal court until the State enforces *that* law against *that* plaintiff—depriving the plaintiff of any opportunity to vindicate his constitutional rights in federal court *before* facing harmful enforcement action by government or private officials. That has never been the law.

Indeed, pre-enforcement standing exists for situations precisely like this. When the Washington Supreme Court held religious organizations could be liable for sexual orientation discrimination under the Washington Law Against Discrimination ("WLAD"), the Attorney General (a) vowed to enforce that rule, (b) launched an investigation against a Christian college for violating that rule, (c) repeatedly said the First Amendment does not protect religious organizations from the rule, and (d) refused (and still refuses) to disavow enforcement of the rule. And third-parties are actively enforcing the new rule against Christian ministries as we speak. The Mission could not have waited any longer to file a pre-enforcement challenge without risking enforcement against it, with all the concomitant expense and burdens such enforcement regularly entails.

The State's theory is found nowhere in precedent. Instead, the State argues *around* controlling precedent, ignoring cases like *Teter*, *Arizona v. Yellen, Italian Colors*, *California Trucking,* and *LSO* or by misunderstanding cases like *SBA List*, *Tingley*, and *Isaacson*.

All signs point toward imminent enforcement against the Mission. In fact, the State's very first sentence of its brief unveils its true position: "Washingtonians have a right to be free from unlawful discrimination in employment" even when that means forcing religious charities to hire those who disagree with them. Appellees' Answering Brief ("Ans. Br.") at 4[1]. And the State says doing so is "unquestionably a matter of the highest public importance." Ans. Br. at 56. There is a credible threat, this suit is ripe for this Court's review, and the Mission's harm is redressable.

This Court should reverse the decision below and remedy the Mission's ongoing and irreparable constitutional harm by directing the district court to enter an injunction.

[1] Page citations are to the original page numbers at the bottom of the page.

ARGUMENT

I. The Mission has standing because it faces a credible threat of enforcement and its injuries are redressable.

The Mission need not "make a clear showing" of standing at this stage to stay in court. *Contra* Ans. Br. at 17. This case is not merely "[a]t the preliminary injunction stage"; the district court granted the State's *motion to dismiss*. 1-ER-30. So the Court must presume "all of the facts alleged in the complaint" as true and construe them "in the light most favorable" to the Mission. *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1209 (9th Cir. 2022) (cleaned up and citations omitted). In reviewing a motion to dismiss on standing, "general factual allegations of injury ... suffice." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Mission may rely on its Complaint and "other evidence [it] submitted in support of [its] preliminary-injunction motion to meet [its] burden of demonstrating Article III standing." *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) (citation and quotations omitted).

True, the Mission asks this Court to reach the merits and issue a preliminary injunction because it continues to suffer actual, ongoing harm—harm that has lasted now close to a year. But that does not alter the standing burden in appealing a motion to dismiss. In any event, the Mission makes a "clear showing" of standing because its speech and employment actions are prohibited by the WLAD, it faces a credible

threat of enforcement from the State, and declaratory and injunctive relief would alleviate its injuries.

A. The Mission has sufficiently alleged injury in fact under *SBA List* and this Court's lenient standing precedents.

To establish standing, the Mission need only allege (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) that "there exists a credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("*SBA List*") (citation omitted). The Mission's burden is especially light because First Amendment cases "raise unique standing considerations that tilt dramatically toward a finding of standing." *Lopez v. Candaele,* 630 F.3d 775, 781 (9th Cir. 2010) (cleaned up). The Mission has alleged an injury under *SBA List*.

The State mainly argues that the Mission fails to show an injury because (1) the WLAD does not prohibit the Mission's intended speech or coreligionists-only hiring, and (2) there is no reasonable fear of enforcement. *See* Ans. Br. at 17–34. These arguments miss the mark.

First, the State gets the standard wrong. The Mission's intended speech and hiring practices must only be "*arguably* proscribed" by the WLAD. *SBA List*, 573 U.S. at 162 (emphasis added); *Hum. Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1001 (9th Cir. 2010) (fear of

enforcement exists if "intended speech arguably falls within the statute's reach") (citation omitted). The State conflates standing with the merits by arguing the Mission must *prove* a constitutional violation from the outset.

Second, the Mission is forced to operate under the "specter of enforcement" *SBA List*, 573 U.S. at 165. The State (a) affirmatively vowed to enforce the WLAD, (b) took self-styled "enforcement action" against Seattle Pacific University for having the same policies as the Mission, (c) weaponized the WLAD against faith-based businesses and disregarded their religious defenses, (d) and refuses to disavowal enforcement. Plus, third-parties can enforce—and in fact are enforcing—the WLAD against faith-based organizations, bolstering the credible threat. *See id.* The Court is not "required to plug its ears and ignore [the State's] siren call, indicating the issues presented by this case require attention." *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 927–28 (5th Cir. 2023).

