Supreme Court No. 91615-2
Benton County Superior Court Nos. 13-2-00953-3 and 13-2-00871-5

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT INGERSOLL, et al.
Plaintiffs-Respondents,
v.
ARLENE FLOWERS, INC., et al.
Defendants-Appellants.

STATE OF WASHINGTON
Plaintiff-Respondent,
v.
ARLENE FLOWERS, INC., et al.
Defendants-Appellants.

BRIEF OF RESPONDENTS INGERSOLL AND FREED ON REMAND FROM THE UNITED STATES SUPREME COURT

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I. INTRODUCTION

The Court's mandate here is to review its original decision in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, __ U.S. __, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018). Though important, the task is straightforward, and the result is clear: *Masterpiece* changes nothing about the outcome of this case. *Masterpiece* turned on a finding that the Colorado Civil Rights Commission adjudicated the matter with bias against people of faith. The record here shows the opposite. Unlike the adjudicator in *Masterpiece*, the adjudicators in this case—the Benton County Superior Court and this Court—demonstrated respect for Appellants. This point is undisputed. Appellants do not even allege that either adjudicator acted with bias. The facts that decided *Masterpiece* are not present here.

In addition, the *Masterpiece* opinion reinforces this Court's original decision. The United States Supreme Court in *Masterpiece* strongly reaffirmed longstanding precedent holding that the constitutional rights of free exercise and expression do not license discrimination in violation of neutral public accommodations laws. This has been the law for 140 years, and for good reason: there is no principled way to limit the religious and artistic exceptions Appellants request. The record here and many decades of case law show that other businesses open to the general public would raise (and have raised) the same arguments made by Appellants to refuse to serve customers based on the customers' race, religion, gender, sexual orientation, and marital status.

Robert Ingersoll and Curt Freed are simply the latest victims of this discrimination. This discrimination is the same as what African-Americans in the South and Asian-Americans in this state once encountered in hotels, restaurants, and shops. Appellants sold Mr. Ingersoll and Mr. Freed flowers for every prior occasion, even anniversaries, but openly discriminated against the couple by refusing to sell flowers for Mr. Ingersoll's and Mr. Freed's wedding—a service Appellants provide without hesitation for heterosexual couples.

This refusal caused profound harm. Instead of the big celebration they originally planned, Mr. Ingersoll and Mr. Freed withdrew to a small and private ceremony out of fear that other vendors would reject them or worse. This is exactly the marginalization our Nation's civil rights laws were enacted to prevent and exactly the harm our Legislature has recognized "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010.

Mr. Ingersoll and Mr. Freed commenced this lawsuit to prevent others from suffering the same affront. Although their case was partially consolidated with the State of Washington's case (for discovery and pretrial motions), it remains a substantively separate action, separately briefed and argued at every stage. While Mr. Ingersoll and Mr. Freed wholly disagree with Appellants' allegations against the Washington Attorney General, they are also wholly irrelevant to this private action and its outcome. In a thoughtful and balanced 60-page opinion, the superior court entered

summary judgment for Mr. Ingersoll and Mr. Freed based on decades of precedent. This Court affirmed that judgment based on well-settled public accommodations law. Nothing has changed. *Masterpiece* reaffirms longstanding precedent governing public accommodations law, and the adjudicative bias in *Masterpiece* is not present here.

This Court should reaffirm its original decision.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In *Masterpiece*, the United States Supreme Court held that adjudicative bodies in public accommodation cases must consider claims of religious objection with fairness and impartiality. The courts in this case demonstrated respect for Appellants and people of faith, and no one—including Appellants—has accused these courts of bias. None of the substantive law governing this case has changed.

Should the Court reaffirm its original decision?

