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, ANDRETA ARMSTRONG, in her official capacity as Executive Director of the Washington State Human Rights Commission; and GUADALUPE GAMBOA, HAN TRAN, JEFF SBAIH, LUC JASMIN, and CHELSEA DIMAS, in their official capacities as Commissioners of the Washington State Human Rights Commission,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
No. 1:23-CV-3027-MKD
The Honorable Mary K. Dimke
United States District Judge

APPELLEES' ANSWERING BRIEF

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I. INTRODUCTION

The Union Gospel Mission of Yakima (UGM) sued the Attorney General of the State of Washington, and the Executive Director and Commissioners of the Washington State Human Rights Commission (HRC), based on zero actions that either agency has taken, or even threatened to take, against UGM. Relying on the mere existence of a state antidiscrimination law, the conduct of unrelated third parties, and naked speculation that UGM may someday be the subject of enforcement action, UGM sued preemptively and prematurely. And remarkably, UGM also requested the extraordinary relief of a preliminary injunction. But the federal judiciary exists to resolve cases or controversies, not to provide advisory opinions on abstract disagreements. The district court properly dismissed UGM's claims for lack of Article III standing and ripeness, and denied its motion for preliminary injunction as moot. This Court should affirm for at least three reasons.

First, UGM did not and cannot carry its burden to establish standing. It brings this case alleging that its faith prohibits hiring anyone who engages in sexual activity outside of a marriage between a man and a woman, and says it fears that such policy does not comport with the Washington Law Against Discrimination (WLAD). While First Amendment plaintiffs need not violate state law before filing a federal suit, they must show that there is imminent enforcement of the challenged law. UGM cannot do that here because its

pleadings do not identify a single instance where it refused to hire, fired, or otherwise took adverse employment action against an individual based on sexual orientation—or any concrete plan to do so in the future—in a manner proscribed by the WLAD. As a result, UGM suffers no Article III injury. And even if it were injured, its claims are not redressable by this Court because this Court's decision will not prohibit private parties from bringing suit under the WLAD.

Second, UGM's claims are not ripe for review. It fails to allege injury-in-fact to establish constitutional ripeness. And as to prudential ripeness, UGM's claim does not present a purely legal question or concrete factual scenario for the district court to adjudicate. UGM itself introduces a host of factual contradictions regarding the roles and responsibilities of its employees that makes federal review of its claim inappropriate at this time. Ripeness protects the federal judiciary from resolving these abstract, hypothetical disagreements.

Finally, even if this Court were to determine that UGM pled sufficient facts to establish standing and that its claims are ripe for judicial review, it should remand to the trial court for its consideration of the motion for preliminary injunction in the first instance. UGM does not satisfy the factors for a preliminary injunction, and its request that the Ninth Circuit affirmatively enter an injunction on appeal is both highly unusual and unsupported by even a single citation in UGM's brief.

The Court should affirm the district court's order dismissing the case and denying UGM's motion for a preliminary injunction as moot.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1291.

III. STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

IV. COUNTERSTATEMENT OF THE ISSUES

1. Whether UGM lacks Article III standing to bring a pre-enforcement challenge seeking prospective relief from future, hypothetical enforcement of a state employment discrimination law in the absence of any threat of enforcement, where UGM fails to allege any facts that explain whether or how it has violated state law in the past, fails to allege a concrete plan to violate state law in the future, and where the requested relief is not redressable.

2. Whether a pre-enforcement challenge seeking prospective relief from a state employment discrimination law is ripe for review when UGM does not allege constitutional injury-in-fact and its allegations create an ambiguous factual record that is not concrete for review and does not present a purely legal issue.

3. Whether UGM is entitled to a preliminary injunction in the first instance from this Court when its sweeping First Amendment theory has no basis

in U.S. Supreme Court or Ninth Circuit precedent, and where it fails to establish any of the remaining *Winter* factors required for a preliminary injunction.

V. STATEMENT OF THE CASE

A. The Religious-Employer Exemption Under the Washington Law Against Discrimination

Washingtonians have a right to be free from unlawful discrimination in employment. Wash. Rev. Code §§ 49.60.030, .180. In establishing that right, the Washington Legislature made clear that "discrimination against any of [the State's] inhabitants because of . . . sexual orientation . . . [is] a matter of state concern," and that such discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." Wash. Rev. Code § 49.60.010.

Under the WLAD, it is an unfair practice for an "employer" to "refuse to hire any person," "discharge or bar any person from employment," or "discriminate against any person in compensation or in other terms or conditions of employment" because of sexual orientation. Wash. Rev. Code § 49.60.180(1)–(3); *accord* Wash. Rev. Code § 49.60.030(1)(a). The Washington Legislature defined "employer" to "include[] any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." Wash. Rev. Code § 49.60.040(11).

To support the rights of Washingtonians, the Legislature created the HRC, a state agency which, among other duties, is charged "[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter." Wash. Rev. Code § 49.60.120(4). In addition to litigating discrimination claims in court, Washingtonians may file complaints of alleged discrimination with the HRC. *See* Wash. Rev. Code § 49.60.230. The HRC promptly reviews and evaluates such complaints. *See* Wash. Rev. Code § 49.60.240. If the underlying facts do not constitute an unfair practice, the HRC may find no reasonable cause that an unlawful practice occurred without any further investigation. *See* Wash. Rev. Code § 49.60.240(1)(a). If, following an impartial investigation, the HRC finds reasonable cause to believe discrimination occurred, it attempts to resolve the matter by conference, conciliation, and persuasion. *See* Wash. Rev. Code § 49.60.240(3). If voluntary resolution is unsuccessful, it may bring an enforcement action. *See* Wash. Rev. Code § 49.60.250.

Washington courts regularly interpret the WLAD's scope and application in light of both state and federal constitutional considerations. As relevant here, this includes the Washington Supreme Court's 2014 decision in *Ockletree v. Franciscan Health System*, interpreting the WLAD's exemption of "religious or sectarian organization[s] not organized for private profit[]" from the definition of covered "employer[s]" who must abide by the WLAD's anti-discrimination

rules. 317 P.3d 1009, 1013 (Wash. 2014) (interpreting Wash. Rev. Code § 49.60.040(11)). The court held that although the provision exempts many employment decisions of religious employers from anti-discrimination rules, the exemption does not apply to claims brought by an employee "whose job description and responsibilities are wholly unrelated to any religious practice or activity." *Id.* at 1028 (interpreting Wash. Rev. Code § 49.60.040(11)) (Wiggins, J., concurring in part and dissenting in part) (opinion containing the narrowest ground supporting the majority result and thus representing the court's holding).

Seven years later, the Washington Supreme Court again addressed the WLAD's religious employer provision in *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060, 1067 (Wash. 2021), *cert. denied*, 142 S. Ct. 1094 (2022). There, the court considered whether the WLAD's religious-employer exemption facially violated the state constitution by improperly favoring religious employers. *Id.* at 1064.

The court in *Woods* reaffirmed that the WLAD's exemption of religious nonprofits from the definition of "employer" was facially constitutional under the state constitution. *Id.* at 1065. However, it held that the exemption "may be constitutionally invalid *as applied* to [the plaintiff]," a bisexual job applicant, in his particular circumstances. *Id.* at 1063 (emphasis added). The court held that the WLAD's religious employer exemption was limited to employees who are "ministers" as defined by the U.S. Supreme Court's First Amendment

jurisprudence. *Id.* at 1069. Under that federal standard, determining whether an employee is a "minister" requires a fact-specific assessment of a non-exclusive "variety of factors," including the level of religious training and examination required for the job, any religious commission the employee receives, any requirement to instruct on religious subjects, any duties to pray with others or attend religious services as part of the job, and the extent to which the church and the employer hold the employee out to the world as a minister. *Id.* at 1068 (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020)). The court concluded that adopting the "ministerial" framework from federal law struck the appropriate balance between the First Amendment's protections of religious employers from "state interference with religious freedoms," and the state constitutional prohibitions on favored treatment for certain classes of businesses. *Id.* at 1067. The court remanded for further proceedings on the plaintiff's as-applied challenge. *Id.* at 1070.

In reaching this result in *Woods*, the Washington Supreme Court made clear that its decision "do[es] not opine on the effect of this decision on *every* prospective employee seeking work with any religious nonprofit such as universities, elementary schools, and houses of worship." *Id.* at 1065 n.2. Instead, the decision was limited to the specific job and the specific job applicant before the court. *Id.* (listing examples of other religious employers in Washington that, depending on the facts, may fall under the religious employer

exemption). The court made clear that "we do not hold that no set of circumstances exist under which the religious employer exemption can be constitutionally applied." *Id.* The U.S. Supreme Court denied a petition for a writ of certiorari to review *Woods* with no noted dissents. *Woods*, 142 S. Ct. at 1094.

B. UGM Files a Pre-Enforcement Challenge and the District Court Grants the State's Motion to Dismiss Current Proceedings

On March 2, 2023, UGM filed suit against Robert Ferguson, in his official capacity as Attorney General of Washington; Andreta Armstrong, in her official capacity as Executive Director of the HRC; and Guadalupe Gamboa, Han Tran, Jeff Sbaih, Luc Jasmin, and Chelsea Dimas, in their official capacities as Commissioners of the HRC (collectively, State).[1] *See* 3-ER-403–15. UGM's complaint asked the district court to "[d]eclare that the recent narrowed interpretation of the WLAD," referring to the Washington Supreme Court's opinion in *Woods*, is unconstitutional under the First Amendment of the U.S. Constitution. 3-ER-413–14.