1. The State misconstrues *SBA List's* injury test, which requires only an *arguable* prohibition.

For the first time, the State asserts the Mission's conduct is not prohibited by the WLAD. *Compare* Ans. Br. at 20–24 *with* 3-ER-349–351 (arguing only no credible threat), 2-ER-129–132 (same). This argument fails because it conflates standing ("arguably" proscribed) with the merits ("actually" proscribed). *Arizona v. Yellen,* 34 F.4th 841,

849 (9th Cir. 2022) (citation omitted) ("standing in no way depends on the merits"). The Mission need not *prove* a constitutional violation to stay in court. *Cf.* Ans. Br. at 20 (arguing the Mission fails the first and second *SBA List* prongs because "there is no unqualified right for religious employers to ignore secular laws," and the WLAD does not proscribe the Mission's conduct). Rather, the Mission's conduct and speech need only be *arguably* prohibited. *SBA List*, 573 U.S. at 162. And it is; post-*Woods*, the WLAD—at a minimum—arguably proscribes the Mission's hiring practices and speech. *See Woods v. Seattle's Union Gospel Mission,* 481 P.3d 1060 (Wash. 2021).

Employment practices. As to the Mission's coreligionist hiring, the State says the Mission does not allege it will engage in *any* conduct that is proscribed by the WLAD following *Woods*. Ans. Br. at 23–24. That's incorrect. First consider what the WLAD prohibits. *Woods* is clear enough, but the Attorney General's own statements make clear that religious organizations can be liable for non-ministerial decisions:

> [W]hile the First Amendment clearly protects [a religious organization's] employment practices with respect to its ministers, *those protections do not extend* to discrimination against the [religious organization's] non-ministerial employees, to whom the WLAD's prohibition of employment discrimination on the basis of sexual orientation would apply.

Mot. to Dismiss at 17, *Seattle Pac. Univ. v. Ferguson*, No. 3:22-cv-05540 (W.D. Wash. Sept. 16, 2022) (emphasis added); *accord, e.g.*, 3-ER-391–93, ¶ 124 (citing similar statements). Less than three months ago, a

federal district court in Washington so held, citing *Woods*: a Christian humanitarian organization was liable under the WLAD for sexual orientation discrimination against a non-ministerial employee. *McMahon v. World Vision, Inc.*, No. C21-0920JLR, 2023 WL 8237111, at *10–14 (W.D. Wash. Nov. 28, 2023).

Now consider the Mission's conduct. The Mission requires *all* employees—including non-ministerial employees like the IT technician and operations assistant—to follow its religious beliefs, including beliefs about sexual morality. 3-ER-378–383. That means the Mission will not employ someone who engages in what it views as sexually immoral conduct, such as homosexuality or bisexuality. 3-ER-260, ¶ 35, 265 ¶ 66. As the district court acknowledged, the Mission "pleads that it intends to require its future IT Technician and Operations Assistant ... to be coreligionists" and "[t]o do so would be proscribed by the [WLAD]." 1-ER-017.

Next the State argues it cannot assess if the Mission's conduct is proscribed because it does not have enough facts. Ans. Br. at 23–24. That's the same as saying the law "arguably" prohibits the Mission's conduct. And the Supreme Court has long held that a plaintiff need not "first expose [itself] to actual arrest or prosecution … to challenge a statute" that deters its "constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)—yet exposure to investigation, lawsuits, and liability is precisely what the State insists the Mission must do here. On

top of that, this case has ample facts because it is an as-applied challenge: the Mission desires to post and fill its IT technician and operations assistant position with coreligionists who follow the ministry's beliefs on sexual morality. *Cf.* Ans. Br. at 23. The Mission has a right to know if it can be held liable for filling those positions consistent with the Mission's religious beliefs *beforehand*.

Speech. Regarding speech, the State baldly asserts that its publication ban, Wash. Rev. Code Ann. § 49.60.180(4), does not prohibit the Mission from posting its IT technician and operations assistant positions or publishing its Religious Hiring Policy. Ans. Br. at 21–23. That ignores the law's plain text. The Ban prohibits the Mission from "circulat[ing] any ... advertisement, or publication" or making "any inquiry in connection with prospective employment" which limits employment based on sexual orientation. Wash. Rev. Code. Ann. § 49.60.180(4). That's what the Mission's Religious Hiring Policy does: it explicitly tells the world that employment is conditioned on "adhere[nce] to" the Mission's "religious beliefs on biblical marriage and sexuality" including the belief that "sexual expression" is only proper in biblical marriage. 3-ER-449, 3-ER-424, 3-ER-378, 383, ¶¶ 66, 85, 3-ER-259–60, ¶¶ 27–29, 35. The Policy bars marriage and sexual conduct between members of the same sex. We already know Washington thinks that's sexual-orientation discrimination. *See Washington v. Arlene's*

Flowers, Inc., 441 P.3d 1203, 1221–22 (Wash. 2019). That means the Mission's speech is at least "arguably" prohibited.

