NO. 91615-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARLENE'S FLOWERS, INC., dba ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,

Appellants.

ROBERT INGERSOLL and CURT FREED,

Respondents,

v.

ARLENE'S FLOWERS, INC., dba ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,

Appellants.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727, 201 L. Ed. 2d 35 (2018). Individuals are free to reject that societal consensus, and their "religious and philosophical objections to gay marriage are protected views[.]" *Id.* But "such objections do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.* These basic principles resolve this case in the State's favor.

Defendant Barronelle Stutzman owns Defendant Arlene's Flowers, which provides wedding flowers for heterosexual couples. Because of Ms. Stutzman's religious views, she refused to serve Robert Ingersoll and Curt Freed for their wedding based on their sexual orientation. She refused to serve them without having any idea what they wanted, and she adopted a policy that Arlene's Flowers would not equally serve gay or lesbian couples for their weddings. Her discriminatory refusal of service clearly falls within the type of conduct states can prohibit.

Recognizing that they cannot prevail under existing precedent based on the factual record in this case, Defendants seek to turn this case into something it is not. The Court should reject this attempt.

First, they ask the Court to find that prior proceedings in this case were riddled with hostility towards Ms. Stutzman's religious faith and that she has been singled out for unfair treatment. These claims are untenable. The superior court and this Court fairly and neutrally evaluated this case, respectfully considering Ms. Stutzman's arguments and acknowledging the sincerity of her views. And the Attorney General's Office exhibited no hostility in seeking to bring Defendants' conduct in line with the law. Defendants attempt to show discriminatory treatment by comparing this case to an incident that occurred years after Ms. Stutzman's actions, but the two incidents differ dramatically, making the comparison irrelevant.

Next, Defendants argue that it would be unconstitutional to require Ms. Stutzman "to physically attend and participate in same-sex weddings." Br. of Appellants 18. But that issue simply is not presented here, because Mr. Ingersoll never asked her to attend or participate in the wedding.

Finally, Defendants claim that intervening precedent requires this Court to revisit its prior analysis of their free speech claims. But nothing in those cases calls this Court's reasoning into question.

The State asks that this Court focus on the true record and issues presented by this case, give Defendants the same respectful consideration they received last time, and reach the same conclusion. Defendants have no constitutional right to refuse service to gay and lesbian couples.

II. STATEMENT OF THE CASE

A. Defendants Operate a Retail Business Marketing and Selling to the Public Goods and Services, Including Wedding Flowers

Defendant Arlene's Flowers, Inc. (Arlene's Flowers) is a Washington for-profit corporation. CP 404. Defendant Barronelle Stutzman and her husband are the sole officers, with Ms. Stutzman as president and operator of the business, a retail store in Richland, Washington. CP 411, 435. The store advertises and sells flowers and other goods to the public, including flowers for weddings. CP 407, 414. Weddings account for about three percent of the store's business. CP 2163-64.

B. Defendants Refused to Serve Mr. Ingersoll for His Wedding Based on His Sexual Orientation

Robert Ingersoll is a gay man who lived in Kennewick, Washington. CP 350. He has been in a committed romantic relationship with Curt Freed since 2004. CP 350. When same-sex marriage became legal in Washington in 2012, Mr. Freed asked Mr. Ingersoll to marry him, and they made plans to get married on their anniversary. CP 350.

Mr. Ingersoll and Mr. Freed had bought flowers from Defendants many times before and planned to use Defendants for their wedding. CP 350. On March 1, 2013, Mr. Ingersoll drove to Arlene's Flowers and met with Ms. Stutzman. CP 350. Ms. Stutzman was aware that Mr. Ingersoll is gay and in a relationship with Mr. Freed. CP 423-24. Mr. Ingersoll told

Ms. Stutzman about his upcoming wedding to Mr. Freed and indicated that the couple wanted Defendants to provide flowers for the wedding. CP 350-51, 426. Ms. Stutzman told Mr. Ingersoll that she could not serve him because of her relationship with Jesus Christ. CP 350-51, 426.

