No. 22-35986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE PACIFIC UNIVERSITY,

Plaintiff-Appellant,

v.

ROBERT FERGUSON,
in his official capacity as Attorney General of Washington,

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
No. 3:22-cv-05540-RJB
The Honorable Robert J. Bryan
United States District Court Judge

APPELLEE'S ANSWERING BRIEF

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I. INTRODUCTION

Seattle Pacific University (SPU) has a policy that prohibits its regular faculty and staff from marrying a spouse of the same sex or engaging in sexual intimacy outside of a marriage between a man and a woman. In May 2022, hundreds of Washingtonians wrote to the Washington Attorney General's Office (AGO), concerned that SPU's employment policies may discriminate on the basis of sexual orientation, in violation of the Washington Law Against Discrimination (WLAD), Wash. Rev. Code § 49.60.

After receiving these complaints, the AGO sent a letter to SPU in June 2022, advising that the AGO was opening an inquiry to determine whether SPU was meeting its obligations under the WLAD or otherwise qualified for a ministerial exception to the law. The AGO's letter requested four categories of information about SPU's employment practices, did not compel any mandatory compliance, and made clear that the AGO had not made any determination about SPU's compliance with the WLAD. SPU responded by filing this lawsuit against Washington State Attorney General Bob Ferguson, alleging that the AGO's inquiry violates SPU's First Amendment rights.

The AGO moved to dismiss the case, and the district court correctly granted the motion, concluding: (1) SPU did not have standing to maintain this action because its alleged injuries were not redressable; and (2) the court should abstain from hearing this matter pursuant to *Younger v. Harris*, 401 U.S. 37

(1971). This Court should affirm the dismissal of SPU's complaint on standing, ripeness, or abstention grounds.

First, on SPU's lack of standing, SPU's alleged injuries are based on its disagreement with a Washington Supreme Court decision interpreting the WLAD, a case that the U.S. Supreme Court declined to review. As a federal district court, the court lacks the power to change Washington state law as interpreted by the state's highest court. In any event, a ruling in SPU's favor in this case would not prevent private parties from enforcing the WLAD against SPU (as one person already has). Moreover, SPU failed to allege an injury-in-fact because its injuries are vague and hypothetical.

Second, SPU's premature claims are not ripe for review. Its failure to allege injury-in-fact means not only that it lacks standing, but also that its claims fail the test for constitutional ripeness. Nor are they prudentially ripe. SPU asks the federal courts to assess its First Amendment theories in the abstract, with no factual basis to evaluate its constitutional claims, and nothing more than conclusory allegations of wholly self-imposed or speculative harm premised on events that may never occur, making them unfit for review. Thus, this Court may also affirm dismissal for lack of constitutional or prudential ripeness.

Third, even if SPU had presented a justiciable claim, the district court correctly decided to abstain from exercising jurisdiction pursuant to *Younger* because the AGO's inquiry was an ongoing quasi-criminal enforcement action.

As the district court recognized, *Younger* abstention applies where, as here, the AGO is currently investigating whether an employer's practices comport with state law. This Court's recent precedent confirms that comity concerns are at their height when a state attorney general is investigating possible violations of state law.

The Court should affirm the district court's order dismissing this case.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether a non-compulsory request for information about a religious employer's employment practices confers Article III standing to bring a pre-enforcement challenge seeking a prospective exemption from state employment law.
2. Whether a pre-enforcement challenge seeking a prospective exemption from state employment law is constitutionally and prudentially ripe for review when the religious employer fails to allege injury-in-fact or facts sufficient to allow the Court to assess its First Amendment claims without further factual development.
3. Whether comity requires federal courts to abstain under the *Younger* doctrine from intervening in a state Attorney General's ongoing inquiry into whether employment practices comport with state law.

III. 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. Wash. Rev. Code § 49.60.030. 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. In light of this compelling state interest and the Attorney General's duty to enforce the law, the AGO routinely investigates alleged violations of the WLAD. *See, e.g.*, *Washington v. Matheson Flight Extenders, Inc.*, No. C17-1925-JCC, 2021 WL 489090, at *3 (W.D. Wash. Feb. 10, 2021) (confirming "the Attorney General is authorized to enforce [the] WLAD"); *Cases*, Wash. State Office of the Att'y Gen., https://www.atg.wa.gov/cases (listing dozens of enforcement actions the AGO has taken under the WLAD).[1]

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.*

[1] In a Rule 12(b)(1) motion, the court "is not confined by the facts contained in the four corners of the complaint—it may consider facts and need not assume the truthfulness of the complaint." *Americopters, LLC v. FAA*, 441 F.3d 726, 732 n.4 (9th Cir. 2006) (emphasis removed).

Franciscan Health System, where the state's high court interpreted a provision that exempts "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) (citing 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.

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). The state high court in *Woods* reaffirmed that the WLAD's exemption of religious nonprofits was facially constitutional. *Id.* However, it held that the exemption "may be constitutionally invalid *as applied* to [the plaintiff]," a bisexual job applicant. *Id.* at 1063 (emphasis added). In directing further proceedings on the as-applied challenge, and in order to avoid a conflict with a provision of the Washington Constitution that prohibits favored treatment, 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 look at a "variety of factors," including but not limited to 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 Washington Supreme Court made clear that its decision in *Woods* "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 U.S. Supreme Court denied a petition for a writ of certiorari to review *Woods*. *See Woods*, 142 S. Ct. at 1094.

B. The Attorney General's Inquiry to Seattle Pacific University

Beginning in May 2022, SPU students and faculty began a sit-in at the University President's office to protest the University's employment policies. SER-009. The protest centered on the University's employee code of conduct,

which requires "all of its regular faculty and staff" to affirm that they will not engage in sexual activity with members of the same sex. SER-007.

During and after the sit-in, the AGO received hundreds of contacts from Washingtonians concerned about SPU's employment practices. ER-7:5–7. Pursuant to its duty to investigate allegations of discrimination and enforce state law, the AGO thereafter sent a private letter to the University's General Counsel and four employees. ER-106–08. Acknowledging the University's First Amendment rights to religious autonomy in the selection of its ministers, the letter asked four questions about the University's employment practices consistent with *Woods*. ER-106–07. The letter made clear that the AGO had "not made any determination as to whether the University has violated any law," did not compel production of information from the University or threaten any consequences for noncompliance, and explicitly acknowledged the ministerial exception contained in the WLAD through a citation to *Woods*. *Id.* The AGO did not publicize or disclose its letter until it received media inquiries following SPU's filing of this lawsuit. SER-041.

In response to the AGO's letter, the University provided none of the requested information and instead responded with a letter asking multiple questions regarding the AGO's legal positions, counsel's arguments, and rhetorical questions. ER-114. Counsel for the University indicated that they would like to discuss their concerns and requested a meeting. ER-115. The AGO

explained that it would respond after conferring with Attorney General Ferguson. ER-114. Two days later, without any further correspondence, SPU filed a federal suit. *Id.*; SER-022.

