No. 21-144

IN THE
Supreme Court of the United States

SEATTLE'S UNION GOSPEL MISSION, *Petitioner*,

v.

MATTHEW S. WOODS, *Respondent*.

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

Brief of *amici curiae* the Islam and Religious Freedom Action Team of the Religious Freedom Institute and the Jewish Coalition for Religious Liberty in support of Petitioner

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INTEREST OF *AMICUS CURIAE* [1]

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

The Jewish Coalition for Religious Liberty is a cross-denominational association of lawyers, rabbis, and communal professionals who practice Judaism and are committed to religious liberty. As adherents of a minority religion, its members have a strong interest in ensuring that religious liberty rights are protected.

Though the facts underlying this appeal do not involve Islamic or Jewish expression or beliefs, the lower court's misapprehension of religious entities' right to hire coreligionists is of great concern to all faith groups and to minority faiths especially. In particular, *amici* fear the lower court's reasoning and holding, if

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[1] The parties' counsel were timely notified of and consented to the filing of this *amicus* brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amicus curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

uncorrected, will have especially deleterious effects on adherents of minority religious faiths who, like Petitioner, often organize collectively to serve the poor and needy as an expression and exercise of their faith.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the Supreme Court of Washington and bring uniformity to the understanding and application of the co-religionist exemption. *Amici* will not repeat Petitioner's arguments explaining the constitutional nature of the coreligionist exemption and why it is a needful companion to the robust protections afforded by this Court under the First Amendment's ministerial exception.

Rather, *amici* focus more narrowly on explaining the additional salutary benefits of a proper application of the coreligionist exemption that defers to religious organizations' own determination of which activities undertaken as part of their religious mission and thus must be conducted by fellow believers. Applied in that way, the exemption preserves the autonomy of religious groups; recognizes and respects their unique knowledge of and expertise in their religious missions and practices; preserves the rights of religious minorities; and avoids First Amendment violations.

The alternatives—requiring religious groups to hire non-adherents for roles that, while not "ministerial," are nevertheless related to the furtherance of the groups' religious mission, or allowing *courts* to decide what tasks and roles have religious significance—would have an outsized and especially perni-

cious effect on minority faith groups. Such groups can maintain their distinct religious identity only by their ability to select leaders, employees, staff, volunteers, and fellow-laborers who share their religious beliefs. Nor can courts be responsible to determine which activities and roles are related to the religious mission of organizations whose religious beliefs, mission, and motivation may be unfamiliar to them. In *amici*'s own faiths, for instance, individuals in religious organizations often engage in activities that, in Christian thought, may not appear to be religiously significant or in furtherance of a religious mission, but which, in fact, are deeply connected to religious observance or the religious organization's mission.

The absence of a robust and uniform application of the coreligionist exemption threatens minority or unfamiliar faith groups with (i) the loss of their religious identity and autonomy; (ii) the imposition of coercive pressure on them to conform in belief and practice to prevailing secular definitions of roles; and (iii) the potential of self-censorship that forces the alteration, limitation, or abandonment of aspects of a religious group's mission and religious practices.

ARGUMENT

As explained in the Petition for a Writ of Certiorari, the coreligionist exemption—which has been recognized by all three branches of government and by all six of the federal appellate courts to consider the issue—allows religious organizations to condition employment on adherence to certain religious tenets. The exemption provides that any attempt "to forbid religious discrimination against non-minister employees where the position involved has any religious

significance is uniformly recognized as constitutionally suspect, if not forbidden." *Little* v. *Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991). See also *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (stating the First Amendment must protect religious organizations' right to define themselves by deciding "that certain activities are in furtherance of [their] religious mission, and that only those committed to that mission should conduct them").

The near universality of that understanding, however, apparently does not extend to the State of Washington. Accordingly, and for the reasons explained below, the Court should grant the Petition, reverse the ruling below, and bring needed uniformity to this area of the law.

I. Courts should defer to religious groups' determinations of which roles or activities should be limited to coreligionists.

In applying the coreligionist exemption, courts should defer to religious groups' understanding of the "religious significance" of a position or activity for at least four reasons. First, deference preserves the autonomy of religious groups. Second, deference recognizes and respects the unique self-knowledge and expertise of religious groups. Third, deference preserves the rights of religious minorities. And fourth, deference avoids First Amendment violations.

