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No. 96132-8

SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW S. WOODS,

Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION

Respondent.

BRIEF OF COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, SAMARITAN'S PURSE, CHRISTIAN CARE MINISTRY, ORCHARD ALLIANCE, MOUNT HERMON ASSOCIATION, OC INTERNATIONAL, THE NAVIGATORS, AND BILLY GRAHAM EVANGELISTIC ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT SEATTLE'S UNION GOSPEL MISSION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICI CURIAE 1

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 3

1. The Religious Organization Exemption accommodates religious association as a form of religious exercise and expression. 3

2. Measuring the religiosity of job duties violates both the Establishment Clause and the Free Exercise Clause. 6

A. The Establishment Clause prohibits judicial inquiries into the religiosity of SUGM's activities or job requirements. .7

B. Including a religious job duties test in the WLAD triggers, and fails, the strict scrutiny standards of the Free Exercise Clause. 13

3. The Religious Organization Exemption should apply to all nonprofits operated in furtherance of religious purposes. 18

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Cases

Ockletree v. Franciscan Health System,
179 Wn.2d 769, 317 P.3d 1009 (2014) 6

Federal Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 5

Burwell v. Hobby Lobby,
134 S.Ct. 2751 (2014) 3, 15, 17

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 14, 17, 19

Colorado Christian University v. Weaver,
534 F.3d 1245 (10th Cir. 2008) 10, 12

Corp. of the Presiding Bishop v. Amos,
483 U.S. 327 (1987) 4, 9, 14, 15

Employment Division v. Smith,
494 U.S. 872 (1990) 14, 16, 19

Fowler v. Rhode Island,
345 U.S. 67 (1953) 11, 12

Hernandez v. Commissioner,
490 U.S. 680 (1989) 9

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,
565 U.S. 171 (2012) 16

Larson v. Valente,
456 U.S. 228 (1982) 18

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission,
138 S.Ct. 1719 (2018) 15

New York v. Cathedral Academy,
434 U.S. 125 (1977) 7, 8

NLRB v. Catholic Bishop,
440 U.S. 490 (1979) 10

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 5

Sherbert v. Verner,
374 U.S. 398 (1963) 18

Spencer v. World Vision, Inc.,
633 F.3d 723 (9th Cir. 2011) 11

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017) 16

University of Great Falls v. NLRB,
278 F.3d 1335 (D.C. Cir. 2002) 9, 10, 13

Widmar v. Vincent,
454 U.S. 263 (1981) 8, 11

Wisconsin v. Yoder,
406 U.S. 205 (1972) 3, 4, 18

Other State Cases

Grand County Board of Commissioners v. Colorado Property Tax Administrator,
401 P.3d 561 (Colo. Ct. App. January 14, 2016) 11

Federal Statutes

42 U.S.C. §2000e-1(a) 5

Washington State Statutes

RCW 49.60.040(11) 2

Other State Statutes

C.R.S. § 24-34-402(7) 5

STATEMENT OF INTEREST OF AMICI CURIAE

Amici constitute a diverse group of religious organizations and collectively they conduct many different types of activities including humanitarian aid and disaster relief, social services, health care sharing, education, and Christian evangelism, discipleship and Bible teaching. *Amici* conduct all of their activities as an exercise of their Christian beliefs and in furtherance of their respective Christian missions. In addition, and importantly, *amici* are guided by their beliefs to carry out their activities as associations of like-minded believers, and doing so is an expression of those beliefs.

Amici are active throughout the United States, including in the State of Washington. With respect to federal and state laws limiting associational rights, *amici* have a vital interest in, and increasingly rely upon, broad interpretations of religious exemptions, including the one at issue in this case. Such exemptions preserve their legal rights to exercise and express their religious beliefs not just through their activities but also through their associations as faith communities.

I. INTRODUCTION

The Washington Law Against Discrimination (WLAD) generally prohibits employers from discriminating based on various grounds, including religion. However, the law entirely exempts from this

prohibition nonprofit religious organizations (the "Religious Organization Exemption"). RCW 49.60.040(11).

Appellant in this case is arguing that the Religious Organization Exemption should not apply to job positions that are secular and not religious (as determined by a court). More specifically, this appeal asks whether a nonprofit religious organization such as Seattle's Union Gospel Mission (SUGM) must prove that any challenged position includes religious job duties in order to claim the Religious Organization Exemption. *Amici* argue that a focus on job duties improperly ignores the associational exercise and expression protected by the exemption. In addition, because a religious job duties test would violate both the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution, *amici* urge this court to reject Appellant's proposed test and to apply the Religious Organization Exemption to all job positions of nonprofit religious organizations.