SPU's initial complaint asserted ten causes of action under 42 U.S.C. § 1983 for alleged First Amendment violations, all stemming from the AGO's inquiry letter. SER-013–021. The AGO moved to dismiss because SPU had suffered no injury, its alleged injuries were not redressable, its claims were not ripe for review, and *Younger* abstention required the federal courts to abstain from adjudicating the case. SER-031–032. SPU filed an amended complaint, adding an eleventh First Amendment claim related to the AGO's press statement confirming the inquiry letter, which it issued in response to media questions generated by SPU's lawsuit but which SPU alleged was retaliatory. ER-92–102. It did not otherwise correct the defects raised by the AGO's motion to dismiss. The AGO thus moved to dismiss on the same grounds. SER-062.

C. District Court Decision

The district court held oral argument on the AGO's motion to dismiss. The AGO made clear to the district court that there were no repercussions to the University for not responding to the AGO's letter:

> THE COURT: Counsel, what would have happened here if Seattle Pacific had responded to the attorney general's inquiry with a polite, "We decline to answer" or "We decline to answer for the reasons that are stated in the briefing"? What happens then?

> MR. JEON: Your Honor, there are no legal consequences to ignoring our letter.
>
> THE COURT: I'm talking about legal consequences --
>
> MR. JEON: There are no other consequences.
>
> THE COURT: -- or any other consequences. I would assume the attorney general would sift through the complaints he has and investigate further without asking the university to respond?
>
> MR. JEON: That's correct, your Honor. As is the case here, we haven't asked anything further from the university since the filing of this lawsuit.

ER-14:7–23. During oral argument, SPU asked the district court to "limit" the scope of the AGO's investigation, but did not explain how any proposed limits should be drawn. ER-33:3–5.

The district court dismissed SPU's amended complaint. ER-123. In so ruling, the district court assumed, without deciding, that the University's Amended Complaint sufficiently alleged injury-in-fact for purposes of standing. ER-37:22–38:3. The court nonetheless found that SPU lacked standing, reasoning that a favorable decision would not redress SPU's alleged injuries. ER 38:4–6. In doing so, it analyzed SPU's claims for relief in two categories.

The first category contained SPU's five prayers for declaratory relief. ER-38:7–13. The court reasoned that those requests would amount to advisory opinions about the law and, because it is "not appropriate" for federal courts to issue advisory opinions, the first five prayers for relief were dismissed. *Id.*

The second category of prayers for relief consisted of SPU's four prayers for injunctive relief. These prayers asked the district court to prohibit (1) the AGO from "requiring" SPU to provide information and otherwise interfering with church governance and SPU's relationship with its ministerial employees; (2) enforcement of the WLAD against SPU's ministerial employees; (3) the AGO from enforcing the WLAD against its employees regardless of ministerial status; and (4) the AGO from retaliating against SPU. ER-39:1–22; ER-103. The court held that the fourth request for relief, the retaliation claims, were subsumed in the other issues in this case. ER-39:21–22. With respect to the first three requests for injunctive relief, the court explained that those requests would require an inquiry into which SPU employees are ministers under Washington law or the court to examine the Washington Supreme Court's interpretation of state law that the court could not perform. ER-39:23–40:3; ER-40:10–17. The court reasoned that "a careful examination of th[e injunctive] requests indicates that [SPU is] asking for a change to the state law against discrimination, or for limits to it, and also, possibly, limits on the state attorney general's investigatory authority." ER-38:16–21. Consequently, the court dismissed SPU's claims because the pleadings did not raise a redressable prayer for relief.

The court separately held that abstention was appropriate pursuant to *Younger v. Harris*. ER-42:21–25. The court reasoned that the AGO's investigation constituted an ongoing, quasi-criminal enforcement action that

implicates important state interests and would allow SPU to raise its federal defenses. *Id.* The court concluded that abstention here "is consistent with the comity considerations that underlie *Younger* abstention." ER 42:23–25. SPU now appeals.

IV. STANDARD OF REVIEW

The district court's dismissal pursuant to Rule 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, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022). The Court likewise reviews a district court's determination to apply *Younger* abstention de novo. *Credit One Bank, N.A. v. Hestrin*, 60 F.4th 1220, 1224 (9th Cir. 2023).

V. SUMMARY OF ARGUMENT

SPU disagrees with the Washington State Supreme Court's decision in *Woods v. Seattle's Union Gospel Mission* and wants a federal court to re-calibrate the scope of a state law exemption as construed by the state's highest court. But federal courts, as mandated by the Constitution, only decide cases and controversies. Plaintiffs bringing pre-enforcement challenges "are not entitled to a special exemption" from this requirement, and the U.S. Supreme Court "has consistently applied these requirements 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." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021). There is no Article III case or controversy here, SPU's claims were not ripe, and, even if this case were justiciable, *Younger* abstention requires the federal judiciary to abstain from unduly interfering with and commanding how state officials should conduct state business.

Redressability. The district court properly dismissed this case because SPU's abstract disagreement with the WLAD cannot be redressed by the federal courts. Indeed, any favorable decision for SPU from this Court would require the federal courts to do one of two things: (1) hold that the Washington Supreme Court interpreted state law incorrectly, or (2) determine how the WLAD would apply to hypothetical facts about employment practices that SPU has not pleaded. The first remedy is off the table as a matter of constitutional federalism. And the second would be an advisory opinion that would not bind the state courts, or any other private individual who wishes to bring a WLAD claim against the University. Because the district court does not have the power to redress SPU's injury, its case is not justiciable.

Injury-in-fact. For the purposes of the motion to dismiss, the district court assumed that SPU had sufficiently alleged injury-in-fact and granted the AGO's motion to dismiss on redressability grounds. But SPU has no legally cognizable injury, and that provides a separate ground to affirm the judgment below. Rather than alleging a "concrete and particularized" injury, SPU's injuries are all

hypothetical conjecture and conclusory statements that it believes penalties may be levied against SPU in the future or that its relationships with its current employees or autonomy have been interfered with in some unspecified way. Such abstract harms and fears do not confer it with Article III standing. And SPU's remaining harms—that it has been chilled or an ordinary person would be chilled from First Amendment activity—are self-imposed harms that do not confer it with constitutional standing. SPU lacks an injury-in-fact sufficient to confer standing.

Ripeness. This court may affirm the district court's order on constitutional and prudential ripeness grounds as well. Just as SPU is unable to satisfy injury-in-fact, its claims are not constitutionally ripe for review. Prudential ripeness also requires dismissal, as SPU asks the federal courts to assess its First Amendment theories in the abstract, with no factual basis to assess its constitutional claims. SPU's conclusory allegations of harm are wholly self-imposed or rely on events that have not and may not even occur. SPU's claims are not constitutionally or prudentially ripe for review by the federal courts.

Abstention. Finally, the court below correctly held that the comity concerns that underlie the *Younger* abstention doctrine require dismissal. *Younger* reflects the principle that our government works best "if the States and their institutions are left free to perform their separate functions in their separate

ways." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 737 (9th Cir. 2020) (cleaned up) (quoting *Younger*, 401 U.S. at 44).

Those concerns are acutely at play here. SPU asks the federal courts to enjoin a state's chief legal officer from investigating a large employer's compliance with state law, as interpreted by the state's highest court. SPU's request, at bottom, is for the federal courts to change state law in its favor, and to do so before the Attorney General has even concluded his inquiry. That is precisely the type of federal intervention in the state process that *Younger* prohibits. This Court should affirm.