Specifically, UGM alleges that the WLAD's employment discrimination provisions, Wash. Rev. Code § 49.60.180(1)–(3), violate its First Amendment rights under the Religion Clauses, Free Exercise Clause, expressive association

[1] UGM's Complaint named Deborah Cook as a defendant in her official capacity as a Commissioner of the Washington State Human Rights Commission. However, Ms. Cook is no longer a Commissioner. Luc Jasmin and Chelsea Dimas were recently appointed to the Commission and are substituted as Defendants-Appellees, in their official capacities as HRC Commissioners pursuant to Fed. R. App. P. 43(c)(2).

protection, and Establishment Clause. *See* 3-ER-404–10, 412–13. It also challenges the WLAD's provisions regarding employment advertisements, Wash. Rev. Code § 49.60.180(4), and religious affiliation disclosures, Wash. Rev. Code § 49.60.208, as violating the Free Speech Clause. *See* 3-ER-410–12. The employment advertisement provision provides that it is an unfair practice for an employer "[t]o print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to" any protected class. Wash. Rev. Code § 49.60.180(4). The religious-affiliation disclosure provision provides that it is an unfair practice for an employer to "[r]equire an employee to disclose his or her sincerely held religious affiliation or beliefs, unless the disclosure is for the purpose of providing a religious accommodation at the request of the employee." Wash. Rev. Code § 49.60.208(1).

Acknowledging that its action is a pre-enforcement challenge, UGM alleges that the WLAD will be enforced against it even though the State had no contact or correspondence with UGM about its employment practices. Instead, UGM alleges a likelihood of future enforcement stemming from a letter that the Attorney General's Office (AGO) sent to Seattle Pacific University (SPU) inquiring about SPU's employment practices. Opening Br. at 24–25. That letter

to SPU, sent by the AGO after it received numerous complaints about SPU's employment practices, asked for information while making clear that the AGO "ha[s] not made any determination as to whether [SPU] has violated any law." 3-ER-344; 3-ER-434–35. The letter to SPU did not compel production of the requested information, did not threaten any consequences for noncompliance with the information request, and expressly acknowledged that the ministerial exception might apply to SPU's employment practices. 3-ER-434–35 (citing *Woods*). SPU filed suit, alleging that the AGO's request for information violated its First Amendment rights. *See* ER-344–45. The district court dismissed SPU's case as non-justiciable, including for lack of standing. *Id.*

Despite never receiving any communication from any State regulator regarding its employment practices, UGM cites the AGO's legal filings in the SPU lawsuit to allege that UGM would face enforcement for its comparable employment policies. UGM further alleges that State enforcement against it is foreseeable due to public discussions about its policies on the online forum Reddit, the publication of an online *Newsweek* article, and an anonymous phone call. *See* 3-ER-398–400. UGM does not allege that the State participated in or prompted the online discussion or news article, and does not allege the State (or anyone else) took any action in response thereto. *Id.* Critically, the complaint also does not allege that UGM has *ever taken* adverse action against an LGBTQ+ employee or prospective employee as a result of its employment policies. *See*

3-ER-381–83. Instead, UGM argues that the mere existence of the WLAD, combined with its general (but unapplied) employment policies, is sufficient to allow UGM to bring a pre-enforcement challenge. 3-ER-393 ¶ 126.

The State moved to dismiss, arguing that UGM had suffered no cognizable Article III injury, its alleged injuries were not caused by the State, its injuries could not be redressed by a favorable decision, and its claims were not ripe for review. *See* 3-ER-342–61. UGM moved for a preliminary injunction to prohibit enforcement of the WLAD against (1) its hiring of only "co-religionists," or those who agree with UGM's religious tenets and conduct requirements, for all of its employment positions, and (2) its "publishing and communicating its religious beliefs and behavior requirements for non-ministerial employees to others," including through publishing a religious hiring statement. 3-ER-233.

The district court heard oral argument on both motions. When the Court asked how the First Amendment could wholly exempt non-ministers in light of the U.S. Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady Guadalupe*, counsel for UGM stated that the Supreme Court "admittedly hasn't taken a case to recognize yet that the co-religionist exemption is, indeed, embedded in the First Amendment." 2-ER-087:5–7.

The district court granted the State's motion to dismiss for lack of Article III standing and denied UGM's preliminary injunction as moot. 1-ER-030. The court determined that UGM failed to establish injury-in-fact or redressability.

Concerning injury, the court held that UGM did not establish a credible threat of prosecution. With respect to the HRC, there is no credible threat because it has not communicated to UGM any specific warning or threat of enforcement and there is no history of past enforcement. *See* 1-ER-021–22. And with respect to the AGO, the court concluded that there is no credible threat of prosecution because UGM points to only a single instance of "*potential* enforcement" action against a different entity and "[a] single inquiry is insufficient to demonstrate enforcement." 1-ER-022–24.

Regarding redressability, the court ruled that UGM's complaint is best understood as a challenge to the Washington Supreme Court's decision in *Woods*. 1-ER-027. Consequently, because any of UGM's requested forms of relief would "effectively reverse" or "void" the Washington Supreme Court's decision, the court concluded that UGM's claims are an impermissible appeal under 28 U.S.C. § 1257 and the *Rooker-Feldman* doctrine. 1-ER-029 (citing UGM's request that the Court "[d]eclare that the recent narrow interpretation of the WLAD . . . violates [UGM]'s First Amendment rights").

In light of this ruling, the court denied UGM's motion for a preliminary injunction as moot without addressing the parties' arguments. 1-ER-030. UGM appealed. 3-ER-458.

VI. STANDARD OF REVIEW

The district court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing is reviewed de novo. *Banks v. N. Trust Co.*, 929 F.3d 1046, 1049 (9th Cir. 2019). "The district court's decision may be affirmed on any ground supported by the record, even if not relied on by the district court." *Twitter v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022).

A district court's denial of a preliminary injunction is reviewed for an abuse of discretion. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010). "This review is 'limited and deferential' and it does not extend to the underlying merits of the case." *Id.* (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)).

VII. SUMMARY OF ARGUMENT

There is no "unqualified right to pre-enforcement review of constitutional claims in federal court." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 49 (2021). Just like any party invoking federal jurisdiction, UGM must carry its burden of establishing that its case or controversy satisfies the requirements of Article III. UGM fails to plead facts sufficient to overcome dismissal, let alone make the "clear showing" of each requirement at the "preliminary injunction stage." *Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020). This Court should affirm.

Injury-in-fact. The district court properly held that UGM faces no credible threat of enforcement. While the chilling of First Amendment speech or activity may constitute an Article III injury, it must be based on a reasonable fear of imminent enforcement action. Otherwise, any chill constitutes nothing more than speculative, self-inflicted harms that do not confer Article III injury. That is the case here. UGM alleges that it will refuse to hire individuals who expressly disagree with its faith and that it has changed its hiring practices in light of online complaints. But its refusal to hire those who disagree with its faith, including the example it provided, is not proscribed by the WLAD, and the State was wholly unaware of UGM's employment practices before UGM filed suit. UGM's unreasonable fear of prosecution does not confer standing.

Redressability. The district court properly held that UGM's claim is not redressable in the federal courts. UGM repeatedly asks the federal courts to hold that, because of the Washington Supreme Court's decision in *Woods*, the WLAD violates UGM's First Amendment rights. However, the fact that third parties may continue to file suit means that UGM will continue to face the alleged injury it seeks to redress here. A federal court cannot bind parties that are not before it. Regardless of how this Court adjudicates UGM's claim, any potential claimants—if any exist—will continue to be able to file suit.

Ripeness. This Court should also affirm on the grounds of constitutional and prudential ripeness. Because UGM fails to plead injury-in-fact, it also falls

short of constitutional ripeness because those inquiries mirror each other in the pre-enforcement context. UGM's claim is also not prudentially ripe. While UGM argues that it hires non-ministerial employees, its litigation arguments conflict with the record, including its own job descriptions and hiring documents attached to its pleadings. *See* 3-ER-432 (requiring signatory to review and agree that they are a minister); 3-ER-376 ¶ 54 (providing that all staff are required to acknowledge that they are a minister); 3-ER-379 ¶ 70 (providing that all employees are required to "review [and] agree" that they are ministers); 3-ER-424 ("In employment, we view all of our permanent staff as ministers of our mission."); 3-ER-439–40 (providing that the IT technician's duties and responsibilities include to "minister to clients, staff, donors, and volunteers"); ER-444–45 (providing that the operations assistant's duties and responsibilities include to "minister to our customers, donors, volunteers, and clients"). In light of these unresolved fact issues, UGM's sweeping First Amendment arguments are not fit for judicial review because they do not present a purely legal question. Instead, UGM presents complex questions of both fact and law, in circumstances where the answers to the fact questions may mean that the legal questions need not be decided at all. There is no hardship in withholding federal review until UGM presents an actual, concrete factual scenario in which it has applied or plans to apply its employment policies to a particular individual in a manner that may violate the WLAD.

Preliminary injunction. The district court properly denied UGM's motion for a preliminary injunction as moot because UGM's complaint is not justiciable in the federal courts. UGM nonetheless makes the extraordinary request that this Court adjudicate and grant its motion in the first instance on appeal. UGM cites no case where an appellate court has taken that remarkable step. This case is no occasion for such innovation, given that UGM satisfies none of the mandatory preliminary injunction factors. In the unlikely event this Court were to conclude that UGM's claims are justiciable, it should remand to the district court for consideration of the preliminary injunction factors.

VIII. ARGUMENT

A. The District Court Properly Held That UGM Lacks Article III Standing

UGM does not carry its burden of establishing the elements of Article III standing. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (cleaned up). It is the plaintiff's burden to establish that (1) it has suffered an "injury in fact," or an injury that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical," (2) the injury is "fairly traceable" to a challenged conduct, and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S 555, 560–61 (1992) (citations and quotations omitted). "A federal court is presumed

to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes of the Colville Rsrv.*, 873 F.2d 1221, 1225 (9th Cir. 1989). "[A] plaintiff must demonstrate standing for each claim he seeks to press" and standing must be satisfied "separately for each form of relief sought." *DaimlerChrysler Corp.*, 547 U.S. at 335, 352.