II. STATEMENT OF THE CASE

SUGM requires its employees to share its Christian beliefs, and to live in accordance with those beliefs. When Matthew Woods applied for a staff attorney position, it became apparent that he did not share SUGM's religious beliefs regarding human sexuality and marriage. Mr. Woods sued SUGM, arguing that its faith-based employment standard violates the

WLAD. SUGM responded that it is not subject to the WLAD because of the Religious Organization Exemption, and the trial court ruled in favor of SUGM. This appeal followed.

III. ARGUMENT

1. The Religious Organization Exemption accommodates religious association as a form of religious exercise and expression.

In a recent religious liberty case before the U.S. Supreme Court, Justice Kennedy described the foundation of this country's commitment to religious liberty as follows:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Burwell v. Hobby Lobby, 134 S.Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

In applying this commitment, the Court has recognized that religious association is a form of religious exercise. For example, in *Wisconsin v. Yoder*, the Court observed that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly

influence." 406 U.S. 205, 210 (1972). The Court further noted that the Amish base this concept on "their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, 'be not conformed to this world . . . .'" *Id.* at 216.

Justice Brennan described more fully this associational aspect of religious exercise in the Court's leading case upholding religious hiring rights. He explained that "determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). Justice Brennan further observed that:

> religious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations . . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Id. at 341-43 (1987) (Brennan, J., concurring) (internal quotation omitted).

Different religious organizations, even those of the same general faith, will reach different conclusions regarding the extent of associational

requirements of their faith. Perhaps not many religious organizations believe the requirements apply as broadly as do the Amish. But the important point is that in each case this determination is based on religious beliefs as interpreted and applied by the religious organization, and is therefore religious exercise.

In addition, the mere act of associating based on shared religious beliefs is often also an expression of those beliefs (just as many other organizations consist of like-minded individuals associating to express their commonly held views). That associations may have an expressive component has long been recognized by the U.S. Supreme Court. *See*, *e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 649, 655 (2000).

As these cases recognize, many types of faith communities exercise and express their religious beliefs in part through religious employment standards. Accordingly, statutory exemptions for religious organizations from civil rights laws, such as the Religious Organization Exemption (as written), accommodate this associational aspect of religious exercise and expression, in addition to the activities of such organizations. *See*, *e.g.*, 42 U.S.C. §2000e-1(a) (exempting religious corporations and associations from religious employment nondiscrimination requirement); Colorado Revised Statutes § 24-34-402(7) (exempting religious organizations or

associations from the Colorado Anti-Discrimination Act). Moreover, such exemptions may also recognize that, when applied by religious organizations, religious employment standards are generally not the type of invidious discrimination against which civil rights laws are targeted.

2. Measuring the religiosity of job duties violates both the Establishment Clause and the Free Exercise Clause.

For Mr. Woods, the Religious Organization Exemption as written is too broad. So, based on this Court's decision in *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 317 P.3d 1009 (2014), Mr. Woods argues that the exemption should apply only to positions that relate to an organization's religious practices and that include duties that are religious or sectarian in nature, or related to religion. *See Ockletree*, 179 Wn.2d at 805-06 (Wiggins, J., concurring). More specifically as applied to SUGM, Mr. Woods argues that the exemption cannot apply to the staff attorney position because of the allegedly secular nature of the position. Mr. Woods asserts that the trial court should have determined whether the various requirements of the staff attorney position, such as to accept SUGM's statement of faith and to attend staff meetings that include prayer, are or are not religious in nature.

But Mr. Woods is asking courts to do something they simply cannot do. Governmental inquiry into the religiosity of activities or job duties

violates principles of religious deference and neutrality under both the Establishment and Free Exercise Clauses of the U.S. Constitution.

A. The Establishment Clause prohibits judicial inquiries into the religiosity of SUGM's activities or job requirements.

Both the U.S. Supreme Court and other courts have held that the criteria used to distinguish among religious and secular activities require government officials to make intrusive religious determinations which inevitably result in religious favoritism. Put differently, government officials have no competence or authority to measure the religiosity of an organization's activities based on some litmus test of perceived religious content, and using such a test invariably favors conventional or orthodox religious activities (such as church worship services) over activities that may seem less conventionally religious to a court (such as serving the homeless).

Religious Deference

In 1977, the Court struck down a statute requiring government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *New York v. Cathedral Academy*, 434 U.S. 125, 132 (1977). The Court noted that the requirement would place religious schools "in the position of trying to disprove any

religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added). The Court concluded that "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id.* at 133.

A few years later, the Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). The Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* Indeed, "[m]erely to draw the distinction would require the [State] – and ultimately the Courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.; see also id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute

religious worship due to the many and various beliefs that constitute religion).