VI. ARGUMENT

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

While SPU views this case as an opportunity to have the federal courts opine on eleven separate theories under the First Amendment, Article III prevents the judiciary from undertaking that academic enterprise. As the U.S. Supreme Court recently made unmistakably clear: Even pre-enforcement challenges may not "disregard the traditional limits on the jurisdiction of federal courts" as there is no "unqualified right to pre-enforcement review of constitutional claims in federal court." *Whole Woman's Health*, 142 S. Ct. at 537–38. The requirement of Article III jurisdiction means that, in practice, "those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments" and that

"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." *Id.*

"To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (cleaned up). "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. v. Cuno*, 547 U.S. 332, 335, 352 (2006).

Contrary to what SPU appears to argue, courts do not discard the constitutionally required elements of standing whenever a plaintiff brings a pre-enforcement challenge under the First Amendment. *Cf.* Opening Br. at 24. The district court appropriately dismissed all of SPU's claims because the relief requested would not redress its alleged injuries. And, even though the district court did not need to reach it, SPU cannot show injury-in-fact sufficient to support standing either. The Court can affirm dismissal based on lack of standing on this separate, fully supported basis in the record.

1. SPU's Alleged Injuries Are Not Redressable

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). The district court properly held that SPU fails to meet these requirements.

In this case, SPU challenges the Washington Supreme Court's decision in *Woods*. As SPU stated before the trial court, "[t]he reason we are here" is "because . . . the Washington Supreme Court in the [*Woods*] case has taken the position that the religious exemption in state law only applies to ministerial employees, so any non-ministerial employees would be subject to the state law provisions on nondiscrimination." ER-17:2–8; *see also* Opening Br. at 7 (asserting that "in 2021, the Washington Supreme Court invalidated much of [the WLAD's religious employer] exemption, stripping away express legislative protections for religious employers").

As the trial court correctly understood, a federal district court lacks the power to "change" state law in the manner sought by SPU. ER-38:22–23. SPU asserts that it is not asking the district court to "change state law," but is instead "bringing an as-applied challenge to the constitutionality of a state law." Opening Br. at 33; *see also id.* at 34 (asserting "SPU brought constitutional challenges to a state statute"). But there has been no change to the text of the

religious-employer exemption, which has remained the same for decades. *See* Wash. Rev. Code § 49.60.040(11). As a result, SPU has no basis to challenge the constitutionality of the statute itself.

Instead, SPU is challenging the Washington Supreme Court's holding in *Woods* that the WLAD's religious employer exemption may be unconstitutional as applied to a non-ministerial employee bringing a claim for sexual orientation discrimination. But a district court cannot review a decision by the Washington Supreme Court, even on questions of federal law. Instead, such power is reserved for the U.S. Supreme Court. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 620 (1989) ("[S]tate courts . . . have it within both their power and their proper role to render binding judgments on issues of federal law, subject only to review by this Court."). And here, the Washington Supreme Court has spoken on the scope of a WLAD exemption, and the U.S. Supreme Court has already declined to review the *Woods* decision.[2]

Moreover, the Washington Supreme Court is "not bound by the interpretations placed on federal law by inferior federal courts." *State v. Barefield*, 756 P.2d 731, 733 n.2 (Wash. 1988); *see also Noble v. Dibble*, 205 P. 1049, 1049 (Wash. 1922) ("[T]he highest court of a state is not bound by the

[2] The Court provided no reasons for the denial of certiorari, stating simply that "[t]he petition for a writ of certiorari is denied." *Woods*, 142 S. Ct. at 1094. Although SPU cites the statement of Justice Alito, joined by Justice Thomas, respecting the denial of certiorari, Opening Br. at 8, that statement concurred in the denial of certiorari and is not precedent from the Court.

decisions of any federal court except the Supreme Court of the United States."). Washington state courts would not be bound by a decision by the district court or this Court regarding the proper construction of the WLAD provision. And parties not before the court also would not be bound by the district court's ruling in this matter. *See, e.g.*, *Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 695 (9th Cir. 2010) (noting the "basic principle of law that a [party] who is not a party to an action is not bound by the judgment in that action").

As a result, even a decision granting the declaratory and injunctive relief requested by SPU would not redress the University's alleged injuries. SPU would still be subject to lawsuits under the WLAD brought by private parties who may be harmed if SPU discriminates based on sexual orientation against non-ministers in employment. *See* Wash. Rev. Code § 49.60.030(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."). As SPU acknowledges, it *has* been sued by a private party alleging sexual orientation discrimination by the University—a case it chose to settle rather than litigate. *See* Opening Br. at 22 ("SPU has already been sued for its religious hiring standards" and case was resolved "pursuant to settlement"). All of SPU's alleged injuries would continue to exist, regardless of the resolution of this case. *See Whole Woman's Health*, 142 S. Ct. at 535 (explaining that even assuming

the state official were enjoined from enforcing the law, an injunction would do nothing to address private persons seeking to bring a claim).

The authority of private parties to enforce the WLAD readily distinguishes this case from *Wolfson v. Brammer*, 616 F.3d 1045 (9th Cir. 2010), which SPU cites to suggest that its alleged injuries are redressable despite the federal courts' inability to change the Washington Supreme Court's interpretation of the WLAD in its *Woods* decision. In *Wolfson*, the plaintiff challenged canons of the Arizona Code of Judicial Conduct that applied to judicial candidates. *Id.* at 1052–53. The plaintiff sued the members of the Arizona Commission of Judicial Conduct, the Arizona Supreme Court Disciplinary Commission, and the Arizona Chief Bar Counsel. *Id.* at 1051. Defendants argued the plaintiff's alleged injuries were not redressable because they lacked authority to change the Arizona Code of Judicial Conduct, a power reserved only for the Arizona Supreme Court. *Id.* at 1056. This Court held that the plaintiff's alleged injuries were redressable because a favorable ruling would entirely prevent enforcement of the challenged policies. The court emphasized that "*[w]ithout a possibility of the challenged canons being enforced*, those canons will no longer have a chilling effect on speech." *Id.* at 1057 (emphasis added).

Here, in sharp contrast, the Attorney General is *not* the only person who may seek to enforce the WLAD against SPU; rather, any aggrieved individual can bring a WLAD action against the University. Indeed, the Washington

Supreme Court has emphasized the important role private parties play in enforcing the WLAD, holding that "a 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). So unlike *Wolfson*, enjoining the Attorney General from enforcing the WLAD will *not* leave SPU "without a possibility" of enforcement of the WLAD against it. 616 F.3d at 1057.

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*, 490 U.S. at 615; *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)); *Vegan Outreach, Inc. v. Chapa*, 454 F. App'x. 598 (9th Cir. 2011) (unpublished) (holding that plaintiff lacked standing because a

favorable result would not be "likely [to] prevent the law from being applied"). In short, the injunctive relief sought by SPU will not change the law, nor will it prevent enforcement of the WLAD against it by private parties. *Id.* As a result, the district court properly recognized that a favorable decision for SPU in this case would not redress the University's alleged injuries.