The burden of proving standing grows in manner and degree at the successive stages of litigation. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). At the preliminary injunction stage, the plaintiff must make a "clear showing of each element of standing." *Yazzie*, 977 F.3d at 966; *see also Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). This "clear showing" requires plaintiffs to demonstrate "a sufficient likelihood that [they] will again be wronged in a similar way," *Bates v. UPS*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)), and there must be a "real and immediate threat of repeated injury," *id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). Even where a plaintiff has shown "[p]ast wrongs" against that particular plaintiff, such wrongs "do not in themselves amount to [a] real and immediate threat of injury necessary to make out a case or controversy." *Id.* (quoting *Lyons*, 461 U.S. at 103).

1. UGM cannot establish injury-in-fact

Article III requires plaintiffs to establish a concrete and particularized injury. Plaintiffs bringing pre-enforcement challenges are not afforded a "special

exemption" to this rule. *Whole Woman's Health*, 595 U.S. at 50. These constitutional requirements are "consistently applied . . . whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right." *Id.*

Decades of precedent make plain that the mere chilling effect of a law is not an Article III injury. *See, e.g.*, *id.*; *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." (cleaned up)); *Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1001 (9th Cir. 2010) (providing that "self-censorship" satisfies Article III only if "it is based on an 'actual and well-founded fear' that the challenged statute will be enforced" (citation omitted)); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that plaintiffs may not "challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute"). Just as with any other federal lawsuit, "the chilling effect associated with a potentially unconstitutional law being on the books is insufficient to justify federal intervention in a pre-enforcement suit"—a plaintiff must allege a concrete injury. *Whole Woman's Health*, 595 U.S. at 50 (cleaned up) (quoting *Younger v. Harris*, 401 U.S. 37, 42, 50–51 (1971)); *contra* Opening Br. at 34–37 (arguing

that UGM satisfies injury solely "because the WLAD chills its speech"). As this Court has repeatedly held, "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *McCormack v. Hiedeman*, 694 F.3d 1004, 1021 (9th Cir. 2012) (quoting *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)).

This does not mean that plaintiffs must violate the law before filing suit. But a plaintiff bringing a pre-enforcement challenge must establish that "the threatened enforcement [is] sufficiently imminent." *Driehaus*, 573 U.S. at 159; *see also Whole Woman's Health*, 595 U.S. at 49 (noting that pre-enforcement review is a modern phenomenon). Plaintiffs do not have standing when they "feel inhibited" by a statute, but fail to allege that "they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible." *Younger*, 401 U.S. at 42. "To this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one." *Whole Woman's Health*, 595 U.S. at 49–50.

As enumerated by the Supreme Court and this Court, plaintiffs carry their burden of demonstrating that enforcement is "sufficiently imminent" by showing that they (1) intend to engage in conduct arguably affected by a constitutional interest, (2) but that conduct is proscribed by statute, and (3) they face a credible

threat of enforcement for that conduct. *See Driehaus*, 573 U.S. at 159; *Lopez*, 630 F.3d at 785 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

UGM did not and cannot carry its burden on any of the three factors. On the first factor, UGM's argument that the First Amendment exempts it from the WLAD falls well short, as this Court has already held that there is no unqualified right for religious employers to ignore secular laws. *See, e.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365–66 (9th Cir. 1986) ("Congress and this court have specifically rejected proposals that provide religious employers a complete exemption from regulation under [civil rights laws]." (cleaned up)); *infra* Section VIII.C.1. On the second factor, UGM's conduct and hiring practices, as alleged, are not proscribed by the WLAD. And with respect to the third factor, there is no credible or imminent enforcement action that would enable federal review. UGM's complaint was properly dismissed for failing to allege, let alone establish, a "clear showing" of injury.

a. UGM fails to allege any conduct proscribed by statute

UGM's pleadings do not allege or make a "clear showing" that any of its conduct is proscribed by statute. This is true of its free speech challenges. "Plaintiffs cannot . . . create a justiciable case or controversy simply by misreading statutes and claiming as injury fears born of their own error." *W. Mining Council v. Watt*, 643 F.2d 618, 626 (9th Cir. 1981).

That rule applies here. UGM alleges that it "stopped advertising on *Indeed.com*, withheld publishing its Religious Hiring Statement, removed its open IT technician position, and refrained from posting its operations assistant position" because of the WLAD. 3-ER-411–12 ¶¶ 218, 221; *see also* Opening Br. at 37. Specifically, it alleges that the WLAD's provisions regarding job publications, Wash. Rev. Code § 49.60.180(4), and the limitation on an employer requiring disclosure of an employee's religious affiliation, Wash. Rev. Code § 49.60.208, demonstrates content and viewpoint discrimination that violates the First Amendment's Free Speech Clause. 3-ER-410–11 ¶¶ 214–16; Opening Br. at 37. But those provisions do not proscribe any of UGM's alleged conduct. None of UGM's alleged conduct involves statements, advertisements, or publications that employment is restricted based on a protected class in a manner that would violate Section 49.60.180(4). *See* 3-ER-438–42 (IT technician job posting); 3-ER-443–47 (operations assistant posting); 3-ER-448–49 (religious hiring policy). As is made plain by UGM's pleadings, none of the content it voluntarily decided to remove or refrain from posting—without any prompting by the State—includes any statements that suggest it would not hire anyone because of their membership in a protected class. The only statement, advertisement, or publication that even suggests UGM will not hire LGBTQ+ applicants is its "Statement of Faith," which provides that UGM believes that "sexual expression" is to be between a married man and woman. 3-ER-423–25.

But that Statement of Faith does not express any limitation on employment because of sexual orientation—in fact it states that UGM "represents a broad range of Christian tradition and fellowship" and that it "focus[es] on what we share in common . . . rather than our differences." *Id.* And, regardless, nowhere does UGM allege it has ever modified, removed, or refrained from posting its Statement of Faith based on a purported chill. *See* 3-ER-411 ¶ 218.

Nor does Section 49.60.208 prevent UGM "from inquiring about prospective employees' religious beliefs on marriage and sexuality." *Cf.* 3-ER-411 ¶ 215. That statute proscribes an employer from "requir[ing] an *employee* to disclose his or her sincerely held religious affiliation or beliefs." Wash. Rev. Code § 49.60.208 (emphasis added). By its plain text, the statute only relates to current employees, not "prospective employees," as UGM fears. The legislative history supports that plain textual reading. Section 49.60.208 of the WLAD became law in 2018 after passage of House Bill 2097. 2018 Wash. Sess. Laws Chapter 303 § 2. As described by one of the bill's sponsors, the purpose of the law was to protect existing employees from threatened efforts by federal officials to create a "Muslim-registry," including through employment records.[2]

[2] *See* Enrique Perez de la Rosa, *Democrats Seek to Shield Washingtonians From President's Executive Orders*, Kitsap Daily News (Feb. 19, 2017), https://www.kitsapdailynews.com/news/democrats-seek-to-shield-washingtonians-from-presidents-executive-orders/.

In addition to being categorically inapplicable to its situation, the statute also does not restrict UGM's speech at all. That is because the statute does not prohibit employers from asking employees about their religious beliefs; it prohibits employers from requiring the disclosure of that information. It protects *employees* from being forced to speak about their religious beliefs, but does not restrict the *employer's* speech in any manner. UGM may not challenge WLAD provisions that no one has threatened against it "by misreading statutes and claiming as injury fears born of their own error." *Watt*, 643 F.2d at 626.

UGM's challenges to the WLAD provisions regarding employee personnel selection fare no better. UGM challenges the WLAD as interpreted by *Woods*, but fails to point to any conduct that is proscribed by the WLAD following the Washington Supreme Court's decision. *Woods* held that particular plaintiffs may be able to bring a WLAD employment discrimination claim if they face discriminatory employment action with respect to particular job positions. *See Woods*, 481 P.3d at 1067. The state high court expressly held that it "do[es] not opine on the effect of this decision on *every* prospective employee seeking work with any religious nonprofit." *Id.* at 1065 n.2. Consequently, without as-applied allegations of a particular LGBTQ+ individual who works for UGM, or who has applied for a particular employment position with UGM, a court cannot assess whether any personnel action UGM might take is even proscribed.

UGM attempts to avoid this problem by simply stating that it "categorically screens out" applicants who express disagreement with its Statement of Faith. 3-ER-382 ¶ 83. But that says nothing about whether applicants who are LGBTQ+ even apply to work with UGM or, even if they do, that those employees would necessarily violate UGM's Statement of Faith by engaging in sexual activity outside of marriage. Even in UGM's example of an application that it screened out, the applicant makes no statement about their sexuality, and UGM does not allege that it refused to hire the individual because of their sexual orientation. *See* 3-ER-382 ¶ 82. Categorically rejecting applicants that state that the "Bible is false" or that "I do not follow the indoctrination of religion" is not at all similar to the employment decision addressed in *Woods*. *See Woods*, 481 P.3d at 1067 (allowing a WLAD plaintiff to move forward in circumstances where the employment decision implicates the fundamental right "to one's sexual orientation as manifested as a decision to marry"). UGM's failure to plead—much less make a clear showing—that it plans to engage in conduct proscribed by state law means that there is no imminent enforcement action that could give rise to an Article III injury.

b. There is no credible threat of enforcement

Nor does UGM establish "a plausible and reasonable fear of prosecution." *Wolfson v. Brammer*, 616 F.3d 1045, 1062 (9th Cir. 2010) (emphasis omitted). The lack of any threat of future harm is dispositive. Absent "a threat of certainly

impending" statutory harms, the costs incurred because of some abstract fear of harm "is insufficient to create standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 418 (2013) ("[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). Nor are "[a]llegations of a subjective 'chill' . . . an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* (quoting *Laird*, 408 U.S. at 11). UGM's "bare allegations" that its conduct has been chilled, *Wolfson*, 616 F.3d at 1062, challenges "the mere existence of a proscriptive statute," *Thomas*, 220 F.3d at 1139. Such a challenge does not survive Article III's strictures.