After another few years, the Court upheld a statutory religious exemption that applied to all activities of a religious organization, not just its religious activities. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The Court noted that "Congress' purpose in extending the exemption was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" *Id.* at 336. Further, the Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.*[1]

More recently, other courts have rejected tests that require judicial determinations regarding the religiosity of various activities. The Court of Appeals for the D.C. Circuit in 2002 struck down a "substantial religious character" test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The test required the NLRB, when evaluating a religious school, to consider

[1] *See also Hernandez v. Commissioner*, 490 U.S. 680, 694 (1989) (in income tax exemption context, pervasive governmental inquiry into "the subtle or overt presence of religious matter" is proscribed by the First Amendment Establishment Clause).

"such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id.* at 1339. (internal quotation omitted). The court held that the "very process of inquiry" into the "'religious mission' of the University," as well as "the Board's conclusions have implicated [] First Amendment concerns . . . ." *Id.* at 1341 (*citing NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)). The court concluded that the test was fatally flawed because it "boil[ed] down to '[I]s [an institution] sufficiently religious?'" *Id.* at 1343.

Similarly, the Tenth Circuit Court of Appeals in 2008 struck down a Colorado statutory distinction between "pervasively sectarian" and other religious schools. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The Tenth Circuit observed that the statutory test criteria required "intrusive governmental judgments regarding matters of religious belief and practice." *Id.* at 1256. The court concluded the test criteria were inconsistent with the U.S. Supreme Court's decisions precluding states from distinguishing among religious activity "on the basis of intrusive judgments regarding contested questions of religious beliefs or practice." *Id.* at 1261; *see also id.* at 1263 (the "First

Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes.").[2]

The Ninth Circuit Court of Appeals has also reached the same conclusion, rejecting a test that would have examined the religiosity of an organization's activities on the grounds that "[t]he Supreme Court … has repeatedly cautioned courts against venturing into this constitutional minefield." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 730 (9th Cir. 2011).

<u>*Religious Neutrality*</u>

Courts have held that religiosity tests result not only in prohibited entanglement, but also in religious favoritism. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the U.S. Supreme Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in the *Widmar* case discussed above. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. *Id.* at 69. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. The Court held that the distinction required by the

[2] *See also Grand County Board of Commissioners v. Colorado Property Tax Administrator*, 401 P.3d 561, 567 (Colo. Ct. App. January 14, 2016). (noting that "[i]t is not our place to undertake an examination of Christian doctrine to determine whether hiking is 'overtly Christian' enough to count as a religious activity.")

ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 69-70.

In *Colorado Christian University*, the Tenth Circuit held that "[b]y giving scholarship money to students who attend sectarian – but not 'pervasively' sectarian – universities, Colorado necessarily and explicitly discriminates among religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials." 534 F.3d at 1258. The court further noted that "the discrimination is expressly based on *the degree of religiosity* of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board." *Id.* at 1259 (emphasis added). Similarly, the court in *University of Great Falls* held that:

> To limit the . . . exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to

> members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause -- not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.

278 F.3d at 1346.

In short, a religiosity test which requires government officials to determine whether an activity or job duty is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no competence or authority to navigate. Such a test will inevitably produce arbitrary and discriminatory results.

As applied in this case, the idea that a court could conclude, as Mr. Woods asserts, that SUGM's particular job requirements - accepting its statement of faith and attending staff meetings that include prayer - are not religious in nature is absurd on its face. But even more to the point, the Establishment Clause simply does not permit courts to make such determinations.

B. Including a religious job duties test in the WLAD triggers, and fails, the strict scrutiny standards of the Free Exercise Clause.

In applying the Free Exercise Clause, the Court has adopted a general rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the

incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (*citing Employment Division v. Smith*, 494 U.S. 872 (1990)). However, "[a] law *failing to satisfy these requirements* must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32 (emphasis added).

If the religious job duties test is grafted onto the WLAD as proposed by Mr. Woods, then the law would substantially burden religious exercise and would be subject to, and would fail, strict scrutiny.

<u>*Substantial Burden*</u>

As an initial matter, the very existence of the Religious Organization Exemption concedes that the WLAD without such an exemption could substantially burden the religious exercise of such organizations. Alleviating this burden is the reason for the exemption. Moreover, as described in Section 1. above, by requiring SUGM to employ individuals who do not share its religious beliefs (even for jobs that may not appear overtly religious), the WLAD restricts or substantially burdens SUGM's religious associational exercise.

In addition, a religious job duties test itself substantially burdens religious exercise. In *Amos*, the Court expressly articulated the burden imposed on religious organizations by a requirement to prove that their

activities are sufficiently religious. The Court stated that "… it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Amos*, 483 U.S. at 336.