And there are yet more redressability problems with SPU's claims. As the district court stated, consideration of the injunctive relief requested by the University would first require a determination regarding which of its hundreds of employees are ministers. *See, e.g.*, ER-39:23–24 (noting "prayers in the complaint would require investigation regarding who is a minister"); *Quick Stats*, Seattle Pac. Univ., https://spu.edu/administration/office-of-institutional-effectiveness/quick-stats/employee-profiles (last visited June 2, 2023) (categorizing hundreds of employees). The injunctive relief requested by SPU explicitly requested that the court enjoin the AGO from "interfering in . . . the University's relationship with ministerial employees" as well as from "enforcing the WLAD against SPU's employment actions with regard to ministerial employees." ER-103. The district court recognized that it could not grant such relief without determining which of SPU's employees are ministers—a highly fact-intensive, individualized inquiry. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (declining to adopt "rigid formula for deciding when an employee qualifies as a minister" and

identifying factors of employment, like whether the organization held the employee out as a minister and job duties); *cf.* Fed. R. Civ. P. 65(1)(d) (every injunction must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required"). But SPU's relief request is to be free from *any inquiry* into its hiring practices and whether all of its staff and faculty employees are ministers—a result at odds with the fact-bound analysis modeled by the U.S. Supreme Court. Because SPU's relief request is squarely in conflict with the very doctrine that it relies on for relief, SPU's claims are not redressable.

Finally, the district court also correctly held that SPU's requests for declaratory relief amounted to improper requests for advisory opinions from the court. ER-38:7–11. As it did below, SPU again contends that "[i]f a plaintiff has standing to seek injunctive relief, the plaintiff also has standing to seek a declaratory judgment." Opening Br. at 35 (quoting *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001)). But this argument merely collapses into the previous analysis, where redressability problems properly prevented SPU from having standing to seek the injunctive relief in the first place.

The utter lack of factual information here underscores how any decision in this case would be advisory. Indeed, the reason SPU's declaratory claims amount to a request for an advisory opinion is that SPU offered no facts that would allow anyone—this Court, the district court, or the AGO—to tell which

of its employees are ministers or how its employment policies are applied in practice. The result is that any opinion offered by the courts would be meaningless once the actual facts necessary to the "minister" analysis emerge. SPU cannot show redressability, and this Court should affirm.

2. SPU Cannot Establish Injury-in-Fact

The district court assumed without deciding that SPU's amended complaint had properly alleged an injury-in-fact in the AGO's "effort to investigate [SPU's] hiring practices that [SPU] believes are not appropriate" for the AGO to investigate. ER-37:22–38:3. But SPU's amended complaint falls well short of demonstrating constitutional injury-in-fact under this Court's precedent. The Court can and should affirm on this independent basis supported by the record.

To satisfy Article III's injury-in-fact requirement, plaintiffs must show a "concrete and particularized" injury where enforcement is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Safer Chems., Healthy Fams. v. EPA*, 943 F.3d 397, 410–11 (9th Cir. 2019) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). An injury is concrete if it "actually exist[s]," such that it is "real, and not abstract." *Id*. (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). "Allegations of possible future injury" are insufficient, as the alleged "threatened injury must be 'certainly impending.'" *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted). Similarly, a plaintiff's

alleged injury based on actions it took in anticipation of government enforcement does not confer standing when there is no actual threat of enforcement. *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021).

While plaintiffs may bring a pre-enforcement challenge to a law before they are subject to it, those claims must not "disregard the traditional limits on the jurisdiction of federal courts." *Whole Woman's Health*, 142 S. Ct. at 537–38. Consequently, the mere "chilling effect associated with a potentially unconstitutional law being on the books is insufficient to justify federal intervention in a pre-enforcement suit," and there must instead be proof of "a more concrete injury." *Id.* at 538 (internal quotation marks omitted) (quoting *Younger*, 401 U.S. at 42, 50–51). Courts have "consistently applied" the constitutional standing requirements, "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*. As Justice Scalia made abundantly clear: While no one "can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice," that "abstract proposition must ultimately be reduced to concrete cases." *City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring).

In pre-enforcement challenges, courts analyzing injury-in-fact look to whether the plaintiff alleges an "(1) 'intention to engage in a course of conduct

arguably affected with a constitutional interest,' (2) 'but proscribed by a statute,' and (3) there must be 'a credible threat of prosecution' under the statute." *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (quoting *Driehaus*, 573 U.S. at 159). But as SPU knows, its employment policy is not categorically "proscribed by statute," but rather potentially unlawful *as applied* to certain employees. *Woods*, 481 P.3d at 1063. In the absence of any fact allegation by SPU of how it plans to refuse to hire, fire, or otherwise discriminate against non-ministerial employees because of their sexual orientation, SPU fails to show that it intends to act in a course of conduct proscribed by the WLAD. *See Carrico v. City & County of San Francisco*, 656 F.3d 1002, 1007 (9th Cir. 2011) ("Without any description of intended speech or conduct, we cannot analyze what [plaintiffs] would like to do. . . . Indeed, without more, we cannot even analyze whether what [plaintiffs] want to do is protected by the First Amendment in the first place.").

Moreover, SPU fails to allege a credible threat of enforcement. In assessing whether the plaintiff alleges a sufficient "credible threat of enforcement," courts consider "(1) whether the plaintiffs have articulated a concrete plan to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the

challenged statute." *Yellen*, 34 F.4th at 850 (cleaned up). SPU falls short of each factor.

First, SPU's alleged "concrete plan" is not a foregone conclusion that it would violate the law. *Woods* was an as-applied challenge particular to the circumstances of the plaintiff in that case—a lawyer seeking a position as a legal-aid attorney. 481 P.3d at 1063. The Washington Supreme Court explicitly stated that it does not opine "on the effect of this decision on *every* prospective employee." *Id.* at 1065 n.2. And even in *Woods* itself, the Washington Supreme Court remanded for additional fact finding to determine "whether staff attorneys can qualify as ministers." *Id.* at 1070 (identifying the need for more facts about staff attorneys' religious training, job duties to nurture "development in the Christian faith," required church affiliation, and obligations to lead faith groups or teach religious doctrine).

All those same needed facts are missing from SPU's complaint here. There are no details about any job applicant, particular job, history of SPU's enforcement of its employment policies, or the results such enforcement has had for any employee. Consequently, unlike *California Trucking Association v. Bonta*, there is no conflict with the challenged "statute," when it is unclear whether the WLAD would proscribe SPU's conduct in the first place. 996 F.3d 644, 653 (9th Cir. 2021). The same point was made in the AGO's letter to SPU,

which made clear that there has been no "determination as to whether the University has violated the law." ER-106.

Second, this Court looks to whether "prosecuting authorities have communicated a specific warning or threat to initiate proceedings," *Yellen*, 34 F.4th at 850, and here the AGO has made no such warning or threat. This case stems from a single letter informing SPU that the AGO has opened an inquiry to learn more about the University's employment practices in light of the hundreds of emails and other correspondence it received.