III. STATEMENT OF THE CASE

A. Factual Background.

Robert Ingersoll and Curt Freed fell in love in 2004. CP 350. After eight years together and soon after Washington recognized their right to be married, Mr. Freed proposed marriage to Mr. Ingersoll. CP 322, 350. Like it is for millions of Americans, their wedding was to be a defining moment. CP 350, 1268. The couple eagerly anticipated their wedding and planned to hold it on September 19, 2013, their anniversary. CP 1775. They were excited to share the moment with loved ones. They wrote up a guest list of hundreds of friends and family members and contracted with Bella Fiori

Gardens—a well-known venue in the Tri-Cities. CP 322-23. Despite the uncertainty of wedding planning, they knew where they wanted to buy their flowers. CP 350. They had a longstanding relationship with Appellants, and Mr. Ingersoll had worked personally with Barronelle Stutzman on several occasions. *Id.* They "considered Arlene's Flowers to be [their] florist." *Id.*

What happened next has never been a matter of factual dispute. On February 28, 2013, Mr. Ingersoll visited Arlene's Flowers. CP 350. He told an employee about his engagement to Mr. Freed and their desire to have Arlene's Flowers "do" the flowers. *Id.* The employee told Mr. Ingersoll to discuss the matter with Mrs. Stutzman and later told Mrs. Stutzman about Mr. Ingersoll's visit. CP 1611. Mrs. Stutzman knew Mr. Ingersoll and Mr. Freed were gay men in a committed relationship. CP 304-05. She knew Mr. Ingersoll was coming the next day to discuss flowers for his wedding. CP 306. She decided that night she and Arlene's Flowers would refuse his request—whatever it may be—based on her "biblical belief that marriage is between a man and a woman." CP 308. As expected, Mr. Ingersoll returned to Arlene's Flowers on March 1, 2013, his birthday. CP 320, 350. Before he could say what he specifically wanted, Mrs. Stutzman turned him away "because of [her] relationship with Jesus Christ." CP 309-11, 318, 321, 326.

Appellants have attempted to re-write this history in their briefing. The record is clear, however, that Appellants categorically refused to sell any goods or services to Mr. Ingersoll and Mr. Freed because they are a gay couple and not "a man and a woman." CP 308. As the superior court found, the record is also clear that Mrs. Stutzman turned Mr. Ingersoll away before

learning what kinds of goods and services the couple sought. CP 309-11, 321, 326. This is not a case about custom flower arrangements, as Appellants contend. *See* CP 321. If Mrs. Stutzman had not immediately turned Mr. Ingersoll away, she would have learned he wanted something simple—"sticks and twigs", as Mr. Ingersoll later described it to be arranged by Mr. Ingersoll and Mr. Freed, to offset the natural garden setting of Bella Fiori Gardens. CP 321, 324, 1870. The information would not have mattered to her because Appellants have an unwritten *carte blanche* policy: "we don't take same sex marriages" because "biblically marriage is between a man and a woman." CP 301.

Appellants have also mischaracterized Mrs. Stutzman's role in the wedding. Their brief reads as if she personally attends every wedding for which Arlene's Flowers does flowers. (App. Br. at 8.) The record shows, however, that most wedding customers pick up their flowers rather than having the flowers delivered. CP 117. The record also shows that, even when delivering flowers, the delivery person does not attend the wedding unless separately paid by the hour to do so. *Id.*

The record is clear that Mr. Ingersoll never had a chance to tell Mrs. Stutzman what he and Mr. Freed wanted. CP 309-11, 318, 321, 326. Moreover, contrary to Appellants' characterization of their role, there is nothing in the record to suggest that Mr. Ingersoll would have asked Mrs. Stutzman (or anyone else from Arlene's Flowers) to attend his wedding. Appellants simply turned away these customers because they are gay.

Mr. Ingersoll was stunned by Appellants' rejection. CP 318-20, 351. For almost a decade, Appellants sold him flowers to mark important occasions—including Mr. Freed's birthday and the couple's anniversary. CP 147, 317. He "walked away feeling very hurt and upset emotionally because [he] didn't understand why this person that [he] had developed a relationship with would do this to [him]." CP 319. On returning home that evening, Mr. Ingersoll told Mr. Freed what happened at Arlene's Flowers earlier that day. CP 320. The news also shocked Mr. Freed, who "never imagined that [they] would be faced with being told somebody wouldn't do [their] flowers, especially since [they had] done business there for so long..." CP 332. The couple felt the "tremendous emotional toll of the refusal." CP 332-33. The incident kept both men up at night and ate at their souls. CP 1264. Mr. Ingersoll had not felt that much pain since his high school days, when other students would call him names. CP 1265.[1]

Appellants' discrimination cast a pall over Mr. Ingersoll's and Mr. Freed's wedding and caused them to cancel their original plans. The couple worried they might suffer similar discrimination from other wedding vendors or even that anti-gay protestors might show up at their wedding.