In determining whether alleged harms stem from a reasonable fear of prosecution, this Court looks to (1) whether the plaintiff has a "concrete plan" to violate the law, (2) whether enforcement authorities have communicated a specific warning or threat to initiate proceedings, and (3) whether there is a history of past prosecution or enforcement. *Id.*; *see also Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1210 n.9 (9th Cir. 2022) ("Plaintiffs suggest that the Supreme Court's decision in *Susan B. Anthony List v. Driehaus* abrogated the Ninth Circuit's three-part test. Not so. We have continued to apply this test after *Susan B. Anthony List* as a means of determining whether a purported injury meets the Supreme Court's 'credible threat' requirement.").

UGM pleads no facts sufficient to meet any of the three factors, let alone proves them by a "clear showing," as required for a preliminary injunction.

First, UGM's pleadings and declarations do not allege a concrete plan to violate the law with respect to any of its claims. That is made plain by its inability to point to any conduct that it has taken or plans to take that actually violates the law in the first place. *See supra* Section VIII.A.1.a.

Moreover, UGM fails to allege a concrete plan under this Court's precedent. In *Thomas*, plaintiffs challenged state and local housing laws that prohibited discrimination on the basis of marital status. 220 F.3d at 1137–38. It was the plaintiffs' sincerely held religious belief that it was sinful to cohabitate as an unmarried man and woman and further, if the plaintiffs were to facilitate that cohabitation by providing housing, it would be equivalent to committing the sin themselves. *Id.* at 1137. While the plaintiffs believed that they would be subject to enforcement at a future date because they alleged that they had rejected unmarried couples in the past, they were unable to point to a single, concrete instance where they had done so, and were similarly unable to point to an instance where they intended to apply their policy against an unmarried couple in the future. *Id.* at 1139. This Court, en banc, held that the inability to specify the "when, to whom, where, or under what circumstances" the policy would be applied meant that the plaintiffs were merely alleging a "general intent to violate

a statute at some unknown date in the future." *Id.* That was not a concrete plan for the purposes of standing. *Id.*

In contrast, this Court in *Tingley* held that a licensed therapist had standing to challenge a Washington law that provided that it was unprofessional conduct to perform "conversion therapy," "a regime that seeks to change an individual's sexual orientation or gender identity," on minors. *Tingley v. Ferguson*, 47 F.4th 1055, 1065 (9th Cir. 2022), *cert. denied* 144 S. Ct. 33 (2023). The *Tingley* plaintiff, who had worked as a licensed therapist for more than 20 years, pointed to specific past minor clients he had worked with to help them "reduc[e] same-sex attractions" or become "comfortable with [their] biological sex." *Id.* at 1067. By identifying "*specific* past instances" of violating the law, coupled with the state defendants' failure to disavow enforcement, the plaintiff was able to establish that there was a credible threat of enforcement if he engaged in the same conduct going forward. *Id.* at 1068 (emphasis added).

Unlike *Tingley*, UGM alleges no concrete plan to violate the law. While UGM alleges that it employs only "coreligionists," it cannot point to a single instance in which it took adverse employment action against an individual because of their sexual orientation. The only example UGM is able to point to is the case of an applicant it rejected because they explicitly disagreed—across the board—with UGM's religious beliefs. *See* 3-ER-382 (answering job application question with "[y]our company just violated my personal beliefs"). Nothing

about that application suggests that the applicant was LGBTQ+ or that UGM knew the applicant was LGBTQ+, and UGM's pleadings similarly provide no statement that the applicant was denied employment because of sexual orientation. The utter absence of any "when, to whom, where, or under what circumstances" of any violation of the law means that UGM falls short of a concrete plan sufficient to demonstrate a likelihood of enforcement and trigger standing. *Thomas*, 220 F.3d at 1139.

Second, UGM has made no allegations or arguments that it faced any specific warnings or threats by the State that its employment practices may constitute sexual orientation discrimination in violation of the WLAD. *See* 1-ER-019. Indeed, UGM alleges no threats of enforcement by anyone at all. Instead, UGM points to the history of "enforcement" by the State against other entities and lawsuits that the State has brought under provisions of the WLAD that do not involve employment at all. But generally pointing to instances the State has enforced the law is not a specific threat for the purposes of standing. *See McCormack*, 694 F.3d at 1021.

The Eighth Circuit held that the plaintiff lacked standing in a strikingly similar lawsuit, *School of the Ozarks, Inc. v. Biden*, 41 F.4th 992 (8th Cir. 2022), *cert. denied* 143 S. Ct. 2638 (2023). There, the Department of Housing and Urban Development (HUD) had issued a memorandum that explained that the Fair Housing Act's prohibition on sex discrimination prohibits sexual-

orientation and gender-identity discrimination in college housing and directed an office in HUD to "fully enforce" the Fair Housing Act. *Id.* at 996. A religious college challenged the memorandum, arguing that it required the college to change its student housing policies in violation of the college's religious beliefs. *Id.* at 998. It argued that enforcement was imminent or, alternatively, it suffered injury because the memorandum was directed at the plaintiff college "in particular." *Id.* at 999. The Eighth Circuit held that the plaintiff did not have standing because "it is speculative that HUD will file a charge of discrimination against the College in the first place" and the memorandum "does not, as the [plaintiff] presupposes, require that HUD reach the specific enforcement decision that the [plaintiff's] current housing policies violate federal law." *Id.* at 998. Consequently, the college's concerns of future enforcement were "too speculative to establish Article III standing." *Id.* at 1000.

So too here. Accepting UGM's standing argument would require this Court to "assume that . . . [a] series of events is imminent." *Id.* But the "highly attenuated chain of possibilities" UGM relies on, a chain based on no communications with regulatory officials at all, does not satisfy standing. *Id.* (quoting *Clapper*, 568 U.S. at 410).

Third, there simply is no history of State enforcement showing that UGM faces a reasonable fear of prosecution. UGM cannot cite a single case where the State litigated issues of sexual-orientation employment discrimination against a

religious employer. *See* Opening Br. at 40–45. It instead argues at a high level that the HRC can enforce the WLAD through investigation and administrative action, and has done so in the past. While true, neither of the two employment discrimination cases UGM cites involved religious employers, and cannot be evidence of a history of enforcement that might threaten UGM. *See* Opening Br. at 41. To the contrary, even though the HRC has received complaints about UGM, 2-ER-148–49, the pleadings are utterly bare of any allegations that the HRC's administrative resolution of those complaints even implicated—let alone violated—UGM's First Amendment rights. UGM cannot reasonably fear prosecution when none of its cited cases raise remotely similar circumstances and where it does not allege a violation of its First Amendment rights even in cases involving UGM itself.

UGM next points to the fact that the AGO sent a letter requesting information from a separate religious employer, SPU, and the AGO's arguments regarding *Younger* abstention in SPU's lawsuit. Opening Br. at 43. But as the district court properly noted, "a single inquiry is insufficient to demonstrate enforcement." 1-ER-023–24. Moreover, the AGO's letter to SPU expressly stated that no determination has been made as to whether the university's policies violate the WLAD, and the letter did not threaten any legal action. 3-ER-433–38. Finally, the request that SPU, like any employer, retain its records is simply a routine request that the AGO includes in every request for

information. It is in no way a foregone conclusion of litigation. UGM's attempt to paint possible, uncertain, future enforcement as a "history" of enforcement fails. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (holding that "[a]llegations of possible future injury" are insufficient, as the alleged "threatened injury must be 'certainly impending'" (citation omitted)).

To this point, UGM argues that the State should be estopped from arguing that the AGO's letter to SPU is not an enforcement action because the State's argument "play[s] 'fast and loose with this Court' to gain an advantage" by "taking inconsistent positions." Opening Br. at 42–43 (cleaned up) (selectively citing from briefing in *Seattle Pac. Univ. v. Ferguson*, No. 22-35986). But there are no inconsistencies. The AGO has consistently maintained that the letter sent to SPU is not the type of enforcement action that would give rise to Article III injury. *See* Appellee's Answering Br. at 38–39, *Seattle Pac. Univ. v. Ferguson*, No. 22-35986 (arguing that any enforcement of the WLAD is wholly speculative and not constitutional injury). The district court in this case agreed. *See* 1-ER-023. The AGO has merely argued that, alternatively, if the Ninth Circuit holds that SPU does adequately plead Article III injury because there is an imminent enforcement action, then that conclusion would prompt the comity concerns underscored in the *Younger* abstention doctrine. Appellee's Answering Br. at 50–51, *Seattle Pac. Univ. v. Ferguson*, No. 22-35986 ("But even assuming SPU establishes Article III's requirements for constitutional standing—which it

cannot—then the district court's abstention is appropriate pursuant to *Younger* and its progeny."). That alternative argument is not "playing fast and loose" with the Court. It merely confirms the State's consistent position that there is no history of enforcement of the WLAD's employment provisions against any religious employer.