While SPU claims that "[t]he enforcing authority has . . . communicated a specific warning or threat," Opening Br. at 21, the AGO's letter does nothing of the sort. The AGO's letter explicitly stated that the AGO has "not made any determination as to whether the University has violated any law," makes no threat of prosecution, and, while asking for information, does not *require* the University to produce anything. ER-105–06. The district court confirmed that the University was free to ignore the AGO's request for information. *See* ER-14:7–23. And, contrary to SPU's repeated characterization of the AGO as having imposed a "litigation hold," the AGO's routine request that SPU preserve records relevant to the inquiry is by no means a foregone conclusion of litigation. Indeed, as SPU acknowledges, it would be unnecessary to request that SPU preserve records if litigation was foreseeable, as SPU would independently be obligated to preserve its records. *See* Opening Br. at 22. Consequently, given

that "the prospect of future enforcement" is wholly "speculative," there is no credible threat of prosecution. *See Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1140 (9th Cir. 2000).

That result comports with this Court's precedent. For instance, this Court held that the plaintiff in *Tingley v. Ferguson* had alleged sufficient injury because he intended to continue past conduct that was clearly proscribed by a new statute. 47 F.4th 1055, 1067–68 (9th Cir. 2022). As the Court reasoned, "we do not require plaintiffs to specify 'when, to whom, where, or under what circumstances' they plan to violate the law when they have already violated the law in the past." *Id.* Here, it is not clear whether SPU has violated the law in the past at all—SPU does not tell us. SPU's citation to *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1173 (9th Cir. 2018), involving a clear intent to violate the law, fails for a similar reason. While a failure to disavow enforcement of the law may weigh in favor of standing, it is not dispositive and even "'general threat[s] by officials to enforce those laws which they are charged to administer' do not create the necessary injury in fact." *Lopez v. Candaele*, 630 F.3d 775, 786–87 (9th Cir. 2010) (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947)). Here, that "threat" has not even been made; there are insufficient facts to determine whether the WLAD applies at all, such that there is not any prospect of "enforcement of the law" to "disavow." Similarly, in *California Trucking Ass'n*, California had sent letters informing business how a

law "must" be applied, and followed up by prosecuting companies that failed to comply. 996 F.3d at 654. This is a far cry from the AGO's single letter here, which made clear there were no determinations that any law had been violated, did not compel any type of action from SPU, and ultimately went ignored with no consequence.

Finally, there is no history of past prosecution or enforcement sufficient to support standing. SPU is unable to cite a single case where the AGO litigated issues of sexual-orientation discrimination against a religious employer. Instead, SPU can only cite one case filed by an individual plaintiff, and that case was filed before *Woods* was even decided. *See Woods*, 481 P.3d at 1060 (decided March 4, 2021); SER-145–159 (Compl., *Rinedahl v. Seattle Pac. Univ.*, No. 21-2-00450-1 SEA (King Cnty. Super. Ct., Wash. Jan. 11, 2021)). In any event, religious employers have been subject to potential liability under the WLAD for nearly a decade, following the Washington Supreme Court's 2014 decision in *Ockletree*, 317 P.3d at 1028. In all that time, the AGO has never enforced the statute against SPU or any other religious employer. SPU fails all three factors of showing a credible threat of prosecution.

Next, SPU argues that the AGO's investigation itself causes injury to SPU that is sufficient to confer standing. Not so. "Even religious schools cannot claim to be wholly free from some state regulation." *Ohio C.R. Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 628 (1986) (rejecting plaintiff's argument that "the

mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights"); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2062–63. As the U.S. Supreme Court held in *Ohio Civil Rights Commission*, the government "violates no constitutional rights by merely investigating the circumstances of [an employee's discharge]." *Ohio C.R. Comm'n*, 477 U.S. at 628. Indeed, the questions the AGO's inquiry is asking are precisely the inquiry that comports with U.S. Supreme Court precedent, as the ministerial exception is a defense on the merits rather than a jurisdictional bar. *Hosanna-Tabor*, 565 U.S. at 195 n.4. SPU's claim that the AGO's inquiry letter, which makes no threat should SPU refuse to provide the requested records, does not confer the necessary injury for constitutional standing.

In an effort to avoid this result, SPU and amici scholars rely exclusively on cases where a religious entity would be compelled to participate in some government process and subject to punishment for noncompliance. *See, e.g.*, *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020) (interpreting whether the National Labor Relations Act requires a religious institution to bargain with a union representing its adjunct faculty); *Whole Woman's Health v. Smith*, 896 F.3d 362, 366 (5th Cir. 2018) (challenging a subpoena for internal communications). Some are not even decided on First Amendment grounds. *See, e.g.*, *Duquesne*, 947 F.3d at 833 (statutory interpretation grounds). And others focus on harms in government interference

with a religious institution's relationship with their ministers—a topic the AGO's letter, which requested the voluntary provision of information, tried to entirely avoid through citing *Woods*. All of the harms that SPU and amici scholars claim are at issue here are utterly lacking when SPU would face no consequences to ignoring the AGO's letter.

SPU's alleged injuries for its retaliation claim likewise fall short. "[S]elf-inflicted injuries" are insufficient to satisfy standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *see also id*. at 416 ("[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). The U.S. Supreme Court has rejected the idea that the purported "chilling effect aris[ing] merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Id.* at 418 (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). This Court has similarly held that even "general threat[s] by officials to enforce those laws which they are charged to administer" does not create sufficient injury-in-fact. *See Lopez*, 630 F.3d at 787 (holding that chill is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" (quoting *Laird*, 408 U.S. at 13–14)).

This Court's recent decision in *Twitter, Inc. v. Paxton*, is instructive. 56 F.4th at 1173. In *Twitter*, the Texas Office of the Attorney General (OAG) had issued a Civil Investigative Demand (CID) to Twitter, asking that it produce records related to its content moderation decisions. *Id*. Twitter filed suit, alleging "the act of sending the CID and the entire investigation were unlawful retaliation for its protected speech," and that its First Amendment rights were consequently chilled. *Id.* at 1172–73. It sought an injunction prohibiting the OAG from "further[ing] the unlawful investigation into Twitter's" protected First Amendment activities. *See Twitter, Inc. v. Paxton*, No. 21-cv-01644-MMC, 2021 WL 1893140 (N.D. Cal. May 11, 2021). The district court dismissed the case on constitutional ripeness grounds, which is "'synonymous with the injury-in-fact prong of the standing inquiry.'" *Twitter*, 56 F.4th at 1173 (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003)).

The Ninth Circuit affirmed. It accepted Twitter's argument that it was not bringing a pre-enforcement challenge, but rather challenging, as retaliatory, actions that the OAG had *already* taken by directing an investigation at Twitter. *See Twitter*, 56 F.4th at 1174–75. Nonetheless, the Court held that Twitter's allegations of harm—that it "is forced to 'weigh the consequence' of investigations when it makes moderation decisions," or is unable "to freely make content decisions"—were too vague and conclusory to satisfy the requisite concreteness and particularity that standing requires. *Id.* at 1175.