The disclosure provision, Wash Rev. Code Ann. § 49.60.208, also arguably applies to the Mission's speech because it "prohibits employers from requiring the disclosure" of religious beliefs. If there is any difference between "requiring the disclosure of" and "asking" about religious beliefs, it does not defeat the relaxed standing requirement here. *Cf.* Ans. Br. at 23. Nor does legislative history matter because "the plain language of the statute is clear on its face," *Suzlon Energy Ltd. v. Microsoft Corp.,* 671 F.3d 726, 728 (9th Cir. 2011), and the Mission does precisely what the statute prohibits: it "require[s]" employees "to disclose [their] sincerely held religious affiliation or beliefs," Wash Rev. Code Ann. § 49.60.208. Lastly, it matters not whether the provision restricts speech only concerning current employees, future employees, or both. It restricts speech all the same.

In short, the State's argument gets the legal standard wrong: the State expects the Mission to *prove* the publication and disclosure provisions violate its free speech rights to stay in court. *Cf. Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023) (standing does not depend on the merits). The proper question is whether the WLAD arguably prohibits the Mission's speech, "not whether it was in fact proscribed under the best interpretation of the statute or under the government's own interpretation of the statute."

Picard v. Magliano, 42 F.4th 89, 98 (2d Cir. 2022); *see also Isaacson v. Mayes,* 84 F.4th 1089, 1099 (9th Cir. 2023) (second *SBA List* prong met where abortion providers' intended conduct "could be deemed violations" of state law). And here both the publication ban and disclosure provision "sweep[ ] broadly," *SBA List*, 573 U.S. at 162, meaning that the Mission's intended speech does not just *"arguably* fall[ ] within the statute's reach," *Lopez,* 630 F.3d at 788 (emphasis added; citation omitted), it actually does.

Because the Mission's employment practices and speech are affected with constitutional interests but arguably prohibited by the WLAD, it satisfies the first two *SBA List* prongs.

2. The Mission's chill is reasonable and there is a credible threat of enforcement.

The Mission also faces a credible threat of enforcement based on the State's conduct, statements, and refusal to disavow. While the State insists that a credible threat of enforcement can only exist *after* enforcement against the plaintiff has already happened, *see* Ans. Br. at 19, 34, that position is contrary to this Court's precedents and would make pre-enforcement lawsuits impossible. *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) ("The injury requirement does not force a plaintiff to await the consummation of threatened injury to obtain preventive relief." (citation and quotations omitted)).

This Court has considered the three *Thomas* factors to determine a credible threat. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). Those factors "must be considered as a whole, in light of the totality of circumstances, and not as a mandatory checklist." *Teter v. Lopez*, 76 F.4th 938, 946 (9th Cir. 2023). Here, a "combination of [ ] potential threats" shows the Mission's fear of enforcement is reasonable. *Isaacson*, 84 F.4th at 1101; *SBA List*, 573 U.S. at 158.

Concrete plan. The Mission "allege[s] a plan to violate the law because [it] intend[s] to engage in conduct arguably proscribed" by the WLAD. *Isaacson*, 84 F.4th at 1099; 1-ER-019 (district court holding the same); *contra* Ans. Br. at 26–28. *Thomas* does not require the Mission to state the "'particular time or date on which [the Mission] intend[s] to violate' the challenged statute." *Teter,* 76 F.4th at 945 (quoting *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir. 1996)). In fact, although *Thomas* cited *San Diego County* for the proposition that "when, to whom, where, or under what circumstances" allegations were necessary, *Thomas,* 220 F.3d at 1139, *Teter* explained that *SBA List* overruled "these aspects of *San Diego County*" and they are "no longer good law." *Teter,* 76 F.4th at 945. So "dates and times are not necessary" and "it is sufficient" for the Mission to identify the conduct "that they affirmatively intend to engage in." *Id.* at 946.

Nor does *Tingley* require the Mission to confess it will violate or has violated the law. *Contra* Ans. Br. at 27. "Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law." *SBA List*, 573 U.S at 163. A plaintiff does not have to "admit to violating [the] law in order to have standing to challenge it." *Arizona*, 34 F.4th at 849.