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[1] As part of their general attempt to re-write the history of this case, Appellants attempt to recast themselves as the victims here. The record does not support this. It is not true that Mr. Ingersoll and Mr. Freed received an outpouring of only support while Appellants received only threats. (*See* App. Br. at 12.) Mrs. Stutzman reported that "customers who visited the flower shop or called...were supportive." CP 1265. Both parties received a range of responses—from supportive comments to crude invectives. CP 1264. The contention that this litigation will bankrupt Appellants is also dubious. They are represented by Alliance Defending Freedom, a well-known and well-funded interest group opposed to equal rights for gay and lesbian families. *See* CP 1262.

CP 333, 351, 1872. Instead of the large, catered wedding that would have celebrated their union on their September anniversary, Mr. Ingersoll and Mr. Freed were married on July 21, 2013, in a small ceremony at their home. CP 352. Only 11 people attended, and Mr. Ingersoll prepared the food. CP 1798-99.

The news media picked up their story before their wedding, and word reached the Washington Attorney General. CP 1296-97. Mr. Freed spoke with the Attorney General before the State filed its enforcement action on April 9, 2013. CP 1-5, 1886-87. Because the Attorney General does not represent Mr. Ingersoll and Mr. Freed individually, however, they commenced their own action on April 18, 2013. CP 1887, 2526-32. Mr. Ingersoll and Mr. Freed are both clear that their purpose in filing this case was to prevent other same-sex couples from suffering this discrimination. CP 1801-02, 1891-93.

B. Procedural History of Mr. Ingersoll's and Mr. Freed's Case

On April 18, 2013, Mr. Ingersoll and Mr. Freed (together, the "**Individual Plaintiffs**") filed a complaint in Benton County Superior Court against Arlene's Flowers and Barronelle Stutzman, as the president, owner, and operator of Arlene's Flowers. CP 2526-32. Their complaint alleged violations of the Washington Law Against Discrimination ("**WLAD**"), ch. 49.60 RCW and the Washington Consumer Protection Act ("**CPA**"), ch. 19.86 RCW. *Id.* At Appellants' request, the superior court consolidated

the Individual Plaintiffs' action with the State's enforcement action for discovery and pre-trial motions. CP 25-27.

Following discovery, the parties filed cross motions for summary judgment, with Appellants filing a consolidated motion and the Attorney General and the Individual Plaintiffs filing separate motions. CP 32-44, 258-84, 358-400. On December 19, 2014, the superior court heard all three motions in almost three hours of oral argument. CP 2193-95. The Attorney General and counsel for the Individual Plaintiffs separately argued their respective motions. *Id.*

On February 18, 2015, the superior court issued a 60-page opinion and order granting the State's and Individual Plaintiffs' motions for summary judgment. CP 2310-69. In its opinion, the superior court explained why Appellants' conduct violates the WLAD and CPA and why Mrs. Stutzman's religious views do not excuse Appellants' non-compliance:

> For 135 years, the Supreme Court of the United States has held that laws may prohibit religiously motivated action, as opposed to belief. In trade and commerce, and more particularly when seeking to prevent discrimination in public accommodations, the Courts have confirmed the power of the Legislative Branch to prohibit conduct it deems discriminatory, even where the motivation for that conduct is grounded in religious belief...

CP 2367. Despite ruling against Appellants, the superior court went out of its way to demonstrate respect for Mrs. Stutzman:

> The Court intends no disrespect and does not mean to imply either that Stutzman possesses any racial animus, or that she has conducted herself in any way inconsistently with Resolutions of the SBC's direction to condemn "any form of

> gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" toward gay men or women.