SPU fares no better than Twitter. Like Twitter, SPU asks the court to enjoin the AGO from requiring SPU to provide information and otherwise interfere with its relationship with its ministers, and to prohibit any retaliatory investigations. SPU alleges chill in its religious exercise and free expression, interference with its First Amendment activities, and belief that it will be subject to penalties and litigation. *See* ER-88 ¶ 56 ("The probe interferes with the relationship between Seattle Pacific and the leadership of the Free Methodist Church."); ER-90 ¶ 65 (alleging that the noncompliance with the letter causes "interference with internal religious discussions and decisions, interference with the relationship with ministerial employees, and chilling of religious exercise and free expression" and belief that the University "will face serious penalties and litigation against Constitutionally protected actions"); ER-92 ¶ 82 ("The attorney general's actions would deter a person of ordinary firmness from continuing to exercise their First Amendment rights."); ER-102 ¶ 177 ("The attorney general's actions would deter a person of ordinary firmness from continuing to exercise their First Amendment rights."). SPU relies for its standing on these vague and high-level fears about future harm.

But in *Twitter*, a case at a parallel stage and with similar allegations of harm, this Court held that Twitter had not been injured because its complaint about the CID speculated "about injuries that have not and may never occur." 56 F.4th at 1176. And Twitter's "bare legal conclusions" were insufficient to

substantiate an injury-in-fact. *Id.* at 1175. Just as in *Twitter,* all of the purported harms in SPU's complaint are conclusory statements that are insufficient to establish a legally cognizable chill, or else stem from a false claim that the AGO is compelling production of information. These harms are wholly speculative, self-inflicted, or both—not concrete or particularized and imminent, as Article III requires. *See Lujan*, 504 U.S. at 560.

Finally, SPU and amici claim that if this Court does not have jurisdiction, then SPU's arguments about its First Amendment rights will forever go unheard. *See* Opening Br. at 54; Amicus Br. at 4. But SPU is well aware that there is an available, adequate state forum for its federal arguments—because SPU has *already used it*. As SPU admits, it has already faced a state court suit related to its employment practices. *See* Opening Br. at 22 (citing *Rinedahl v. Seattle Pac. Univ.*, No. 21-2-00450-1 SEA (King Cnty. Super. Ct., Wash. May 6, 2022)). And there, it raised the same First Amendment defenses that it seeks to use as the basis for its complaint in this case. *See* SER-179–189 (arguing that an applicant's discrimination lawsuit should be dismissed pursuant to the "co-religionist exemption in the church autonomy doctrine," the right to expressive association, that it is chilled, and because the WLAD is not neutral or generally applicable).[3] That SPU chose to settle the lawsuit before proceeding to judgment

[3] This Court "may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts." *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

was SPU's own choice, and not any indication that SPU suffers some injury from having to assert a First Amendment argument in state court. *See Whole Woman's Health*, 142 S. Ct. at 537 (rejecting effort by plaintiff to "pick and choose the timing and preferred forum for their arguments"). SPU cannot show injury-in-fact, and the Court should affirm that judgment on that basis.

B. This Case Also Should Be Dismissed for Lack of Ripeness

SPU's claims are not ripe for judicial review, and this Court can and should affirm dismissal on that independent basis. *See Twitter*, 56 F.4th at 1173. Cases before the federal courts must be ripe—not dependent on "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) (internal quotation marks 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)). Courts assess whether a case is both constitutionally and prudentially ripe for review. *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 Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Social 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.*, 943 F.3d at 411. For the same reasons SPU fails to meet its burden of establishing concrete and particularized injury to confer standing, its claims are not constitutionally ripe for review. *See supra* Section VI.A.2.

Prudential ripeness considerations separately require dismissal. Ripeness prevents the "courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab'ys*, 387 U.S. 148–49. Constitutional issues raise particular ripeness concerns, as federal courts "cannot decide constitutional questions in a vacuum." *Alaska Right to Life*, 504 F.3d at 849; *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) ("[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." (citations omitted)).

In assessing prudential ripeness, courts look to whether (1) the case is fit for review and (2) withholding review will cause hardship on the parties *See Thomas*, 220 F.3d at 1141. While "'pure legal questions that require little factual development are more likely to be ripe,' a party bringing a pre-enforcement challenge 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." *Alaska Right to Life*, 504 F.3d at 849 (quoting *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996)); *see also City of Boerne*, 521 U.S. at 544. Both factors require dismissal here.

Applying the first prong, none of SPU's claims are fit for review. As the district court correctly noted, SPU's claims for relief require the court to distinguish between ministerial and non-ministerial employees, without any information that would permit that fact-intensive analysis. That is because SPU fails to allege necessary facts that would allow the court to assess the "variety of factors" that the U.S. Supreme Court has held are relevant to evaluating whether the First Amendment protects a religious employer's employment decisions. *Our Lady of Guadalupe*, 140 S. Ct. at 2063–64 (identifying factors including the employee's job duties, religious title, academic requirements, and religious training); *see also Hosanna-Tabor*, 565 U.S. at 191–93. For instance, in analyzing the First Amendment's protections of a religious employer, *Our Lady*

of Guadalupe underscored that the employees there "performed vital religious duties," including in "[e]ducating and forming students in the Catholic faith," "guid[ing] their students, by word and deed," "pray[ing] with their students, attend[ing] Mass with the students, and prepar[ing] the children for their participation in other religious activities." 140 S. Ct. at 2066. The Court noted that the employees there "were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith." *Id.* Here, SPU fails to allege that it has ever taken any adverse action pursuant to its employment policy at all, let alone explain the religious job duties of the positions to which the policy was applied.

Moreover, SPU's conclusory allegations of harm from the investigation, which it alleges it suffers regardless of any particular employee's ministerial status, are not fit for review because all of those harms "rest[] upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scott*, 306 F.3d at 662 (citation omitted); *see also supra* at 32–33 (listing alleged harms). SPU's allegations of a fear of being compelled to produce records in the future is speculative and has not occurred in the year since the AGO's inquiry began. The AGO has done nothing to compel production; indeed, it made clear to the district court that there are no consequences to SPU for ignoring the AGO's letter. ER-14:7–23. Without a "concrete factual scenario that demonstrates how the law[], *as applied*, infringe[s] on [Plaintiff's] constitutional

rights," there is no case or controversy for this Court to review. *Thomas*, 220 F.3d at 1141 (emphasis added).

Turning to the second prong of the prudential ripeness inquiry, SPU faces no hardship in awaiting judicial review. The hardship prong requires SPU to show "that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *US W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999). But there is no direct or immediate hardship here. Indeed, because any decision by the federal courts could not redress SPU's alleged injuries and it would be subject to the same alleged harms due to potential actions by third parties not before this court, withholding review creates no direct or immediate hardship. *See supra* Section VI.A.1. SPU's conclusory claim that it suffers chill and interference in its relationship with its employees as a result of the AGO's inquiry—as opposed to the employment policies themselves and the sustained school-level controversy about them—do not make this matter ripe for judicial review. This case is neither constitutionally nor prudentially ripe and should be dismissed on those additional grounds.

C. Even Assuming the District Court Had Jurisdiction, It Correctly Abstained Under *Younger v. Harris*

Younger abstention also mandates dismissal of SPU's claims. Because SPU does not have standing, this Court need not assess whether the district court appropriately abstained pursuant to *Younger*. *See City of South Lake Tahoe v.*

Cal. Tahoe Reg'l Plan. Agency, 625 F.2d 231, 233 (9th Cir. 1980) ("Only after a court is satisfied that standing and the other jurisdictional prerequisites are met may it determine, within its discretion, whether to abstain."). 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.