A. Deference preserves the autonomy of religious groups.

Writing for this Court over three decades ago, Justice White described the dangers posed to reli-

gious autonomy by judicial intervention in religious practice:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. *Amos*, 483 U.S. 327, 336 (1987).

Legal commentators have recognized similar autonomy concerns:

> Even if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal. Regulation may be thought of as taking the power to decide a matter away from the church and either prescribing a particular decision or vesting it elsewhere—in the executive, a court, an agency, an arbitrator, or a union. And regulation takes away not only a decision of general policy when it is imposed, but many more decisions of implementation when it is enforced.

Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Rela-*

tions and the Right to Church Autonomy, 81 COLUM. L. REV. 1373, 1399 (1981).

In short, Justices and legal scholars alike have recognized the straightforward and somewhat common-sense proposition that judicial determination of what has "religious significance" to a given religion necessarily deprives religious groups of the autonomy to make that decision for themselves. This is particularly true for religions like *amici*'s that are broad enough to include differing strands or denominations that may not themselves agree on all the particulars of the interpretation, application, and outworking of their faith. It is far too simplistic to think, for example, that a court could simply apply "the Jewish view" or "the Muslim view" when analyzing a Jewish or Muslim organization's assertion of the coreligionist exception, as if each faith group were a monolithic entity without internal variations and nuances of faith and practice. Respect for religious autonomy, then, counsels in favor of deference.

B. Deference recognizes and respects the unique self-knowledge and expertise of religious groups.

Deference is also owed to religious groups based on their own knowledge of their religious traditions. In a separate context, this Court has recognized that "judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S.Ct. 2049, 2066 (2020). Judge O'Scannlain recognized a similar point in his concurring opinion in *Spencer* v. *World Vision, Inc.*, asking : "[i]f we are ill-equipped to determine whether an ac-

tivity or service is religious or secular in nature, how are we to know which side of the line an entity's 'purpose' falls on?" 633 F.3d 723, 732 (9th Cir. 2011) (O'Scainnlain, J., concurring). He continued:

> The same is true for factors which ask this court to determine whether an organization includes 'prayer' or 'worship' in its activities, or whether it disseminates a 'religious' curriculum. . . . In such a scenario, it is questionable whether a court is competent to distinguish religious speech (or instruction) from other activities.

Spencer, 633 F.3d at 732 n.8. In a country with at least 221 recognized religions, it would be impossible for any judge to understand the central tenets, much less the scope of activities, of all those religious groups. See Kimberly Winston, *Defense Department expands its list of recognized religions*, RELIGIOUS NEWS SERVICE (April 21, 2017), https://religionnews.com/2017/04/21/defense-department-expands-its-list-of-recognized-religions/.

In other contexts, courts routinely grant deference to various entities based on those entities' knowledge or expertise. See Note, *The Ministerial Exception to Title VII: The Case for A Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1792 (2008). For example, in expressive association cases, this Court has given deference to an association's own assertions regarding the nature of its expression. See *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."). In aca-

demic promotion or tenure cases, courts have been willing to defer to the expertise of educators. See, e.g., *Kunda* v. *Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980) ("Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges."). Perhaps most famously, many early decisions on deference to administrative agencies were based at least in part on agency expertise. See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 741 (2002) ("Skidmore, Chenery, and Cement Institute all invoke enhanced agency expertise as the rationale for affording agency work product deference on judicial review.").

C. Deference preserves the rights of religious minorities.

Deference also preserves the rights of religious minorities, whose traditions may less familiar to the judiciary. To the extent judges' own religious preferences or affiliations may inform their decisions in a particular case, it is noteworthy that many courts are composed almost exclusively of jurists from a Judeo-Christian heritage. See Sepehr Shahshahani and Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeal*, 14 JOURNAL OF EMPIRICAL LEGAL STUDIES 716 (2017) (describing the religious affilia-

tion of federal appellate judges).[2] Although these judges may be familiar their own faith traditions, they are almost certainly less familiar with other faith traditions. This lack of familiarity necessarily hinders any attempt to judicially define religious significance.

Justice Thomas recognized this point in the context of the Ministerial Exception in his concurring opinion in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *E.E.O.C.*: "[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." 565 U.S. 171, 197 (2012) (Thomas, J., concurring). Judge O'Scannlain acknowledged a similar point in his concurring opinion in *Spencer*: "While these questions [about the scope of an organization's religious activities] are relatively easy in some contexts, they might prove more difficult when dealing with religions whose practices do not fit nicely into traditional categories." 633 F.3d at 732 n.8.