CP 2360 n.31; *see also* CP 2200, 2315. Even in granting the Individual Plaintiffs' and State's motions, the superior court recognized how Mrs. Stutzman perceives her situation:

> On the evening of November 5, 2012, there was no conflict between the WLAD or the CPA and the tenets of Barronelle Stutzman's Southern Baptist tradition. The following evening, after the passage of Referendum 74, confirming the enactment of same-sex marriage, there would eventually be a direct and insoluble conflict between Stutzman's religiously motivated conduct and the laws of the State of Washington. Stutzman cannot comply with both the law and her faith if she continues to provide flowers for weddings as part of her duly-licensed business, Arlene's Flowers.

On April 27, 2015, Appellants appealed the superior court's decision directly to this Court. CP 2557-61. On February 16, 2017, this Court affirmed the superior court. *See State v. Arlene's Flowers*, 187 Wn.2d 804, 389 P.3d 543 (2017). Like the superior court, this Court also recognized in its opinion that Appellants' beliefs were "sincerely held," *id.* at 815, and treated all litigants with respect.

Appellants petitioned the United States Supreme Court for review. *See Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). While their petition was pending, the Supreme Court decided *Masterpiece*. The Supreme Court then remanded this case to this Court "for further consideration in light of" *Masterpiece*. *Id.*

C. Other parties' requests to supplement

Appellants and the State have requested leave to supplement the record with information about an incident at Bedlam Coffee, a cafe in

Seattle, on October 1, 2017—almost eight months after this Court issued its original decision here. Appellants' submittal does not appear to include any evidence that the adjudicative bodies in this case—*i.e.*, the Benton County Superior Court and this Court—were involved in what happened at Bedlam Coffee or its aftermath. Their materials focus instead on the Attorney General's conduct. His conduct is irrelevant because he is a party—not the adjudicative body—in this case.[2]

IV. ARGUMENT

This Court should reaffirm its original decision. The Court held that Appellants violated the WLAD and the CPA when they refused to provide wedding flowers to the Individual Plaintiffs and that application of those laws did not violate the Appellants' constitutional rights. *Arlene's Flowers, Inc.*, 187 Wn.2d at 855-56. This was the right decision based on undisputed facts and well-settled law, and the United States Supreme Court's decision in *Masterpiece* does nothing to change that.

A. *Masterpiece* requires neutral and respectful adjudication, which Appellants received.

In *Masterpiece*, 138 S.Ct. at 1729, the Supreme Court held that a business owner who invokes First Amendment protections in a public accommodations case is entitled to "neutral and respectful consideration of his claims in all circumstances of the case." *Masterpiece* involved a Colorado bakery whose owner refused, on religious grounds, to provide a

[2] Notwithstanding the irrelevance of the proposed supplemental materials, the Individual Plaintiffs do not oppose either party's proposed supplementation to assure that all parties have had a full opportunity to submit whatever information they believe is relevant.

wedding cake to two men engaged to marry one another. *Id.* at 1723. The Colorado Civil Rights Commission determined that the bakery violated Colorado's Anti-Discrimination Act and ordered compliance. *Id.* at 1726. On appeal, the United States Supreme Court reversed, holding that the bakery did not receive a fair and impartial adjudication in violation of the "First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732.

In reaching this holding, the Supreme Court concluded that members of Colorado's Civil Rights Commission—the first adjudicative body to consider the bakery's claims—made statements on the record "implying that religious beliefs and persons are less than fully welcome in Colorado's business community." *Id.* at 1729. The Supreme Court took particular umbrage at a statement made by one Commissioner who said that invoking religious beliefs to justify discrimination "is one of the most despicable pieces of rhetoric that people can use." *Id.* The Supreme Court characterized this as "disparag[ing]" the bakery owner's religion. *Id.*

The Supreme Court also expressed concern that the Colorado courts, which affirmed the Commission's decision, "did not mention those comments, much less express concern with their content." *Id.* at 1729-30. Based on this unique procedural history, the Supreme Court could not "avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of [the baker's] case." *Id.* at 1730. It concluded that the State of Colorado's adjudication of *Masterpiece* violated the First Amendment's Free Exercise Clause.