Younger requires that courts abstain from hearing claims for relief in (1) ongoing criminal prosecutions, (2) certain "civil enforcement proceedings," and (3) pending civil proceedings relating to the state court's ability to perform its judicial functions. *Bristol-Myers Squibb*, 979 F.3d at 735. The types of "civil enforcement proceedings" that warrant *Younger* abstention are those that include the characteristics of a criminal prosecution, such as those proceedings that "are characteristically initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some wrongful act." *Id.* (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79–80 (2013)). For a civil enforcement proceeding to warrant abstention, courts assess whether the proceeding: "(1) is ongoing, (2) constitutes a quasi-criminal enforcement action, (3) implicates an important state interest, and (4) allows litigants to raise a federal challenge." *Citizens for Free Speech, LLC v. County of Alameda*, 953 F.3d 655, 657 (9th Cir. 2020); *see also ReadyLink HealthCare, Inc. v. State Compensation Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). In "quasi-criminal enforcement actions," "a

state actor is routinely a party to the state proceeding and often initiates the action" and "[i]nvestigations are commonly involved, often culminating in the filing of a formal complaint or charges." *Readylink Healthcare, Inc.*, 754 F.3d at 759 (quoting *Sprint*, 571 U.S. at 79–80). When these characteristics are present, the federal court must abstain if "federal action would effectively enjoin the state proceedings." *See Citizens for Free Speech*, 953 F.3d at 657.

At its core, the purpose of *Younger* abstention is to "prevent friction" between the states and the federal government. *See Trump v. Vance*, 140 S. Ct. 2412, 2421 (2020). "The underlying reason for restraining courts of equity is the notion of comity, that is, a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Bristol-Myers Squibb*, 979 F.3d at 737 (cleaned up) (quoting *Younger*, 401 U.S. at 44). As this Court reasoned, "[t]he key to determining whether comity concerns are implicated in an ongoing state proceeding . . . is to ask whether federal court adjudication would interfere with the state's ability to carry out its basic executive, judicial, or legislative functions." *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 883 (9th Cir. 2011). Consequently, the federal government, including the judiciary, must only intervene with state functions "in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. "Minimal respect

for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

Younger abstention also avoids unnecessary and "unwarranted determination of federal constitutional questions." *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). "When federal courts interpret state statutes in a way that raises federal constitutional questions, 'a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.'" *Id.* (quoting *Moore v. Sims*, 442 U.S. 415, 428 (1979); *see also supra* Section VI.A.1.

Abstention may be required even if the federal claim implicates First Amendment rights. *Bristol-Myers Squibb*, 979 F.3d at 738 ("*Younger* abstention routinely applies even when important rights are at stake."). As *Younger* itself observed: Even though "an injunction that would prohibit any prosecution" would cure an alleged First Amendment chill, it would certainly lead to the States being "stripped of all power to prosecute even . . . socially dangerous and constitutionally unprotected conduct." 401 U.S. at 51.

Following the standards for *Younger* abstention and "vital consideration[s]" of comity and federalism undergirding the doctrine, the district court correctly abstained here. *See Younger*, 401 U.S. at 44.

1. The AGO's Inquiry Is an Ongoing Quasi-Criminal Proceeding

The AGO's inquiry is an ongoing quasi-criminal enforcement action that satisfies the first two *Younger* elements. That conclusion naturally follows this Court's precedent. "[C]ivil enforcement proceedings initiated by the state 'to sanction the federal plaintiff . . . for some wrongful act,' *including investigations* 'often culminating in the filing of a formal complaint or charges,'" are quasi-criminal enforcement actions that qualify for *Younger* abstention. *Citizens for Free Speech*, 953 F.3d at 657 (emphasis added). Other cases make the same point: "The state-initiated proceeding in this case—the Elections Commission's *investigation* of Plaintiffs' activities—is ongoing" and therefore *Younger* abstention is appropriate. *San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092, 1094 (9th Cir. 2008) (emphasis added). Coupled with *Bristol-Myers Squibb*, where the Hawai'i Attorney General's civil enforcement action qualified for *Younger* abstention, this Court's precedent makes clear that state attorney general actions and investigations qualify for *Younger* abstention. 979 F.3d at 737 ("What matters for *Younger* abstention is whether the state proceeding falls within the general class of quasi-criminal enforcement actions—not whether the proceeding satisfies specific factual criteria."). The AGO's inquiry is precisely the type of proceeding triggering the comity concerns at the heart of *Younger* and that require abstention.

SPU's cited authority does little to support its argument. As noted, *San Jose Silicon Valley Chamber of Commerce Political Action Committee*, *Bristol-Myers Squibb*, and *Citizens for Free Speech* make clear that the AGO's investigation is precisely the type of quasi-criminal proceeding where federal intervention would "unduly interfere with the legitimate activities of the State[]." *Younger*, 401 U.S. at 44. Indeed, *Bristol-Myers Squibb* makes clear that AGO actions—brought on behalf of the state to vindicate state interests—warrant *Younger* abstention. That is the case here, where the AGO is investigating discrimination under the WLAD on behalf of the state. *See* ER-106–07; *see also City of Seattle v. McKenna*, 259 P.3d 1087, 1092 (Wash. 2011) (confirming the Attorney General's "discretionary authority to act" . . . on any "matter of public concern") (cleaned up) (citing Wash. Rev. Code § 43.10.030(1)); *Matheson Flight Extenders*, 2021 WL 489090, at *3 (confirming "the Attorney General is authorized to enforce [the] WLAD").

SPU's other cases do no better. *Sprint* was not an enforcement proceeding brought by the state. It involved a private party asking the state court to review an administrative decision that the same private party was a party to and did not like. *Sprint*, 571 U.S. at 80. In underscoring why abstention was inappropriate, the Court highlighted that the "state enforcement action[]" there was not akin to a quasi-criminal action because it was not "initiated by 'the State in its sovereign capacity'" and "[n]o state authority conducted an investigation into [plaintiff's]

activities." *Id.* (citations omitted). And in *ReadyLink*, this Court held that abstention was inappropriate in a case involving two private parties whose dispute was adjudicated by a state agency. 754 F.3d at 760. The Court's refusal to abstain in that case therefore comes as no surprise. The "*judicial* or quasi-*judicial* administrative proceeding[s]" in *ReadyLink*, *id.* (emphasis added), are not the quasi-*criminal* proceedings initiated by a state actor that *Younger* is concerned with.

Next, while SPU points to many out-of-circuit cases to manufacture a circuit split, it cites no case that addresses whether the state's chief law enforcement official's investigation qualifies as a "quasi-criminal enforcement action." *See Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 513 (1st Cir. 2009) (involving administrative proceedings); *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1227-28 (4th Cir. 1989) (same); *PDX North, Inc. v. Comm'r N.J. Dep't of Labor & Workforce Dev.*, 978 F.3d 871, 877 (3d Cir. 2020) (same); *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 815 (7th Cir. 2014) (same). Even as to administrative proceedings, the Court of Appeals for the Tenth Circuit has held that "state proceedings" for purposes of *Younger* begin when the federal plaintiff receives a letter notifying him of a regulatory board's investigation. *Amanatullah v. Colo. Bd. of Med. Examiners*, 187 F.3d 1160, 1163 (10th Cir. 1999); *see also Wood v. Frederick*, No. 21-12238, 2022

WL 1742953, at *5 (11th Cir. May 31, 2022) (unpublished) (holding that an ongoing bar complaint investigation warrants *Younger* abstention).