Even so, the Mission points to specific conduct that violates the WLAD. It alleged that every year it categorically screens out applicants that do not follow its beliefs on marriage and sexuality, and that it will keep doing so. 3-ER-259–61, 381–82, 393–403. Moreover, the Mission stated that should an injunction be issued, it would (a) fill its vacant IT technician and operations assistant positions immediately, (b) require those employees to adhere to its beliefs on marriage and sexuality, and (c) post its Religious Hiring Policy and the two jobs. 3-ER-265, ¶ 66; 3-ER-268, ¶¶ 82–83; 3-ER-401, ¶ 163; *cf. Italian Colors*, 878 F.3d at 1174 ("specific intent" to violate the law evidences a concrete plan). Because the Mission's employment practices "are presently in conflict" with the WLAD, it is "deemed to have articulated a concrete plan to violate it." *Cal. Trucking,* 996 F.3d at 653 (citation omitted).

Specific warning or threat and failure to disavow. Next the State argues it has not specifically warned the Mission. Ans. Br. at 28–29. But any "suggestion that a plaintiff must *always* prove 'a specific warning or threat to initiate proceedings' has no basis in [this Circuit's]

precedent." *Teter*, 76 F.4th at 946. "[A] plaintiff may reasonably fear prosecution even if enforcement authorities have not communicated an explicit warning to the plaintiff." *Isaacson*, 84 F.4th at 1100. The Mission could not have waited any longer to bring a pre-enforcement suit. If it waited for a direct letter from the Attorney General, the State would argue abstention and the Mission would be deprived of its right to seek relief in federal court: exactly what happened to Seattle Pacific University at the State's behest.

Besides, the State *has* warned religious organizations about WLAD enforcement. Washington's top law enforcement official promised to "uphold Washington's law prohibiting discrimination, including on the basis of sexual orientation" right *after* SPU sued him for unconstitutionally enforcing the WLAD. 3-ER-390, ¶ 118. That statement—combined with several other representations to this Court and lower courts, *e.g.*, Opening Br. at 26–27—satisfies the second *Thomas* factor. Even if viewed as "general statement[s]," they could be "reasonably interpret[ed] [ ] as a threat to investigate [organizations] who run afoul" of the challenged law." *Isaacson*, 84 F.4th at 1101.

The State's silence also speaks volumes. The Commission's and Attorney General's failure to disavow enforcement of the WLAD against the Mission weighs heavily in favor of standing. *SBA List*, 573 U.S. at 165; *Tingley*, 47 F.4th at 1068 (failure to disavow weighed in favor of standing despite no threats of enforcement); *Arizona*, 34 F.4th at 850

(failure to disavow "is evidence of an intent to enforce" even where government disavowed enforcement "in the way Arizona fears"); *Cal. Trucking*, 996 F.3d at 653 (failure to disavow "during th[e] litigation is strong evidence that the state intends to enforce the law"); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (citing other cases).

In *Seattle Pacific University*, the State's attorney (same one here) similarly refused to disavow future enforcement against SPU—who has the same religious hiring requirements as the Mission:

> Judge McKeown: "Well aside from the letter, has the Washington Attorney General or the Department at any time disavowed its intent to enforce this law [the WLAD] against Seattle Pacific?"
>
> Attorney Jeon: "Your honor, ***no***, your honor."

Oral Argument at 24:13–24:34, *Seattle Pac. Univ. v. Ferguson*, No. 22-35986 (9th Circuit Nov. 16, 2023)[2]. Instead, the State quibbled that disavowal was impossible because the State didn't know if the WLAD applied in the first place. *Id.*

Here, the State offers the same flawed justification in one single sentence. Ans. Br. at 34. But this is just a regurgitation of its "not arguably proscribed" argument and tantamount to saying the State will enforce the WLAD. Nor does the State need any additional facts to disavow enforcement in this as-applied case: the Mission provided

[2] Available at https://www.ca9.uscourts.gov/media/video/?20231116/22-35986/.

detailed facts about who it wants to hire, when it wants to hire them, and what criteria it will use when hiring. The State *could* disavow—it just refuses to do so.

The State's reliance on *School of the Ozarks, Inc. v. Biden,* 41 F.4th 992, 997 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2638 (2023), is misplaced. *Ozarks* is an out-of-circuit case that dealt with a challenge to a HUD internal memorandum. But in *Ozarks*, there was no threat of enforcement because the government had "formally advised the College that it [was] exempt [under Title IX] from numerous regulatory provisions on housing and other matters." *Id*. at 999. And, for eight prior years, HUD interpreted the law at issue to prohibit sexual orientation and gender identity discrimination, yet no enforcement was taken against similar colleges, thus undermining the plaintiff's fear. *Id*. Finally, the challenged memorandum was directed to internal HUD agencies and not regulated entities. *Id.*

None of the *Ozarks* circumstances are present here. This case deals with statewide nondiscrimination law, not internal federal regulatory guidance. The WLAD's religious employer exemption does not protect the Mission for its non-ministerial decisions, as the State has already acknowledged. There is ample enforcement history against similarly situated entities, including SPU, which shares the Mission's hiring policies. And the Attorney General has made several threatening "affirmative statements" putting religious organizations on notice that

the WLAD applies to their non-ministerial employees. 1-ER-020–21; *e.g.*, 3-ER-391, ¶ 124.