This case, like *Masterpiece*, involves a business owner invoking First Amendment protections in a public accommodations case. That is presumably why the Supreme Court returned this case for review "in light of *Masterpiece*." *Arlene's Flowers*, 138 S. Ct. at 2671. But the similarities end there. Unlike the owner in *Masterpiece*, Appellants here received a neutral and respectful adjudication of their claims at every stage of the dispute. The facts that decided *Masterpiece* are not present here.

B. Both adjudicative bodies here considered Appellants' First Amendment arguments in a neutral and respectful manner.

Appellants do not even allege that any adjudicative body in this state considered their case or applied Washington's laws in anything but a neutral and respectful manner. Nor is there any evidence of anything other than neutral and respectful treatment of Mrs. Stutzman's religion throughout the adjudicative process.

The superior court—the first adjudicative body here—took pains to note its respect for Mrs. Stutzman's religion. In its 60-page opinion, the superior court specifically wrote that in applying the WLAD and the CPA to Appellants, it intended "no disrespect" and did "not mean to imply that [Mrs.] Stutzman possesses any racial animus, or that she has conducted herself in any way inconsistently with" her church's teachings. CP 2360 n.31. The superior court acknowledged a "direct and insoluble conflict between [Mrs.] Stutzman's religiously motivated conduct and the laws of the State of Washington. [She] cannot comply with both the law and her faith if she continues to provide flowers for weddings as part of her duly-

licensed business, Arlene's Flowers." CP 2367; *see also* CP 2200, 2315 ("Stutzman has a firmly held religious belief..."). Likewise, this Court in its unanimous original decision recognized that Mrs. Stutzman's religious beliefs are "sincerely held." *Arlene's Flowers*, 187 Wn.2d at 815.

Rather than revealing hostility towards religion or bias in the adjudication of this case, the record shows that both adjudicative bodies thoughtfully treated Mrs. Stutzman's religious beliefs with neutrality and respect—as was appropriate. That is all *Masterpiece* requires.

C. The Attorney General was not an adjudicator in this case or in the State's separate enforcement action.

Because they cannot show a lack of neutrality and respect in the adjudication of this case, Appellants argue that *Masterpiece* compels a different result because of alleged conduct by the Attorney General. Appellant's focus on the Attorney General is misplaced. The Attorney General had no role in adjudicating either this case by the Individual Plaintiffs or the State's separate enforcement action. Even in the State's action, the Attorney General's role was not adjudicative. His role there is as plaintiff's counsel; he commenced a civil action on behalf of the State.

The superior court and this Court are the sole adjudicators in this case—not the Attorney General. The procedural history and the roles of the parties here are materially different from *Masterpiece*. The Supreme Court's holding in *Masterpiece* simply does not apply.[3]

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[3] It is for this reason that the other parties' proposed supplemental materials are irrelevant. *Masterpiece* holds that the adjudicator must act fairly and impartially, 138 S. Ct. at 1730-32; it says nothing in this regard about the conduct of litigants.

D. The Attorney General's conduct is irrelevant to the outcome of the Individual Plaintiffs' case.

The Individual Plaintiffs agree with the State that the Attorney General's conduct in the State's separate action was neither an adjudication of that action nor a demonstration of religious hostility or bias. Nonetheless, his conduct (and his alleged failure to bring an enforcement action in another context) has no bearing on the Individual Plaintiffs' case.

The Individual Plaintiffs have asserted independent claims, and they are not state actors. The Individual Plaintiffs have no such duty (and, to be clear, harbor no hostility toward people of faith). The First and Fourteenth Amendments limit state action; they do not apply to private individuals unless those individuals are acting under color of state law. *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996); *accord Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 430, 780 P.2d 1282 (1989). The Supreme Court vacated the Colorado Commission's order in *Masterpiece* because the "Commission's treatment of [the baker's] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731.

Masterpiece provides no basis for altering the original decision in the Individual Plaintiffs' lawsuit.

E. In *Masterpiece*, the Supreme Court reaffirmed the well-settled case law on which this Court based its original decision.