Unable to point to a single instance of employment discrimination enforcement post-*Woods*, UGM instead points to two cases—one beginning more than a decade ago—that involved First Amendment rights in some capacity. As UGM acknowledges, however, neither case involves an employment discrimination claim brought by the State. Opening Br. at 43–45. Consequently, and unsurprisingly, neither case involved *Woods* or its interpretation of the WLAD's definition of "employer." *See Olympus Spa v. Armstrong*, No. 22-CV-00340-BJR, 2023 WL 3818536, at *2 (W.D. Wash. 2023) (involving a claim under Wash. Rev. Code § 49.60.215, the "public accommodations" provision of the WLAD); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1211 (Wash. 2019) (same). While UGM argues that this Court should disregard these differences, Opening Br. at 45, it points to no instance where this Court found a reasonable fear of prosecution based on a prior enforcement action under an entirely different statute. Nor would doing so now make sense. *See Lopez*, 630 F.3d at 787 ("'[G]eneral threat[s] by officials to enforce those laws which they are charged to administer' do not create the necessary injury in fact."

(quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947))). Neither of the public accommodations cases involved the "employer" definition under the WLAD as interpreted by *Woods*, and neither sheds any light on UGM's concerns that the WLAD will be applied to it in an unconstitutional manner. Those differences prove fatal to UGM's attempt to paint a credible threat of enforcement.

Finally, this Court has held that "a combination of other circumstances" may create a credible threat of enforcement. *Isaacson v. Mayes*, 84 F.4th 1089, 1100 (9th Cir. 2023). In *Isaacson*, the fact that "county attorneys, the Arizona health agencies, and private parties" could criminally and civilly enforce Arizona's abortion laws demonstrated that the abortion-provider plaintiffs faced a credible threat of future enforcement and sufficiently alleged an imminent future injury. *Id.* at 1101; *see also Driehaus*, 573 U.S. at 166 (holding that agency proceedings and the threat of *criminal* prosecution gave rise to an Article III injury).

But those circumstances do not apply here. Unlike *Isaacson*, the WLAD's employment-discrimination provisions contemplate only civil, not criminal, liability. And while UGM fleetingly cites the WLAD provision making it a misdemeanor to interfere with an HRC investigation, Wash. Rev. Code § 49.60.310, UGM fails to allege any facts remotely establishing how that provision is triggered. Rather, UGM effectively asks the Court to assume that

the HRC will someday investigate UGM, that the investigation will be unconstitutional, and that UGM may interfere with that hypothetical investigation in some unidentified way. This speculative chain of events cannot support injury-in-fact. Nor can the State disavow enforcement when there is no concrete factual basis to assess whether the as-applied nature of *Woods* even applies in the first place. And, even as to the WLAD's civil provisions, no third party has ever enforced them against UGM. In fact, as UGM pleads, despite complaints against UGM having been filed with the State, Opening Br. at 48, UGM still fails to allege *any* type of resulting enforcement action. Simply put, UGM fails to allege any credible threat of imminent enforcement as required to satisfy this Circuit's three-part test. UGM cannot show injury-in-fact.

2. UGM's claims are not redressable

UGM also falls short of the modest bar of redressability. To satisfy the redressability prong of standing, "plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). Consequently, "[r]edressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). Here, UGM seeks two forms of relief: (1) a declaration that "the recent narrowed interpretation of the WLAD" by the Washington Supreme Court, "and [the State's] enforcement of the WLAD,

violates [UGM]'s First Amendment rights;" and (2) an injunction barring the State "from enforcing (including through investigations) the WLAD against the Mission (and other religious organizations with similar religious beliefs and hiring practices) for engaging in its constitutionally protected activities." 3-ER-413–14. The district court properly held that it cannot grant the sweeping relief that UGM seeks.

The possibility of enforcement will exist regardless of this Court's decision. This case cannot bind parties not before it. *See, e.g.*, *Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 695 (9th Cir. 2010). An aggrieved individual—if any exist—may bring a WLAD action directly against UGM. Washington law underscores this point, as an individual plaintiff "bringing a discrimination case [under the WLAD] assumes the role of a private attorney general, vindicating a policy of the highest priority." *Marquis v. City of Spokane*, 922 P.2d 43, 49 (Wash. 1996). Indeed, in *Whole Woman's Health*, the U.S. Supreme Court dismissed claims against the Texas Attorney General because, even if the state's chief legal official could enforce the challenged statute restricting abortion access, the federal courts could do nothing to prevent "any and all unnamed private persons who might seek to bring their own" lawsuits. 595 U.S. at 44. "[N]o court may lawfully enjoin the world at large or purport to enjoin challenged laws themselves." *Id.* (cleaned up).

UGM's reliance on *Wolfson* is misplaced. *See* Opening Br. at 57. In that case, the plaintiff brought First Amendment challenges to the Arizona Code of Judicial Conduct applicable to judicial candidates. *Wolfson*, 616 F.3d at 1052–53. The plaintiff brought suit against the members of the Arizona Commission of Judicial Conduct, the Arizona Supreme Court Disciplinary Commission, and the Arizona Chief Bar Counsel. *Id.* at 1051. While defendants argued that they could not change the challenged Code of Judicial Conduct, this Court held that plaintiff's alleged injuries were redressable because a favorable ruling would entirely eliminate any enforcement of the challenged policies. *Id.* at 1056 (holding that if defendants are enjoined, the plaintiff may engage in certain activities "without fear of punishment"). "Without a *possibility* of the challenged canons being enforced, those canons will no longer have a chilling effect on speech" and the plaintiff obtains judicial redress. *Id.* at 1057 (emphasis added).

Here, in contrast, UGM will be unable to operate "without fear of punishment" regardless of how the federal courts resolve this case against the State. *Id.* at 1056. The redressability prong of standing cannot be met when it "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *see also Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) (holding that "[p]laintiffs have not shown a likelihood that" a favorable ruling

against the government defendant would change the behavior of third-parties and therefore have not established standing); *Glaton ex rel. ALOCOA Prescription Drug Plan v. AdvancedPCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) ("There is no redressability, and thus no standing, where (as is the case here) any prospective benefits depend on an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or to predict.'" (quoting *ASARCO*, 490 U.S. at 615)).

At bottom, UGM asks for a federal court order that the WLAD, as interpreted by *Woods*, does not apply to any religious entities. It argues that it is entitled to this relief based on a sweeping First Amendment theory that its counsel pressed in petitioning for certiorari following the Washington Supreme Court's decision in *Woods*. *See* Pet. Reply Br. at 4–5, *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094 (2022), 2021 WL 5364522 (arguing that the "coreligionist doctrine was pressed *and* passed on" in the *Woods* decision). The U.S Supreme Court denied that petition for certiorari, and UGM's brief does not explain why it is entitled to this sweeping relief. UGM's injuries cannot be redressed by the federal courts and the order dismissing UGM's complaint should be affirmed.

B. UGM's Contradictory Pleadings Do Not Present a Case Ripe for Review

Nor are UGM's claims ripe for judicial review. The ripeness doctrine ensures that "courts adjudicate live cases or controversies and do not 'issue

advisory opinions [or] declare rights in hypothetical cases.'" *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017) (quoting *Thomas*, 220 F.3d at 1138). Ripeness involves a constitutional and a prudential component. *See Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007). Those considerations reflect both "Article III limitations on judicial power" and "prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

In the context of pre-enforcement actions, the constitutional ripeness analysis is the same as the injury-in-fact assessment for purposes of standing. *See Twitter*, 56 F.4th at 1170. "To satisfy the constitutional ripeness requirement, a case 'must present issues that are definite and concrete, not hypothetical or abstract.'" *Safer Chems., Healthy Fams. v. EPA*, 943 F.3d 397, 411 (9th Cir. 2019) (citation omitted). Just as UGM's hypothetical and abstract fears do not establish injury-in-fact, they do not sufficiently satisfy constitutional ripeness, either. *See supra* Section VIII.A.1.

UGM's claims also fail this Circuit's test for prudential ripeness. The Court has "regularly declined on prudential grounds to review challenges to recently promulgated laws or regulations in favor of awaiting an actual application of the new rule." *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 751 (9th Cir. 2020) (quotation and citation omitted).

This prevents the courts from "entangling themselves in abstract disagreements." *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967)). Prudential ripeness considers two overarching factors: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Bishop Paiute Tribe*, 863 F.3d at 1154. In this case, both factors weigh in favor of affirming the dismissal of UGM's unripe claim.

With respect to the first prong, this Court examines whether the case "presents a concrete factual situation or purely legal issues." *Id.* (quotations omitted). Courts "cannot decide constitutional questions in a vacuum," so even purely legal questions "must nonetheless present a 'concrete factual situation to delineate the boundaries of what conduct the government may or may not regulate without running afoul' of the Constitution." *Feldman*, 504 F.3d at 849. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cleaned up). "[P]articularly where constitutional issues are concerned, problems such as the inadequacy of the record, or ambiguity in the record, will make a case unfit for adjudication on the merits." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (citations and quotations omitted).

Consequently, this Court has held that challenges to laws that have yet to be enforced are not fit for judicial review when it is unclear how government officials will enforce the law or whether they will enforce the law at all. For instance, in *Thomas*, this Court held that prudential ripeness required dismissal because plaintiffs' claims required the Court to assess "the intersection of marital status discrimination and the First Amendment . . . devoid of any specific factual context." *Thomas*, 220 F.3d at 1141. The Court did not accept the plaintiffs' invitation to decide the constitutionality of a law based on "hypothetical situations with hypothetical tenants." *Id.* at 1142; *see also Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 781 (9th Cir. 2000) (holding that plaintiffs have no standing to challenge agency investigations when it is "an open question" whether agency action would even result in a finding against the plaintiffs).

In assessing whether the record is inadequate or ambiguous, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). And this Court does not accept as true "facts which are revealed to be unfounded by documents included in the pleadings or introduced in support of [a] motion." *Interstate Nat'l Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953); *see also Cheng v. Neumann*, 51 F.4th 438 (1st Cir. 2022) ("It is a well-settled rule that when a written instrument contradicts

allegations in the complaint to which it is attached, the exhibit trumps the allegations." (quotation and citation omitted)); *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) ("When an exhibit incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss."); 5A Charles Alan Wright, Arthur Miller & A. Benjamin Spencer, *Federal Practice and Procedure* § 1327 (4th ed. 2023).