Active enforcement. "Courts have found standing where no one had ever been prosecuted under the challenged provision." *LSO, Ltd.*, 205 F.3d at 1155. Even so, there's a history here. The State offers three rebuttals; all fail.

1. The State says the SPU investigation was not "enforcement" of the WLAD. That's wrong three ways. First, enforcement does not have to be prosecution in court; administrative action like a government investigation counts. *SBA List,* 573 U.S. at 164.; *accord, e.g.*, *Prete v. Bradbury,* 438 F.3d 949, 952 n.3 (9th Cir. 2006) (mere "inquiry letters" that only "request [ ] additional information" can establish injury). Even "preliminary efforts" suffice. *Lopez,* 630 F.3d at 786.

Second, the State admitted the purpose of investigating SPU was to "sort[ ] out" and "categor[ize]" the school's employees 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). *That's* enforcement because "the very process of inquiry" into religious organizations "impinge on rights guaranteed by the Religion Clauses." *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979).

Third, the Attorney General has called the SPU investigation an "enforcement action" all along. Opening Br. at 30. The State talks out of

both sides of its mouth to insulate itself from actually having to defend the WLAD in federal court.

2. The fact that *Olympus Spa v. Armstrong,* No. 22-CV-00340-BJR, 2023 WL 3818536 (W.D. Wash. June 5, 2023), and *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) involved the public accommodations arm of the WLAD does not help the State. Quite the opposite, "[a] history of past enforcement against parties *similarly situated*" to the Mission "cuts in favor of a conclusion that a threat is specific and credible." *Lopez*, 630 F.3d at 786–87 (emphasis added).

And to be clear, those cases did not involve "an entirely different statute." Ans. Br. at 32. Both the employment and public accommodation provisions have existed in the Washington Law Against Discrimination since 1957. H.R. 25, 35th Leg., Reg. Sess., 1957 Wash. Sess. Laws 107–123. Further, the State admits it has enforced the WLAD's prohibition on sexual orientation discrimination against secular employers. Following *Woods* and the SPU investigation, there is no reason to believe the State will *not* enforce the WLAD against religious employers as "it enforces other restrictions" under the WLAD. *Tingley*, 47 F.4th at 1068.

3. The State cites *Isaacson* and *SBA List* for the proposition that criminal penalties are necessary to establish standing. Ans. Br. at 33. Nonsense. Criminal enforcement creates an "additional threat" that supports pre-enforcement standing; it has never been a prerequisite.

SBA List, 573 U.S. at 166. Nor does the Mission have to "establish[ ]" how the WLAD's criminal penalties are "triggered." Ans. Br. at 33. After all, law enforcement officials like the Attorney General have broad discretion when to press charges.

In the end, enforcement history "carries little weight" here because *Woods* occurred just two years before the Mission filed suit—and the investigation into SPU less than one year. *Cf. Tingley*, 47 F.4th at 1069 (complaint filed three years after challenged law was enacted).

Third-party enforcement. The State is almost completely silent on third-party enforcement, noting only that complaints *have* been filed against the Mission but discounting them because none resulted in litigation. Ans. Br. at 34. This misreads the import of third-party enforcement. Third-party enforcement "bolster[s]" the threat of enforcement, in part, because it sets in motion "burdensome" "Commission proceedings" which itself is "harm sufficient to justify pre-enforcement review." *SBA List*, 573 U.S. at 164–66; *accord* Opening Br. at 34–37. And the WLAD contains a private right of action, further bolstering standing. *Italian Colors*, 878 F.3d at 1173.

McMahon v. World Vision, Inc.—which the State does not mention once in its brief—is case in point. No. C21-0920JLR, 2023 WL 8237111 (W.D. Wash. Nov. 28, 2023). There, World Vision, a Christian ministry, rescinded a job offer to a woman in a same-sex marriage because of her inability to comply with World Vision's standards of conduct on biblical

marriage and sexuality and she then sued for sexual orientation discrimination. *Id.* at *7. After the Mission filed its opening brief here, the district court in *McMahon* held that, given *Woods*, World Vision violated the WLAD by terminating a non-ministerial employee for not adhering to the ministry's beliefs on marriage and sexuality. *Id.* at *10–14. World Vision is likely to be financially penalized merely for following its religious beliefs.

The Mission hires its personnel in the same way as World Vision. Its fear of enforcement is rational, the threat is credible, and the Mission has sufficiently pled an injury in fact. *Cf. 303 Creative LLC v. Elenis*, 600 U.S. 570, 580–83, 598 (2023) (confirming pre-enforcement standing in a similar case).