Masterpiece confirms this Court's original decision is grounded in settled law. Contrary to Appellants' argument that *Masterpiece* somehow

requires this Court to upend its original analysis, the *Masterpiece* Court strongly affirmed that laws like the WLAD "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Masterpiece*, 138 S. Ct. at 1727 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d. 487 (1995)).

While religious objections receive constitutional protection, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.* To support this statement, the Supreme Court cited a footnote in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968). The footnote characterizes as "patently frivolous" the argument that a public accommodation law is "invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the defendant's religion.'" *Id.*

The Supreme Court's view on whether a business owner's religious views can excuse a refusal to sell goods or services based on protected characteristics remains in line with more than a century of precedent upholding anti-discrimination laws. *Masterpiece*, 138 S. Ct. at 1727-28.

F. There has been no change in the law governing compelled-speech that requires this Court to change its original decision.

Perhaps because *Masterpiece* reinforces, rather than undermines, this Court's original decision, Appellants invite the Court to reexamine its free-speech analysis in light of *Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31*, __ U.S. __, 138 S. Ct. 2448, 2461, 201 L. Ed. 2d 924 (2018) and *Nat'l Inst. of Family & Life Advocates v. Becerra*, __ U.S. __, 138 S. Ct. 2361, 2369, 201 L. Ed. 2d 835 (2018). Neither case applies here. In *Janus*, 138 S. Ct. at 2460, the Supreme Court invalidated an Illinois law requiring public employees to subsidize the speech of labor unions. In *Becerra*, 138 S. Ct. at 2368, the Supreme Court invalidated a California law requiring women's health clinics to post certain prescribed notices. These cases say nothing about compliance with public accommodation laws as a potential form of compelled speech.

Because these cases are inapposite, Appellants rely primarily on *Hurley*, 515 U.S. 557, to argue that the flower arrangements themselves are protected expression. This is the same argument they presented in their original briefing, and this Court correctly rejected the argument in its original decision. *See Arlene's Flowers*, 187 Wn.2d at 833-34. *Hurley* presented a "peculiar" circumstance—a parade as a place of public accommodation—that does not exist here. *Id.* at 834 (citing *Hurley*, 515 U.S. at 561-62). This case involves "places traditionally subject to public accommodations laws—places that provide 'publicly available goods, privileges, and services.'" *Id.* (citing *Hurley*, 515 U.S. at 568-72).

In its original decision, this Court correctly found that the regulated activity here is the sale of floral arrangements, not the arranging of flowers, which is properly characterized as conduct. *Id.* at 832. The Constitution protects conduct as speech only if: (a) the actor intends to convey a particularized message through the conduct; and (b) "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* (citing *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974)). Appellants admit their flower arrangements send no particular message: "As [Mrs.] Stutzman acknowledged at deposition, providing flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." *Id.*; *see also* CP 2108. Thus, without more speech, no observer would conclude that wedding flowers constitute such an endorsement if the couple is gay or lesbian, but not if the couple is Muslim or atheist. *See also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006).

Questions around the potentially expressive nature of a flower arrangement are irrelevant here. "The United States Supreme Court has never found a compelled-speech violation arising from the application of anti-discrimination laws to a for-profit public accommodation." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 65 (N.M. 2013) *cert. denied* 572 U.S. 1046 (2014). Neither *Masterpiece* nor any other recent Supreme

Court decision has changed this. There is no reason to revisit this Court's original decision on compelled speech.

G. Overturning 140 years of case law would severely undermine the efficacy of our Nation's civil rights laws.

Even while vacating the Colorado Commission's order, the Supreme Court in *Masterpiece* explicitly reaffirmed that religious and philosophical objections do not exempt business owners (and their businesses) from valid, neutral, and generally applicable public accommodations laws. *See Masterpiece*, 138 S. Ct. at 1727. This has been the law for 140 years for good reason:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices....Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. United States, 98 U.S. 145, 166–67, 25 L. Ed. 244 (1878). The exemption Appellants seek here would swallow this longstanding rule. The Supreme Court recognized this danger in *Masterpiece*. While noting that a religious exemption may exist for clergy asked to perform marriage rites, such an exemption must be narrowly confined:

> Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

Masterpiece, 138 S. Ct. at 1727.[4] Recent history demonstrates that flower arrangements and cakes are not the only wedding-related products with arguably expressive elements. Wedding photographers have also refused gay couples on religious grounds. *See Elane Photography*, 309 P.3d 53. Bartenders, caterers, event planners, musicians and DJs, and venue designers could be next. This likelihood concerned the Supreme Court enough that it repeated in *Masterpiece* the need to constrain religious exemptions to religious institutions, "lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons." *Masterpiece*, 138 S. Ct. at 1728-29.