SPU attempts to fashion a requirement that the AGO itself needs to be able to sanction SPU in some way. Opening Br. at 43.[4] But that rule would squarely contravene *Bristol-Myers Squibb*, where this Court held that the Hawai'i Attorney General's enforcement action, seeking civil penalties to sanction the federal plaintiff, "fits comfortably within the class of cases" that qualify for abstention. 979 F.3d at 738. Moreover, this Court has made clear that there is no purported "checklist" of features to a quasi-criminal enforcement action. *Id.* at 737. "[T]he Supreme Court described the characteristics of quasi-criminal enforcement actions in general terms by noting features that are typically present, not in specific terms by prescribing criteria that are always required." *Id.*

Put simply, no case that SPU cites even remotely addresses the comity concerns that are directly implicated here, where SPU seeks to enjoin a state's chief legal officer from pursuing an investigation under state law. As this Court put it, "[a] federal-court inquiry into why a state attorney general chose to pursue a particular case, or into the thoroughness of the State's pre-filing investigation,

[4] The principle case on which SPU relies, *Mulholland*, is inapposite. That case explained that the county election board's authority to sanction was "extremely limited" because at best it could only make a recommendation of prosecution to a county prosecutor or the state attorney general. *Mulholland*, 746 F.3d at 817.

would be entirely at odds with *Younger*'s purpose of leaving state governments 'free to perform their separate functions in their separate ways.'" *Bristol-Myers Squibb*, 979 F.3d at 737–38. Nor do any of SPU's cases provide any basis to conclude that the nature of the AGO's investigation is anything other than an ongoing quasi-criminal enforcement action that warrants abstention. Any adjudication by the federal courts here would "interfere with the state's ability to carry out its basic executive, judicial, or legislative functions" in a manner that rejects the underlying comity concerns announced in *Younger*. *Potrero Hills*, 657 F.3d at 883. The first two elements of the *Younger* standard are met.

2. The AGO's Inquiry Implicates an Important State Interest

SPU does not, and cannot, contest the third *Younger* requirement that the proceeding implicate an important state interest. Here, the ongoing proceeding stems from the state's interest in investigating and addressing possible violations of Washington's bedrock anti-discrimination law. In enacting the WLAD, the state legislature expressly found and declared "that practices of discrimination against any of [Washington's] inhabitants . . . are a matter of state concern" that affects "the public welfare, health, and peace of the people of this state." Wash. Rev. Code § 49.60.010.

It is beyond dispute that state investigations pursuant to civil rights laws implicate "an important state interest." *See, e.g.*, *Ohio C.R. Comm'n*, 477 U.S. at 628 ("We have no doubt that the elimination of prohibited sex discrimination

is a sufficiently important state interest" for *Younger* purposes). This interest extends to religious institutions as well. "Even religious schools cannot claim to be wholly free from some state regulation." *Id.* Consequently, in *Ohio Civil Rights Commission*, the U.S. Supreme Court held that the government "violates no constitutional rights by merely investigating the circumstances" of an employee's discharge. *Id.* Here too, the state proceeding pursues an important state interest in determining whether SPU is honoring "the rights and proper privileges" of Washington employees, as guaranteed to them by the state Legislature. *See* Wash. Rev. Code § 49.60.010.

3. Any Federal Constitutional Claims May Be Raised in State Proceedings

Finally, SPU has ample opportunity to raise federal challenges in any litigation that may occur around its employment practices. Again, SPU is well aware of this, as it already *has* raised federal challenges in state-court proceedings involving its employment practices. As SPU admits, it previously faced a state court suit for its employment practices. *See* Opening Br. at 22 (citing *Rinedahl v. Seattle Pac. Univ.*, No. 21-2-00450-1 SEA (King Cnty. Super. Ct., Wash. May 6, 2022)). It raised First Amendment arguments before the state court in those proceedings as well, arguing that the First Amendment precluded that plaintiff's claims. *See* SER-179–190 (SPU's motion for summary judgment raising four separate First Amendment defenses, including the ministerial exception, the "co-religionist exemption," the right to expressive

association, and that the WLAD is not generally applicable); SER-197–200 (supporting its First Amendment arguments in its reply in support of its motion to dismiss). But rather than litigate its First Amendment arguments there—in the proper posture before a court with jurisdiction—SPU chose to settle that lawsuit before judgment. *See* SER-202–204 (stipulating to dismiss plaintiff's action). SPU has raised federal defenses in state court before and could do so in connection with any future litigation. That is enough to satisfy the fourth *Younger* element. *See Juidice v. Vail*, 430 U.S. 327, 337 n.14 (1977) (holding that *Younger* abstention was appropriate because there were prospective opportunities in state proceedings to raise constitutional challenges).

At bottom, SPU asks the federal courts to enjoin a state investigation based on its disagreement with a Washington Supreme Court case that even the U.S. Supreme Court declined to review. Abstention doctrines exist to prevent these types of collateral attacks on state court rulings and proceedings. *See, e.g.*, *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858–59 (9th Cir. 2008) (prohibiting federal courts "from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment" under *Rooker-Feldman* abstention); *Doe & Assocs. Law Off. v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001) ("Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined" and abstention pursuant to *Rooker-Feldman* is

proper). Even if a case does not fall squarely within an abstention category, "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions." *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)); *see also Pennzoil*, 481 U.S. at 11 n.9 ("The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."). Those principles are directly at issue here, where SPU seeks an injunction against the state's chief legal officer, before the Attorney General has even determined whether or how state anti-discrimination law applies. Comity and "Our Federalism" precludes that review. *See Younger*, 401 U.S. at 45. All of the *Younger* abstention elements are met here, and the district court's order should be affirmed.

VII. CONCLUSION

For the foregoing reasons, SPU's complaint does not establish a constitutional case or controversy and is not justiciable before the federal courts. The Court should affirm.

RESPECTFULLY SUBMITTED this 2nd day of June 2023.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 22-35986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE PACIFIC UNIVERSITY,

Plaintiff-Appellant,

v.

ROBERT FERGUSON,
in his official capacity as Attorney General of Washington,

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
No. 3:22-cv-05540-RJB
The Honorable Robert J. Bryan
United States District Court Judge

APPELLEE ROBERT FERGUSON'S ADDENDUM TO ANSWERING BRIEF

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STATUTORY ADDENDUM

Table of Contents

Effective: October 19, 1996

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights [Statutory Text & Notes of Decisions subdivisions I to IX]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

RCW 43.10.030

General powers and duties.

The attorney general shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

(3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he or she shall attend the trial of any person accused of a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;

(9) Keep in proper books a record of all cases prosecuted or defended by him or her, on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his or her successor in office;

(10) Keep books in which he or she shall record all the official opinions given by him or her during his or her term of office, and deliver the same to his or her successor in office;

(11) Pay into the state treasury all moneys received by him or her for the use of the state.

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.