B. Redressability is met: the possibility of third-party enforcement bolsters standing, not defeats it.

The State does not defend the district court's *Rooker-Feldman* analysis, conceding its error. *See* Opening Br. at 40–43. Instead, the State argues that injunctive and declaratory relief would not remedy the Mission's injuries because third parties can still file private lawsuits. Ans. Br. at 35. But redressability does not require relief from "*every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). True, a court cannot enjoin parties not before it, "but the ability to effectuate a partial remedy satisfies the redressability requirement." *Uzuegbunam*

v. Preczewski, 141 S. Ct. 792, 801 (2021) (citation and quotations omitted).

The State's theory would defeat standing in *every* case when third-party enforcement is possible. That's not the law. *Wolfson v. Brammer*, 616 F.3d 1045 (9th Cir. 2010), did not hold that redressability is met *only* when an injunction "would entirely eliminate any enforcement of the challenged policies." Ans. Br. at 36. Rather, *Wolfson* directs that the Mission's harm is redressable by enjoining enforcement officials even if courts cannot revise the law itself. *Wolfson*, 616 F.3d at 1056. And courts routinely find standing where similar anti-discrimination laws provide for both government and private enforcement. *See, e.g.*, *303 Creative,* 600 U.S. at 583; *Religious Sisters of Mercy v. Becerra,* 55 F.4th 583, 609 (8th Cir. 2022); *Braidwood Mgmt.*, 70 F.4th at 930. Third-party enforcement *bolsters* standing, not destroys it.

The State's other cited cases are inapposite. *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), does not control because there, plaintiffs sought to enjoin the Texas attorney general, which they argued, "would automatically bind any private party who might try to bring a [private suit] against them." 595 U.S. at 43. The Court unsurprisingly held it lacked that power. Here, the Mission does not seek "an injunction against any and all unnamed private persons" who might bring private suits. *Id.* at 44.

As for *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), *Novak v. United States*, 795 F.3d 1012 (9th Cir. 2015), and *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS, Inc.*, 465 F.3d 1123 (9th Cir. 2006), they all dealt with plaintiffs who sought remedies for alleged economic harms, but the relief sought was *entirely* dependent on the actions of non-parties. That's not the case here. The State can enforce the WLAD unilaterally. 3-ER-384–87 (describing enforcement authority).

Enjoining the State from enforcing the WLAD's employment provision, publication ban, and disclosure provision against the Mission would allow the Mission to keep hiring only coreligionists and publishing its speech without fear of being penalized by the government. That is more than enough to redress the Mission's ongoing and imminent injuries.

II. The Mission's claims are ripe.

The State argues this case is not ripe. Not so. The case is constitutionally ripe because the Mission has standing. *Twitter, Inc. v. Paxton*, 56 F.4th 1170 (9th Cir. 2022). And it is prudentially ripe[3] be-

[3] Prudential ripeness is discretionary. *Thomas*, 220 F.3d at 1142. And the Supreme Court has questioned the doctrine's "continuing vitality." *SBA List*, 573 U.S. at 167. Because "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging," *id.* (cleaned up), and because the Mission has standing, *supra* § I, prudential ripeness should not be grounds for dismissal.

cause (1) the issues are fit for judicial decision, and (2) the Mission will continue to face hardship absent adjudication. *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 751 (9th Cir. 2020).

Fitness. A "claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Id.* at 752 (citation and quotations omitted). These factors are all met here. First, the Mission's claims are straightforward and present purely legal questions: whether the Constitution protects the Mission's hiring practices and speech, thereby superseding the WLAD's prohibition on sexual orientation discrimination. Second, the legal question is not about "hypothetical situations with hypothetical [employees]." *Thomas*, 220 F.3d 1142. Rather, the Mission has detailed two open positions it intends to fill immediately. 3-ER-393–398; 3-ER-439–447. The Mission "has provided enough of a specific factual context for the legal issues [ ] raise[d]." *Tingley*, 47 F.4th at 1070; *accord id.* (distinguishing *Thomas* because plaintiff described "current clients" he works with). Third, the Mission challenges final action. The WLAD has the "status of law" because it is the law; the statute directly affects the Mission because it has already caused constitutional chill; and the state nondiscrimination law always "requires immediate compliance"—as shown by the SPU investigation. *Id.* (listing factors to consider).

The State questions the Mission's documents, asserting they create ambiguity that makes this case unripe. Ans. Br. at 41–43. Not at all. The Mission's documents that reference "ministering" do not create *factual* uncertainty for the simple fact that whether a position falls under the ministerial exception is a *legal* question. Ripeness is concerned with timing and whether the facts are developed enough to issue a decision now. *SBA List*, 573 U.S. at 167. They are. The Mission has described the IT technician's and operations assistant's job duties and expectations, 3-ER-393–398, and supplied their job descriptions, 3-ER-439–447. These facts—including the Mission's documents—will not change.