Far from a "concrete factual situation" fit for judicial decision, UGM's contradictory pleadings, arguments, and exhibits create an ambiguous record that makes it plain that there is no ripe case or controversy. While UGM argued at oral argument that it has non-ministerial positions and that certain positions are "ministers in a biblical sense" but not "a minister for the purposes of the law," 2-ER-067:3–9, those purported admissions are belied by the job descriptions and employment documents attached to its complaint. Indeed, its employment documents make plain that it believes that it *only* hires individuals who are ministers "by law and judicial decision." 3-ER-432 (requiring signatory to acknowledge that they are a minister); *see* 3-ER-376 ¶ 54 (noting that all staff are required to acknowledge that they are a minister); 3-ER-379 ¶ 70 (same); 3-ER-424 ("In employment, we view all of our permanent staff as ministers of our mission.").

This factual discrepancy goes to the heart of UGM's alleged injuries and to the tailoring of any relief that would be granted by the federal courts. Indeed,

resolution of these fact questions is necessary to determine whether there is any controversy at all. If UGM's attached employment records accurately state the facts, and all of UGM's employees are ministers, then any decision from the federal courts would be wholly advisory. *See City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring) ("[T]he abstract proposition that the government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice[] . . . must ultimately be reduced to concrete cases.").

The contradictory factual allegations do not end there. UGM argued that the two positions it is attempting to hire for are "not really there to necessarily minister to others," 2-ER-086:22–23, but the record contradicts that litigation position. UGM's job descriptions for the positions in question state that those employees minister to members of the public. The IT technician's duties and responsibilities include to "minister to our clients, staff, donors, and volunteers." 3-ER-439–40. The operations assistant's duties and responsibilities similarly include to "minister to our customers, donors, volunteers, and clients," and also requires them to work with "guests, clients, community job workers, staff, volunteers, donors, and customers in a 'revealing Christ' team environment." 3-ER-444–45 (requiring that the operations assistant also "[d]emonstrate Matthew 18 principles when addressing disputes, issues, questions, or problems").

These factual discrepancies not only prevent UGM's attempt to establish constitutional standing, *see supra* Section VIII.A.1, but they also mean that this case is particularly unripe for judicial review. As UGM correctly identifies, whether an employee is a minister or not depends on the facts of what the employee does. *See Our Lady of Guadalupe*, 140 S. Ct. at 2063. Consequently, these factual discrepancies and lack of allegations describing any adverse employment action against a particular individual based on their sexual orientation would require this Court to assess UGM's First Amendment arguments in a vacuum, with no clear factual basis or question of law before it. This Court declines those academic endeavors in favor of awaiting an actual case or controversy. *See Thomas*, 220 F.3d at 1142.

The factual questions begged by UGM's contradictory allegations also underscore that UGM's claims do not present a purely legal issue for review. Indeed, in holding that a Title VII plaintiff may move forward in their suit against a religious employer, this Court has acknowledged that questions about whether the First Amendment protects employment decisions for non-ministerial employees is not purely a legal question. *See Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) ("In the case of lay employees, the particularly strong religious interests surrounding a church's choice of its representative are missing, and we have concluded that applying Title VII is constitutionally permissible."); *see also Hosanna-Tabor Evangelical Lutheran*

Church & Sch. v. EEOC, 565 U.S. 171, 195 n.4 (2012) (holding that the ministerial exception is a defense on the merits, not a jurisdictional bar). Just as in *Thomas*, the "many unknown facts" and "sketchy record" here make it inappropriate to decide the legal issue in question. 220 F.3d at 1142 (quoting *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510–11 (1991)). UGM asks this Court to declare the limits of their sweeping First Amendment theory without any information about, for example, how it applies its policy to individuals who are attracted to members of the same sex but are celibate or to individuals who are married but separated, what constitutes "human sexual expression," or how UGM investigates and enforces its policy. *See id.* at 1142 n.8 ("We cannot judge the outer bounds of the application of our decision without knowing the particular contours of the case or controversy.").

UGM also faces no hardship that militates in favor of this Court's review. Hardship exists when withholding review creates a "[d]irect and immediate hardship" that requires "an immediate and significant change in the plaintiff['s] conduct of their affairs with serious penalties attached to noncompliance." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (cleaned up). "[T]he absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines any claim of hardship." *Thomas*, 220 F.3d at 1142.

Here, UGM faces no immediate harms as all of its purported fears are hypothetical. *See supra* Section VIII.A.1. Moreover, UGM does not plead that it stopped requiring its employees to agree to its Statement of Faith, or that it stopped asking its employees to agree that they are ministers by law and judicial decision. And UGM faces no threat of an enforcement action at all, let alone criminal enforcement. In short, setting aside contradictory allegations related to two of its more than 150 employment positions, UGM conducts business as usual. 3-ER-379.

While UGM faces no hardship in awaiting an actual case or controversy, adjudicating this case now would require the State to defend a Washington statute "in a vacuum and in the absence of any particular victims of discrimination." *Thomas*, 220 F.3d at 1142. "Postponing judicial review to a time when [UGM] actually face[s] an enforcement proceeding, or at least an imminent threat of one, poses insufficient hardship to justify the exercise of jurisdiction now." *Id.*

C. UGM Does Not Satisfy Any of the Factors for a Preliminary Injunction

The district court properly denied UGM's preliminary injunction as moot because it did not have jurisdiction and this Court should affirm on those grounds. *See LA All. for Hum. Rts. v. County of Los Angeles*, 14 F.4th 947, 956 (9th Cir. 2021). In the unlikely event this Court holds that UGM has standing,

however, it should remand the case back to the district court so that it may consider the *Winter* factors in the first instance.

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). And whether to grant a preliminary injunction "is a matter committed to the discretion of the trial judge." *Evans v. Shoshone-Bannock Land Use Pol'y Comm'n*, 736 F.3d 1298, 1307 (9th Cir. 2013) (quoting *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984)); *see Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1111 (9th Cir. 2020) ("A district court is usually best positioned to apply the law to the record."); Fed. R. Civ. P. 65(d) (listing the required factual determinations in any preliminary injunction). UGM fails to cite a single case showing that it is entitled to the extraordinary relief of a preliminary injunction from this Court in the first instance.

While the district court is best situated to assess the factual discrepancies and whether UGM is entitled to a preliminary injunction, the record is plain that UGM does not satisfy all of the preliminary injunction factors. "The proper legal standard for preliminary injunctive relief requires a party to demonstrate 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,

and that an injunction is in the public interest.'" *Selecky*, 586 F.3d at 1127 (quoting *Winter*, 555 U.S. at 20). Even in the relaxed standard where a First Amendment violation is claimed, "a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018) (per curiam). UGM is unlikely to succeed on the merits and does not satisfy (indeed, hardly addresses) the remaining *Winter* factors.

1. UGM is unlikely to succeed on its extraordinary theories

UGM is unlikely to succeed on any of its First Amendment theories. UGM contends that it is free to hire and fire whomever it would like, so long as those hiring practices are religiously motivated. *See* 2-ER-082:13–16. It argues that while any individual may file a complaint with the State, and the State is free to inquire about a particular allegation, as soon as a religious employer states that a particular employment practice is based on its religious observance or beliefs, any further inquiry is prohibited. *See* 2-ER-082:21–25.

The U.S. Supreme Court has never held that the First Amendment provides such sweeping immunity from civil rights laws. UGM readily admits as much, as it must. 2-ER-087:5–6 ("The Supreme Court, you know, admittedly hasn't taken a case to recognize yet that the co-religionist exemption is, indeed, embedded in the First Amendment."). In fact, the U.S. Supreme Court has expressly held otherwise. In *Hosanna-Tabor*, the Court explicitly held that the

ministerial exception is an affirmative defense on the merits, not a jurisdictional bar as some circuits had held. 565 U.S. at 195 n.4. Thus, like any other affirmative defense, the inquiry does not immediately stop once a potential defendant raises its First Amendment defense—whether an employee is in fact covered by the ministerial exception is subject to discovery and must be proved by the defendant in order to be asserted and defeat a claim. *See also Ohio C.R. Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986) (holding that a state agency violates no constitutional rights by "merely investigating the circumstances" of an employee's discharge).

Nor is there any basis to believe that the First Amendment prohibits any government inquiry into any employment practices that are rooted in religious belief. As detailed in *Hosanna-Tabor*, the "[d]istrict courts have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed." 565 U.S. at 195 n.4. Consequently, even if it were an employer's sincere religious belief that individuals with disabilities should not participate in the workforce, ADA claims could move forward. And as this Court has held, "[i]n the case of lay employees, the particularly strong religious interests surrounding a church's choice of its representative are missing, and we have concluded that applying Title VII is constitutionally permissible." *Bollard*, 196 F.3d at 947; *see also Fremont Christian Sch.*, 781 F.2d at 1366, 1370 (religious school could not enforce religious belief that only men can be the head of a

household by paying health insurance benefits to married men but not to married women); *EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276–77, 1280 (9th Cir. 1982) (religious publishing house barred from firing an employee for filing a discrimination complaint with the EEOC, even though church doctrine prohibited members from filing lawsuits against the church). Accepting UGM's argument would mean that religious entities have a constitutional right to discriminate in hiring on whatever basis they believe their faith requires, regardless of the duties or roles that the job entails. UGM's attempt to pour old wine in new bottles should be rejected.

UGM's argument that the WLAD is not neutral or generally applicable also fails. The Washington Supreme Court has already held that the WLAD is a neutral and generally applicable law. *See Arlene's Flowers,* 441 P.3d at 1231 ("The WLAD is a neutral, generally applicable law subject to rational basis review."). And this Court classifies a law as not generally-applicable where, "in a selective manner, [it] impose[s] burdens only on conduct motivated by religious belief." *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993)), *cert. denied*, 579 U.S. 942 (2016). But the WLAD is not selective at all—religious and secular activities are equally covered under the WLAD.