Religious Neutrality and Interference with Internal Affairs

The Court imposes strict and comprehensive requirements for religious neutrality. *See*, *e.g.*, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1731 (2018) ("The Free Exercise Clause bars even subtle departures from neutrality on matters of religion.") (internal quotation omitted); *Hobby Lobby*, 134 S.Ct. at 2783 n.41. (noting that strict scrutiny applies when exemptions are given for certain secular or religious reasons but not for other religious reasons).

As described in Section 2.A above, the Court has held that, when government officials seek to determine the religious content in activities or policies, they effectively create an implicit state-defined orthodoxy regarding religious activities. Distinctions based on a court's view of the relative religious significance of various activities inevitably favor expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods.

Of course, religious exemptions that distinguish based on non-religious factors (such as size, or even tax-exempt status) may be part of a

neutral and generally applicable law. But the government cannot use religious exemptions to favor some types of religious activities over others based on their religiosity, and a test based on the religiosity of job duties leads precisely to this result.

In addition, the U.S. Supreme Court has held that certain religiously neutral laws may also be subject to strict scrutiny. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) ("This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause"). For example, the Court created a religious exemption to a law that "interfere[d] with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 190 (2012). The WLAD's religious employment restrictions constitute exactly this type of interference.

In short, attaching a religious job duties test to the WLAD triggers strict scrutiny both because the resulting law is not religiously neutral and because it interferes with the internal affairs of religious organizations.[3]

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[3] The assessment of the "religiosity" of distinct activities also constitutes a form of individualized exceptions that trigger strict scrutiny under *Smith*. 494 U.S. at 884.

Strict Scrutiny

The Court has emphasized that the Free Exercise scrutiny test must be rigorous:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests.

Lukumi, 508 U.S. at 546 (citations omitted).

Those seeking to apply statutes to religious exercise will generally argue that any applicable legislative interest is compelling, and that declining to apply the law to the person whose free exercise it burdens will materially impair such interest. But it is important to note that these two parts of the test push against each other, such that it is difficult to maintain that a law is narrowly tailored to a broadly stated interest. Accordingly, the Court has held that the test "requires us to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'--in other words, to look to the marginal interest in enforcing the [law] in th[is] case[ ]." *Hobby Lobby*, 134 S.Ct. at 2779 (citation omitted); *see also id.* at 2780.

Finally, the strict scrutiny burden cannot be satisfied with mere speculation, but instead must be supported by evidence. *Larson v.*

Valente, 456 U.S. 228, 249 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 224-25 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

Strict scrutiny in this case requires both an examination of the interests furthered by the WLAD and the impact on such interests from exempting SUGM. As the party seeking to enforce the WLAD, Mr. Woods must establish that the State of Washington has a compelling interest in requiring SUGM to employ an individual who does not share its religious beliefs. In addition, Mr. Woods must establish that declining to apply this requirement to SUGM imposes meaningful harm on the state's compelling interest.

However, Mr. Woods simply cannot meet his burden on these points. By including the Religious Organization Exemption in the WLAD, the State of Washington has expressly conceded that it does not have a compelling interest in imposing the WLAD requirements on any positions of religious organizations like SUGM.

3. The Religious Organization Exemption should apply to all nonprofits operated in furtherance of religious purposes.

Instead of measuring the religiosity of an organization's activities, courts applying the Religious Organization Exemption should determine only whether the organization is operated for a religious purpose. As courts have recognized, the extent of distinctly religious content in a

particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters.

These cases also affirm that purposes and activities are no less religious merely because some persons may embrace similar purposes or conduct similar activities for nonreligious reasons. Put differently, an organization's primary purpose is no less religious merely because it might be embraced by other organizations for secular reasons. To hold otherwise would mean that many organizations which believe as a matter of religious conviction that they are called to serve tangible human needs would be required to sacrifice their religious character in order to fulfill their calling. Such a result trivializes religious exercise.

IV. CONCLUSION

Amici respectfully request this court to apply the Religious Organization Exemption as written and to reject the religious job duties test. On this basis, *amici* request this court to rule in favor of SUGM and affirm the judgment of the trial court.

RESPECTFULLY SUBMITTED this 22nd day of January, 2019.

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CERTIFICATE OF SERVICE

1. I am a legal assistant with the law firm Sherman & Howard L.L.C. I am over the age of 18, am competent to make this declaration and have personal knowledge of the facts herein.

2. I certify that I served by efiling on January 22, 2019 a copy of the foregoing Brief of Council For Christian Colleges & Universities, Samaritan's Purse, Christian Care Ministry, Orchard Alliance, Mount Hermon Association, OC International, The Navigators, and Billy Graham Evangelistic Association as *Amicus Curiae* Supporting Respondent Seattle's Union Gospel Mission to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 22nd day of January, 2019, at Colorado Springs, Colorado.

By: /s/ Heather Kelley
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