The only potential ambiguity is *legal* ambiguity—*i.e.,* whether the IT technician and operations assistant are ministers. And that's not ambiguous either. The Mission conceded from the start of this litigation that those positions are *not* ministers under the ministerial exception. 3-ER-393–96. And the Mission described why those employees would not fall under the exception. 3-ER-394–96; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063–69 (2020) (describing factors to consider). The court below accepted the Mission's concession. 1-ER-017.

While the State splits hairs over the Mission calling all employees "ministers," it makes no legal difference. After all, "[s]imply giving an employee the title of 'minister' is not enough to justify the exception."

Our Lady, 140 S. Ct. at 2063. The Mission recognizes this, which is why it sued to *protect* its decisions about non-ministers.

If appropriate, this Court could view the IT technician and operations assistant job descriptions and duties and hold they fall under the ministerial exception. The Mission would accept that relief because then its religiously motivated conduct would be protected. But the Mission has not brought a ministerial exception claim, and it would be extraordinary for a court to decide a matter not pressed before it. What would be easier is for the State to concede the two positions are protected by the ministerial exception and disavow WLAD enforcement. Full stop. Until then, this case presents straightforward legal questions, does not require additional facts, and is ripe.

But the Court doesn't even need to look at specific job descriptions because the coreligionist exemption is purely legal; no other facts would alter the analysis. *See infra* pp. 26–28. The case is ripe because the Mission needs to hire non-minister, coreligionists right now. 3-ER-394, ¶ 130.

The State throws one last ripeness Hail Mary, arguing the Mission "asks this Court to declare the limits of [its] sweeping First Amendment theory without any information about ... how [the Mission] investigates and enforces its policy." Ans. Br. at 44. But the Court does not need facts about *every single* application of the Mission's beliefs to decide the much narrower issue of whether the Mission legally can

require its IT technician and operations assistant (and all other employees) to follow its belief about biblical marriage and relationships—*i.e.*, the same underlying issues in *Woods* and *McMahon*.

Hardship. The State repackages its lack of injury argument under the hardship prong. Because the Mission's hiring criteria are illegal under the WLAD, the Mission faces hardship by risking penalties and prosecution. Plus, the Mission is chilling its speech *today*, causing it First Amendment hardship that requires a remedy.

III. This Court should reach the merits and enter a preliminary injunction because the Mission is being harmed right now.

This Court has "equitable discretion to reach an issue in the first instance." *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 946 F.3d 1100, 1110 (9th Cir. 2020) ("*PPGW*"). This Court can—and should—reach the Mission's preliminary injunction request because (1) "injustice [will] otherwise result" and (2) the issues are "purely legal." *Id.* (citations omitted).

First, the Mission has been unable to exercise its constitutional rights for almost a year because of the district court's erroneous standing ruling. Declining to end this injury is injustice. This Court should decide the issue "rather than remanding and thereby guaranteeing that [the Mission's] claimed injury will persist during the further litigation." *Skyline*, 968 F.3d at 754; *see also Hormel v.*

Helvering, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.").

Second, the issues at this stage of the case are purely legal. *See supra* § II. This Court "need not wait" because the legal questions would not "be affected by deference to a trial court's factfinding or fact application." *PPGW*, 946 F.3d at 1111. There are no fact issues for the district court to determine at this stage, all parties submitted declarations containing all necessary decisional information, and the State could have requested an evidentiary hearing had it thought more evidence was needed. The merits are fully briefed, and this Court sits in no different position to decide the issues than the district court would on remand. *Cf. Skyline*, 968 F.3d at 754 (noting both parties addressed the merits of a free exercise claim on appeal).

A. The Mission is likely to succeed on its claims because Washington's application of the WLAD must submit to the Constitution.

Church autonomy. The State offers two rebuttals to the Mission's autonomy claim. First, it argues only ministerial employment decisions merit constitutional protection. Ans. Br. at 49. But church autonomy protections extend beyond ministerial employees. *See* Opening Br. at 46–51. That's because the Religion Clauses bar courts from adjudicating *religious questions*. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871) (courts cannot decide "a matter which concerns

theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the *standard of morals required of them*") (emphasis added). And deciding a discrimination claim against a religious organization that asserts the decision was based on its religious beliefs would necessarily require deciding what the religion proscribes or prescribes, and whether the religious belief or practice was truly followed or violated. Endeavoring to answer that question unconstitutionally entangles government in religion. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 344 (1987) (Brennan, J., concurring).