UGM argues nonetheless that the WLAD is not neutral or generally applicable for two reasons. First, it argues that the fact that the WLAD exempts employers that have fewer than eight employees, but not religious employers, regardless of the number of employees they have, means that the WLAD treats religious activity worse than comparable secular activity in a manner that violates *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam). Opening Br. at 63–64. Second, it argues that the WLAD allows for individualized exceptions to certain employment practices in conflict with *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). *See* Opening Br. at 64–65. But these arguments are based on a misreading of both cases.

For the first argument, UGM principally relies on *Tandon v. Newsom*, but that case is inapposite as to whether an antidiscrimination law's structure is general or neutrally applicable. There, the Supreme Court granted an injunction pending appeal involving a plaintiff who challenged California's regulations that sought to combat the spread of the coronavirus. *Tandon*, 593 U.S. at 62; *Tandon v. Newsom*, 517 F. Supp. 3d 922, 938 (N.D. Cal. 2021). The California regulation at issue assigned activities different levels of scrutiny based on more than a dozen factors, including the number of coronavirus cases in the county, the county's health equity metric, whether the activity accommodates face covering, the ability to physically distance during the activity, the ability to ventilate the space, and whether the activity involves actions that are known to increase the

spread of the virus. *Tandon*, 517 F. Supp. 3d at 938. Of the numerous plaintiffs, two brought First Amendment free exercise challenges to the regulations because, under the multi-faceted framework set out by the state, they could not have more than three households inside their home to "hold Bible studies, theological discussions, collective prayer, and musical prayer," while other comparable activities, such as going to hair salons, retail stores, or movie theaters, allowed for more than three households. *Id.* at 946.

The U.S. Supreme Court held that the plaintiffs were likely to succeed in their Free Exercise claim because the regulations prohibited at-home religious exercises with more than three households, but allowed more than three households to gather for "comparable secular activities." *Tandon*, 593 U.S. at 63–64. Critically, the opinion makes clear that there was no evidence that plaintiffs' conduct "pose[d] a lesser risk of transmission" and California did not explain why at-home worshipers could not gather in large numbers. *Id.* And so, absent an explanation as to why those activities were treated differently, many activities that allowed for more than three households to gather were "comparable secular activities" to the in-home religious worship, and thus the regulation was subject to strict scrutiny. *Id.*; *see also Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689 (9th Cir. 2023) (en banc) (noting that the *Tandon* Court was concerned with the "risks various activities pose" and whether they were comparable).

The multi-factor scheme in *Tandon* is a far cry from the WLAD's non-discretionary structure that exempts employers, regardless of religious or secular identity, with fewer than eight employees. The Washington Legislature's decision to define "employer" as those having eight or more employees reflects legislative line-drawing around which sized employer should be tasked with knowing and complying with anti-discrimination law. This point is further underscored by the state legislator amici, who make plain that the reason that small employers are exempt under the WLAD is entirely different from the reasons that the religious employers are exempt. As they explain, the Legislature enacted the religious employer exemption because of religious freedom concerns and to "increase the availability of charitable and social services in Washington." ECF No. 16.1 at 24–34. In contrast, the small employer exemption exempts the "majority of businesses in Washington State" and "reflect[s] legislative judgments that the employment opportunities provided by smaller businesses outweigh the benefits of imposing compliance on these employers." *Id.* at 34–36. And the small employer exemption applies equally to religious and secular employers. Furthermore, these exemptions are not "comparable" because each exemption is supported by a different state interest, and addresses differing "risks" of each activity. *See Fellowship*, 82 F.4th at 689. The logical conclusion of UGM's argument is that the WLAD, and all government regulations, should provide for no exceptions at all, even when exceptions are prompted by different

concerns. Neither *Tandon* nor the First Amendment restrict the government in that nonsensical manner. *See Tingley*, 47 F.4th at 1088–89 (rejecting plaintiff's contention that Washington's conversion therapy law still allows for the "psychological harms" that it seeks to combat); *see also Tandon,* 593 U.S. at 65 (Kagan, J., dissenting) ("[T]he law does not require that the State equally treat apples and watermelons.").

UGM's second argument, that the WLAD is unconstitutional because Section 49.60.180(3) allows for the HRC to make individualized exceptions, principally relies on *Fulton v. City of Philadelphia*, 141 S. Ct. at 1877. But the WLAD provision UGM cites does not provide for the type of individualized exceptions that were at issue in *Fulton*. Section 49.60.180(3) of the WLAD once provided for "special exemptions or exceptions because of sex," but such exemptions are no longer valid following adoption of the Equal Rights Amendment to the Washington Constitution. *Marchioro v. Chaney*, 582 P.2d 487, 491–92 (Wash. 1978) (holding that any "special treatment for or discrimination against" either sex violates the state constitution's Equal Rights Amendment). Consequently, not only has that provision never been implemented by the HRC's rules or regulations, and never once used to allow for sex discrimination—it *cannot* be used going forward. As the Washington Supreme Court has held, the WLAD is generally applicable, neutral, and constitutional.

UGM's Expressive Association claim also falls short. "The right to freedom of association is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor*, 565 U.S. at 189. As a result, if a religious employer has an expressive association right to refuse to hire individuals based on a protected class, secular employers would also have such a right. No court has invalidated civil rights laws in such a wholesale manner. The only binding precedent that UGM relies on for that extraordinary proposition is *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). But that case involved whether a private membership organization could exclude individuals from membership and leadership positions based on sexual orientation, in light of state laws prohibiting discrimination in places of public accommodation. *Id.* at 647. It did not involve the rights of employers. And the U.S. Supreme Court has squarely rejected the proposition that the First Amendment's expression and association clauses prohibit states from adopting anti-discrimination laws in employment. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). UGM's remarkable First Amendment argument, if accepted, would eviscerate every anti-discrimination law in the country.

With respect to its Free Speech claims, UGM misinterprets the WLAD provisions that it challenges. *See supra* Section VIII.A.1.a. As detailed above, neither of the challenged statutes restrict its speech in any way. But setting aside the fact that UGM lacks standing, the WLAD's provisions relating to job

advertisements survive constitutional muster. "[C]ourts have found that speech related to hiring constitutes commercial speech." *Yim v. City of Seattle*, 63 F.4th 783, 801 (9th Cir. 2023) (Wardlaw, J., concurring) (collecting cases). While commercial speech enjoys First Amendment protections, those constitutional interests are "altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973) (upholding regulation that prevented newspaper from publishing job advertisements preferring sex because such activity is not protected under the First Amendment). Because the WLAD's speech provisions apply only to the extent that the activity itself—discrimination in employment—is unlawful under the WLAD, that provision too survives UGM's unripe constitutional attack.

2. UGM also fails to establish the remaining *Winter* factors

Because UGM is unable to succeed on the merits, it cannot establish irreparable harm. In contrast, the State suffers irreparable harm whenever it is enjoined from effectuating its statutes. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). That interest is in full force here. As UGM put it, after *Woods*, the State should have determined that "applying the WLAD against religious nonprofits violated the First Amendment and declined to enforce the law as such." Opening Br. at 53. But that is not the law, and

UGM's request that the state's chief legal official ignore the interpretation of the WLAD as set out by the state's highest court is hardly in the public interest. At bottom, UGM's irreparable harm argument is doomed by its inability to identify any individuals who applied and were rejected by UGM after *Woods*, and the fact that it has continued to apply its policy to its employees without apparent incident.

Nor does UGM provide any argument that it has met the last two *Winter* factors. Opening Br. at 71–72. "Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge." *Roman v. Wolf*, 977 F.3d 935, 940–41 (9th Cir. 2020). And here, these factor require denial of UGM's requested injunctive relief. The WLAD's protections for all Washingtonians are unquestionably a matter of the highest public importance. "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015); *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 631 (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.").

The district court properly denied UGM's motion for a preliminary injunction as moot, and this Court should affirm. Even if the Court concludes

this controversy is justiciable, it should remand to the district court for consideration of the *Winter* factors, which UGM fails here to establish.

IX. CONCLUSION

For the foregoing reasons, UGM does not establish a case or controversy that would allow the federal courts to adjudicate its case. This Court should affirm.

RESPECTFULLY SUBMITTED this 22nd day of January, 2024.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-2606

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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, ANDRETA ARMSTRONG, in her official capacity as Executive Director of the Washington State Human Rights Commission; and GUADALUPE GAMBOA, HAN TRAN, JEFF SBAIH, LUC JASMIN, and CHELSEA DIMAS, in their official capacities as Commissioners of the Washington State Human Rights Commission,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
No. 1:23-CV-3027-MKD
The Honorable Mary K. Dimke
United States District Judge

APPELLEES' ADDENDUM TO ANSWERING BRIEF

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STATUTORY ADDENDUM

Table of Contents

2018 Wash. Sess. Laws Chapter 303 § 2

Sec. 2.

A new section is added to chapter 49.60 RCW to read as follows: It is an unfair practice for an employer to: (1) Require an employee to disclose his or her sincerely held religious affiliation or beliefs, unless the disclosure is for the purpose of providing a religious accommodation at the request of the employee; or (2) Require or authorize an employee to disclose information about the religious affiliation of another employee, unless the. individual whose religious affiliation will be disclosed (a) 2 expressly consents to the disclosure, and (b) has knowledge of the purpose for the disclosure

28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term ‘‘highest court of a State’’ includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646, 62 Stat. 929; Pub. L. 91–358, Title I, §172(a)(1), July 29, 1970, 84 Stat. 590; Pub. L. 100–352, §3, June 27, 1988, 102 Stat. 662.)