Ms. Stutzman refused to serve Mr. Ingersoll before he could tell her what sort of flowers he wanted, i.e., whether he intended to purchase unarranged flowers or floral arrangements. CP 426-29, 444-46. As Ms. Stutzman put it, "[w]e didn't get into that." CP 426-27. Mr. Ingersoll never asked Ms. Stutzman to attend the wedding. CP 426-27.

Ms. Stutzman admits that Defendants turned Mr. Ingersoll away because of her religious belief "that marriage is a union of a man and a woman." CP 47. In support of this view, Defendants' expert Mark Hall testified that businesses should be allowed to refuse service on religious grounds, including, for example, to interracial couples. CP 2155-56.

Mr. Ingersoll was surprised and hurt by Defendants' refusal to serve him. CP 318-19. Before Defendants refused to do the flowers for their wedding, Mr. Ingersoll and Mr. Freed planned to have a big wedding at a large venue in Kennewick, and to invite over 100 guests. CP 322-24. After Defendants' refusal, Mr. Ingersoll and Mr. Freed pared back their plans. CP 351. Shocked and saddened, they feared being denied service by other

wedding vendors. CP 351. They ended up marrying in a small ceremony at their home, attended by 11 people. CP 352, 327.

C. After Defendants Refused to Serve Mr. Ingersoll, They Instituted a Policy Not to Arrange Flowers for Any Wedding or Commitment Ceremony of Gay or Lesbian Couples

When Defendants refused to serve Mr. Ingersoll, they knew that Washington law prohibited discrimination based on sexual orientation and that in 2012 Washington voters had affirmed the right to marry of gay and lesbian couples, as already approved by the legislature. CP 418-20. Despite this, after Defendants refused to serve Mr. Ingersoll, Ms. Stutzman created an unwritten policy that Arlene's Flowers would not provide arranged flowers for marriage or commitment ceremonies between gay or lesbian couples. CP 421-22. Ms. Stutzman says that "doing the flowers for any same-sex wedding would give the impression that [she] endorsed same-sex marriage." CP 46. Yet she also testified that she would sell flowers for heterosexual non-Christian weddings (e.g., atheist or Islamic weddings) and that doing so would not endorse atheism or other religions. CP 431-32.

After the State filed suit against Defendants, they made a policy of "not provid[ing] any floral wedding services or support for any customers besides [Ms. Stutzman's] immediate family until this case ends." CP 548.

D. The Attorney General's Office Asked Defendants to Comply With State Law, and They Refused

After learning that Defendants refused to serve Mr. Ingersoll, and after review and investigation, the Consumer Protection Division of the Attorney General's Office sent a letter to Ms. Stutzman asking her to agree that in the future she and her business would not discriminate against customers based on their sexual orientation. CP 1325-29. The letter included an Assurance of Discontinuance reflecting such an agreement. CP 1325-29. The letter explained that if Ms. Stutzman signed and complied, the matter would be resolved and she would bear no costs and admit no wrongdoing. CP 1325. But if Ms. Stutzman did not respond or was unwilling to sign the Assurance, the Attorney General's Office would pursue more formal options. CP 1326. Defendants declined to sign. CP 547-48.

The approach the Attorney General's Office took in this case is not exceptional. The Consumer Protection Division often opens investigations and files enforcement actions without having first received a consumer complaint.[1] Nor was this case the first or only action taken by the Attorney

[1] Decl. Shannon Smith in Supp. State's Reply in Supp. Pl.'s Mot. Partial Summ. J. on Def.'s Non-Constitutional Defenses at 2, *State v. Arlene's Flowers*, No. 13-2-0081-5 (Benton Cty. Super. Ct. Nov. 24, 2014) (Exhibit M attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice, filed Jan. 14, 2019). Attached to that declaration is a list of consumer protection enforcement actions taken without having first received a consumer complaint. *Id.* at 2, No. 6 (Ex. 1). That list was provided to Defendants in discovery.

General's Office to address discrimination based on sexual orientation in commerce.[2] And an Assurance of Discontinuance, authorized by RCW 19.86.100, is a widely-used method of resolving consumer protection concerns without the need for formal enforcement,[3] and under the Washington statute it is not an admission of a violation.