D. Deference avoids First Amendment violations.

Deference also avoids potential First Amendment violations. For one, it prevents "the kind of intrusive inquiry into religious belief" that this Court has condemned. *Amos*, 483 U.S. at 339. Further, as the Third Circuit explained in *Little* v. *Wuerl*, the

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[2] The Senate confirmed the Honorable Zahid Quraishi as a United States District Judge on June 10, 2021. Judge Quraishi is the first Article III judge of the Muslim faith in American history.

application of employment non-discrimination laws to religious groups "would be constitutionally suspect because it would arguably violate both the free exercise clause and the establishment clause of the first amendment." 929 F.2d 944, 947 (3d Cir. 1991). In explaining the potential problem of excessive entanglement, the Third Circuit noted:

> [T]he inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship less fit for scrutiny by secular courts. Even if the employer ultimately prevails, the process of review itself might be excessive entanglement.

Id. at 949.

II. Judicial second-guessing of the religious significance of an activity or role has an especially deleterious effect on minority religions.

Even assuming *arguendo* that judges could reliably determine what roles and activities have religious significance in faith traditions they are familiar with, they are ill equipped to do so in the context of faith traditions whose beliefs, liturgy, roles, spiritual obligations, and duties are unfamiliar to them.

Take *amici*'s faith groups, for example. Across the nation, as around the world, Muslims organize together, often in incorporated form, to provide social services to the poor and needy. To an outsider, these groups and their activities may appear indistin-

guishable from similar social services provided by the government or by secular charitable organizations. Accordingly, to an outsider, a Muslim individual employed by such a group providing such services may not appear to be engaged in activities related to or in furtherance of a religious mission.

Nothing could be further from the truth. In Islam, the social services noted above, as well as other deeds in service of the public good, are commanded in the Hadith. See, e.g., *Musnad Ahmad ibn Hanbal*, Vol. 12 at 208 (Ahmad Zayn, ed.) (1994) ("Honor the guest, be generous to the orphan, and be good to your neighbor."); *Ṣaḥiḥ Ibn Ḥibban bi-Tartib Ibn Balaban*, Vol. 2 at 262 (Shuʿayb al-Arnaʾuṭ, ed.) (1993) ("There are rooms in Paradise which God has prepared for those who feed others, spread greetings of peace, and pray at night while others sleep."). Indeed, even a general disposition of friendliness is itself part of the mission of the Muslim believer, and being beneficent to others is thus an activity of religious significance. See Abu Hamid Muhammad al-Ghazali, *Ihya Ulum ad-Deen*, Vol. 5 at 112 (2016) ("The believer is friendly and befriended, for there is no goodness in one who is neither friendly, nor befriended. The best of people are those who are most beneficial to people.").

To a jurist unfamiliar with Islam, then, it would be easy erroneously to miss the fact that care for orphans or the needy is of great religious significance, as it is commanded by the Prophet as a way of sharing the faith and carrying out its mission.

So too could a jurist lacking sufficient knowledge of and experience with the Jewish faith erroneously substitute his or her own view of "religious signifi-

cance" for that of the religion. Activities relating to keeping kosher, for example, are of great religious significance but include conduct that, to an outsider, would not seem overtly religious. Kosher food preparation requires an extensive knowledge of Jewish law and a willingness to adhere to it strictly despite the difficulties that entails. Kosher laws apply not only to the food that is served at an event; they govern every aspect of the food's preparation. For example, many religious Jews go through a rigorous process of washing vegetables and checking to make sure that they do not contain bugs, because bugs are not kosher. Many religious Jews would not eat vegetables unless they were certain that the processes had been strictly followed. Accordingly, in Judaism, a task that, by secular or Christian standards seems mundane and unrelated to religious observance, actually carries great religious significance. In the absence of personal knowledge of and experience with Judaism, a jurist could mistakenly conclude that this or a dozen other tasks or roles lack religious significance.

The absence of a robust and uniform application of the coreligionist exemption lands with outsized impact on minority or unfamiliar faith groups and threatens (i) the loss of their religious identity and autonomy; (ii) the imposition of coercive pressure on them to conform in belief and practice to prevailing secular definitions of roles; or (iii) a self-censoring alteration, limitation, or abandonment of aspects of a religious group's mission and religious practices.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court grant certiorari to review the judgment of the Supreme Court of Washington and bring clarity to First Amendment jurisprudence involving the right of religious entities to hire coreligionists.

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