Second, the State creates a straw man, claiming the Mission asks for "sweeping immunity from civil rights laws." Ans. Br. at 47. Not even close. The Mission does not claim jurisdictional immunity from the entire WLAD. What it does claim is a right to make employment decisions rooted in its faith, free from liability. When those decisions are made, the State must be stopped from labeling those decisions as "discrimination" in violation of civil rights laws.

This is not to say the government cannot engage in limited fact-finding. After all, courts routinely do so in ministerial exception cases when they look at the function and duties of the position and not the *reason* behind the employment decision. But in coreligionist exemption cases, the inquiry is almost the opposite. Instead of looking at the *position*, courts should look at the *reason*: "If the religious employer

fired the employee for a religious reason, then the 'religious questions' doctrine is implicated, and courts should avoid excessively entangling themselves by adjudicating the dispute." Athanasius G. Sirilla, *The "Nonministerial" Exception*, 99 Notre Dame L. Rev. 393, 417 (2023). If the religious justification is sincere, the ministry cannot be penalized under nondiscrimination law. *See generally id.*

Free exercise. Next, the State misapplies *Tandon v. Newsom,* 593 U.S. 61 (2021) (per curiam), in arguing that the WLAD's small-employer exemption has no bearing on the Mission's rights. *Tandon* held that a law is not "neutral and generally applicable ... whenever [it] treat[s] *any* comparable secular activity more favorably than religious exercise." 593 U.S. at 62. The first step in the analysis is to determine the government interest that the WLAD advances. *Id.* The State's argument fails at step one when it says that the small-employer exemption is not comparable because it is "supported by a different state interest." Ans. Br. at 52. The question is not what interest justifies the *exemption* but what interest justifies the *rule*—the prohibition on employment discrimination. *Tandon*, 593 U.S. at 62. Interests that justify the WLAD *exemptions* go toward strict scrutiny, where the State must show it has a compelling interest in denying religious employers the same exception granted to small employers. *Id.* There is no "legislative line-drawing" exception to the Free Exercise Clause. *Cf.* Ans. Br. at 52. As this Court recently made clear en banc, "[t]hat the

[State] allows such discrimination for [small employers] significantly undercuts its goal" in preventing employment discrimination. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689 (9th Cir. 2023) (en banc) ("*FCA*").

As for individualized exemptions, *Marchioro v. Chaney*, 582 P.2d 487, 489 (Wash. 1978), did not somehow destroy the individualized exemption authority found in § 49.60.180(3). That case dealt with a different statute, and any discussion of the Washington Equal Rights Amendment is dicta. No federal or state court has held § 49.60.180(3) invalid under the Washington Constitution, and it remains on the books. The Court need not reach this issue, however, because the State ignores the Attorney General's exemption authority, conceding the WLAD fails general applicability. Opening Br. at 53.

Expressive association. There is no employment exception to the First Amendment. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 528 (2022). *Hishon v. King & Spalding*, 467 U.S. 69 (1984) does not apply. That case did not hold that the right to expressive association was inapplicable to employment disputes. Rather, it held that a large, for-profit law firm failed to show how the "association" at issue—making women partners—would limit its "ability" to express its messages and views. *Id*. at 78. Just because the Mission pays its employees does not mean it loses its expressive associational rights.

Green v. Miss United States of Am., LLC, 52 F.4th 773, 803–806 (9th Cir. 2022) (Vandyke, J., concurring).

Speech. The Mission's speech is not commercial speech. The Mission is a nonprofit, religious charity organization. Needless to say, it does not act "primarily out of economic motivation" by publishing its Religious Hiring Policy. *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1116 (9th Cir. 2021) (emphasis omitted). And because the Mission's right to hire only coreligionists is protected by the First Amendment, its speech is too.

B. The State promises to enforce the WLAD, satisfying the remaining factors and proving a threat exists.

The Mission will not rehash its injury arguments here: it faces irreparable harm because its constitutional rights are currently chilled.

Further, despite arguing at length that there is no threat of WLAD enforcement, the State promises to enforce "the WLAD as set out by the state's highest court" because doing so is "unquestionably a matter of the highest public importance." Ans. Br. at 56. The State's staunch defense of the WLAD on the merits concedes there is a threat to the Mission. *E.g.*, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 770 (6th Cir. 2019) (continued defense of a policy suggested future threat). And while nondiscrimination laws might serve "admirable goals, [ ] when those goals collide with the Constitution's protections, those goals must yield—no matter how well-intentioned." *FCA*, 82 F.4th at 695

(citation omitted). The Mission is not asking the State to ignore state law; the State is asking the Court to ignore the Constitution. The Court should decline that extraordinary invitation.

CONCLUSION

The Court should reverse the district court's order dismissing the case and order the court to enter the Mission's requested preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2024, I electronically filed the foregoing Reply 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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February 12, 2024

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FOR THE NINTH CIRCUIT

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