What is more, there is no principled way to limit this exemption to same-sex couples. The victims here happen to be gay. If Appellants' position were the law of the land, businesses would be free to refuse an interracial couple, a Jewish couple, or couple in which one person is Hindu and the other a Baptist. An owner could simply declare that her religion views such marriages as sinful. Appellants' own expert confirmed this:

> Q: So if they were of a different race, then there should be no religious accommodation. But because they happen to be – instead of an interracial couple they happen to be a gay couple, that now their civil rights should not be protected to the same degree? That's your opinion?

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[4] The WLAD already exempts religious institutions from the statutory definitions of public accommodation and employer. *See* RCW 49.60.040(2) and (11). In other words, the State has already created the only appropriate religious exemption.

> A: What I think I would say is this. That the state has an interest in varying weights in prohibiting different sorts of discrimination. And I can see that it's being greater in the case of – of interracial marriage than in the case of same-sex marriage.
>
> But I suppose, when push comes to shove, I'm a pretty doggone powerful advocate of religious liberty. And so I would, in fact, argue for religious accommodation in this case – particularly in the case of an interracial marriage, particularly if there are plenty of alternatives available to that couple.

CP 2101. History also bears this out. *See Loving v. Virginia*, 388 U.S. 1, 11-12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

There is also no principled way to limit a religious exemption to the wedding industry. Fashion designers, architects, landscapers, graphic designers, restaurants, bars, and coffee shops also provide goods and services with arguably artistic elements. Why must they provide services to support something their religion forbids if wedding florists need not do so? The Nation's history is rife with attempts to discriminate on these very bases. From the earliest days, religion was used to justify slavery and, later, to oppose the Civil Rights Act of 1964. *See* William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657 (2011). Litigants have invoked their religion to defend racially discriminatory admissions policies, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983); the denial of health insurance benefits to unmarried women-employees, *see EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); housing discrimination against unmarried couples and people of different faiths; *see Smith v. Fair Emp't and Hous.*

Comm'n, 913 P.2d 909 (Cal. 1996); and religious discrimination in employment and membership at a health club, *see McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985).

A uniform history of case law, going back 140 years, holds that one cannot use sincerely held religious belief to evade an otherwise valid and neutral law of general application. Public accommodation laws, particularly those regulating a private commercial enterprise, are one such set of laws. Justice O'Connor explained in *Roberts v. United States Jaycees*, 468 U.S. 609, 634, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984): "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."

The substantive law governing this case has not changed, and the adjudicative conduct here is nothing like the conduct that decided *Masterpiece*. The Court should reaffirm its original decision.

V. REQUEST FOR ATTORNEYS' FEES AND COSTS

Under RAP 18.1, the Individual Plaintiffs respectfully request an award of their attorneys' fees and costs on remand. The superior court awarded their attorneys' fees and costs as the prevailing party on their claims under the WLAD and the CPA. *See* CP 2555 (citing RCW 49.60.030 and RCW 19.86.090).

VI. CONCLUSION

The United States Supreme Court instructed this Court to revisit its original decision in light of *Masterpiece*. The Supreme Court held in

Masterpiece that adjudicative bodies must consider First Amendment arguments and apply laws in a manner that is neutral and respectful of the litigant's religion. The record shows that both adjudicators here—the Benton County Superior Court and this Court—did just that. The substantive law of public accommodations remains the same as it was before *Masterpiece*. This Court correctly decided this case the first time. It should reaffirm that decision.

RESPECTFULLY SUBMITTED this 14th day of January, 2019.

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