RCW 49.60.010

Purpose of chapter.

This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, citizenship or immigration status, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, citizenship or immigration status, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

RCW 49.60.030

Freedom from discrimination—Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin, citizenship or immigration status, or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

RCW 49.60.040

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary [genitourinary], hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW 41.04.007; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

(18) "National origin" includes "ancestry."

(19) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) "Race" is inclusive of traits historically associated or perceived to be associated with race including, but not limited to, hair texture and protective hairstyles. For purposes of this subsection, "protective hairstyles" includes, but is not limited to, such hairstyles as afros, braids, locks, and twists.

(22) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(23) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(24) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(25) "Service animal" means any dog or miniature horse, as discussed in RCW 49.60.214, that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by the service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks. This subsection does not apply to RCW 49.60.222 through 49.60.227 with respect to housing accommodations or real estate transactions.

(26) "Sex" means gender.

(27) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

RCW 49.60.120

Certain powers and duties of commission.

The commission shall have the functions, powers, and duties:

(1) To appoint an executive director and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(2) To obtain upon request and utilize the services of all governmental departments and agencies.

(3) To adopt, amend, and rescind suitable rules to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.

(4) To receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter.

(5) To issue such publications and results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of sex, sexual orientation, race, creed, color, national origin, citizenship or immigration status, marital status, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies.

(7) To cooperate and act jointly or by division of labor with the United States or other states, with other Washington state agencies, commissions, and other government entities, and with political subdivisions of the state of Washington and their respective human rights agencies to carry out the purposes of this chapter. However, the powers which may be exercised by the commission under this subsection permit investigations and complaint dispositions only if

the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices under this chapter. The commission may perform such services for these agencies and be reimbursed therefor.

(8) To foster good relations between minority and majority population groups of the state through seminars, conferences, educational programs, and other intergroup relations activities.

RCW 49.60.180

Unfair practices of employers.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the

presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

RCW 49.60.208

Unfair practice-Religious affiliation disclosure.

It is an unfair practice for an employer to:

(1) Require an employee to disclose his or her sincerely held religious affiliation or beliefs, unless the disclosure is for the purpose of providing a religious accommodation at the request of the employee; or

(2) Require or authorize an employee to disclose information about the religious affiliation of another employee, unless the individual whose religious affiliation will be disclosed (a) expressly consents to the disclosure, and (b) has knowledge of the purpose for the disclosure.

RCW 49.60.215

Unfair practices of places of public resort, accommodation, assemblage, amusement—Trained dog guides and service animals.

It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, citizenship or immigration status, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practi

RCW 49.60.230

Complaint may be filed with commission.

(1) Who may file a complaint:

(a) Any person claiming to be aggrieved by an alleged unfair practice may, personally or by his or her attorney, make, sign, and file with the commission a complaint in writing under oath or by declaration. The complaint shall state the name of the person alleged to have committed the unfair practice and the particulars thereof, and contain such other information as may be required by the commission.

(b) Whenever it has reason to believe that any person has been engaged or is engaging in an unfair practice, the commission may issue a complaint.

(c) Any employer or principal whose employees, or agents, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written complaint under oath or by declaration asking for assistance by conciliation or other remedial action.

(2) Any complaint filed pursuant to this section must be filed within six months after the alleged act of discrimination, except that complaints alleging an unfair practice related to:

(a) A real estate transaction pursuant to RCW 49.60.222 through 49.60.225 must be filed within one year after the alleged unfair practice in a real estate transaction has occurred or terminated;

(b) Pregnancy discrimination pursuant to RCW 49.60.180 must be filed within one year after the alleged unfair practice; and

(c) A complaint alleging whistleblower retaliation must be filed within two years.

RCW 49.60.240

Complaint investigated—Procedure—Conference, conciliation—Agreement, findings—Rules.

(1)(a) Except as provided for in (c) of this subsection, after the filing of any complaint, the chairperson of the commission shall refer it to the appropriate section of the commission's staff for prompt review and evaluation of the complaint. If the facts as stated in the complaint do not constitute an unfair practice under this chapter, a finding of no reasonable cause may be made without further investigation. If the facts as stated could constitute an unfair practice under this chapter, a full investigation and ascertainment of the facts shall be conducted.

(b) If the complainant has limitations related to language proficiency or cognitive or other disability, as part of the review and evaluation under (a) of this subsection, the commission's staff must contact the complainant directly and make appropriate inquiry of the complainant as to the facts of the complaint.

(c) After the filing of a complaint alleging an unfair practice in a real estate transaction pursuant to RCW 49.60.222 through 49.60.225, the chairperson of the commission shall refer it to the appropriate section of the commission's staff for prompt investigation and ascertainment of the facts alleged in the complaint.

(2) The investigation shall be limited to the alleged facts contained in the complaint. The results of the investigation shall be reduced to written findings of fact, and a finding shall be made that there is or that there is not reasonable cause for believing that an unfair practice has been or is being committed. A copy of the findings shall be provided to the complainant and to the person named in such complaint, hereinafter referred to as the respondent.

(3) If the finding is made that there is reasonable cause for believing that an unfair practice has been or is being committed, the commission's staff shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.

If an agreement is reached for the elimination of such unfair practice as a result of such conference, conciliation, and persuasion, the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the commission setting forth the terms of said agreement. No order shall be entered by the commission at this stage of the proceedings except upon such written agreement, except that during the period beginning with the filing of complaints alleging an unfair practice with respect to real estate transactions pursuant to RCW 49.60.222 through 49.60.225, and ending with the filing of a finding of reasonable cause or a dismissal by the commission, the commission staff shall, to the extent feasible, engage in conciliation with respect to such complaint. Any conciliation agreement arising out of conciliation efforts by the commission shall be an agreement between the respondent and the complainant and shall be subject to the approval of the commission. Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the commission determines that disclosure is not required to further the purposes of this chapter.

If no such agreement can be reached, a finding to that effect shall be made and reduced to writing, with a copy thereof provided to the complainant and the respondent.

(4) The commission may adopt rules, including procedural time requirements, for processing complaints alleging an unfair practice with respect to real estate transactions pursuant to RCW 49.60.222 through 49.60.225 and which may be consistent with the federal fair housing amendments act of 1988 (42 U.S.C. Sec. 3601 et seq.), but which in no case shall exceed or be more restrictive than the requirements or standards of such act.

RCW 49.60.250

Hearing of complaint by administrative law judge—Limitation of relief—Penalties—Order—Arbitration.

(1) In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of findings to that effect, the entire file, including the complaint and any and all findings made, shall be certified to the chairperson of the commission. The chairperson of the commission shall thereupon request the appointment of an administrative law judge under Title 34 RCW to hear the complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of the complaint at a hearing before the administrative law judge, at a time and place to be specified in such notice.

(2) The place of any such hearing may be the office of the commission or another place designated by it. The case in support of the complaint shall be presented at the hearing by counsel for the commission: PROVIDED, That the complainant may retain independent counsel and submit testimony and be fully heard. No member or employee of the commission who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall the member or employee participate in the deliberations of the administrative law judge in such case. Any endeavors or negotiations for conciliation shall not be received in evidence.

(3) The respondent shall file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The respondent has the right to cross-examine the complainant.

(4) The administrative law judge conducting any hearing may permit reasonable amendment to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

(5) If, upon all the evidence, the administrative law judge finds that the respondent has engaged in any unfair practice, the administrative law judge shall state findings of fact and shall issue and file with the commission and

cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the administrative law judge, will effectuate the purposes of this chapter, including action that could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed twenty thousand dollars, and including a requirement for report of the matter on compliance. Relief available for violations of RCW 49.60.222 through 49.60.224 shall be limited to the relief specified in RCW 49.60.225.

(6) If a determination is made that retaliatory action, as defined in RCW 42.40.050, has been taken against a whistleblower, as defined in RCW 42.40.020, the administrative law judge may, in addition to any other remedy, require restoration of benefits, back pay, and any increases in compensation that would have occurred, with interest; impose a civil penalty upon the retaliator of up to five thousand dollars; and issue an order to the state employer to suspend the retaliator for up to thirty days without pay. At a minimum, the administrative law judge shall require that a letter of reprimand be placed in the retaliator's personnel file. No agency shall issue any nondisclosure order or policy, execute any nondisclosure agreement, or spend any funds requiring information that is public under the public records act, chapter 42.56 RCW, be kept confidential; except that nothing in this section shall affect any state or federal law requiring information be kept confidential. All penalties recovered shall be paid into the state treasury and credited to the general fund.

(7) The final order of the administrative law judge shall include a notice to the parties of the right to obtain judicial review of the order by appeal in accordance with the provisions of RCW 34.05.510 through 34.05.598, and that such appeal must be served and filed within thirty days after the service of the order on the parties.

(8) If, upon all the evidence, the administrative law judge finds that the respondent has not engaged in any alleged unfair practice, the administrative law judge shall state findings of fact and shall similarly issue and file an order dismissing the complaint.

(9) An order dismissing a complaint may include an award of reasonable attorneys' fees in favor of the respondent if the administrative law judge concludes that the complaint was frivolous, unreasonable, or groundless.

(10) The commission shall establish rules of practice to govern, expedite, and effectuate the foregoing procedure.

(11) Instead of filing with the commission, a complainant may pursue arbitration conducted by the American arbitration association or another arbitrator mutually agreed by the parties, with the cost of arbitration shared equally by the complainant and the respondent.

RCW 49.60.310

Misdemeanor to interfere with or resist commission.

Any person who wilfully resists, prevents, impedes, or interferes with the commission or any of its members or representatives in the performance of duty under this chapter, or who wilfully violates an order of the commission, is guilty of a misdemeanor; but procedure for the review of the order shall not be deemed to be such wilful conduct.