E. Procedural History

1. When Defendants refused to comply with state law, the Attorney General filed this action

On April 9, 2013, the State of Washington, through the Attorney General's Office, filed this action under the Consumer Protection Act (CPA), RCW 19.86. The complaint alleged that Defendants violated the CPA when they engaged in sexual orientation discrimination in public accommodation by refusing to sell Mr. Ingersoll flowers for his wedding to another man, Mr. Freed. CP 3-4.

There are two grounds for the State's CPA claim. CP 3-4. First, Defendants' refusal to sell flowers to Mr. Ingersoll is sexual orientation

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[2] *Id.* at 7-9 (referencing two prior cases in which the Attorney General took action to address discrimination based on sexual orientation in commerce).

[3] *See*, *e.g.*, Ariz. Rev. Stat. § 44-1530; Me. Stat. tit. 9-A, § 6-109; Mass. Gen. Laws ch. 93A, § 5; Mich. Comp. Laws § 445.906; Minn. Stat. § 8.31 Subd. 2b; Nev. Rev. Stat. § 598.0995; N.Y. Exec. Law § 63(15); W. Va. Code § 46A-7-107; *see also* Maryland Office of Attorney General, Consumer Protection Division, *In re Career Education Corporation et al.*, Assurance of Voluntary Compliance/Assurance of Discontinuance (Jan. 3, 2019), http://www.marylandattorneygeneral.gov/News%20Documents/1_3_19_CEC_AVC.pdf (example of multistate assurance of discontinuance, involving 48 states and the District of Columbia).

discrimination and thus an unfair practice under the Washington Law Against Discrimination (WLAD), which prohibits such discrimination in public accommodation. CP 3; RCW 49.60.030(1), .215. This unfair practice is a per se violation of the CPA. CP 3-4; RCW 49.60.030(3). The second, separate CPA claim, is that Defendants' conduct "constitutes an unfair practice in trade or commerce and an unfair method of competition that is contrary to the public interest and therefore violates RCW 19.86.020[.]" CP 4.

2. The superior court respectfully considered Defendants' claims and ruled for the State

The superior court thoroughly, carefully, and respectfully considered the issues in this case before ultimately ruling against Defendants. The court issued a neutral and carefully considered 60-page opinion, based on hundreds of pages of briefing and documentary evidence submitted by the parties, and many hours of oral argument, and it never showed any signs of hostility towards Ms. Stutzman's faith. CP 2310-69.

Defendants cite nothing in the superior court's written orders or oral comments evidencing hostility towards religion. To the contrary, the superior court repeatedly acknowledged the sincerity of Ms. Stutzman's religious beliefs and the conflict between her beliefs and state law. *See, e.g.*, CP 2315, 2346-47 ("a central tenet of Stutzman's firmly-held religious belief is in direct conflict with the Laws of the State of Washington"), 2355

("The AG and Individual Plaintiffs do not contest that Stutzman has a sincerely-held religious belief, nor could they: the doctrinal statement of her church is clearly delineated in the record, her actions are entirely consistent therewith, and the Court should not inquire further in the matter."). The court expressly disclaimed attributing any malicious intent to Defendants:

> 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 [Southern Baptist Convention]'s direction to condemn "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" towards gay men or women.

CP 2360 n.31. The superior court instead focused on the discriminatory *impact* of Defendants' actions, without regard to Defendants' state of mind. CP 2334-35, 2336. The superior court acknowledged the "insoluble" conflict between Defendants' sincerely-held religious beliefs and the State's compelling interest in enforcing a "valid and neutral law of general applicability that forbids conduct that a religion requires." CP 2347, 2323.

Rather than basing its decision on religious hostility, the superior court rejected Defendants' arguments based on long-established law that the Free Exercise Clause does not relieve an individual from compliance with neutral laws of general applicability. CP 2349-52. The court also rejected Defendants' free speech arguments, finding that selling floral arrangements is conduct, not speech, and is not inherently expressive. CP 2347-49.

After the superior court granted summary judgment in favor of the State, the State submitted a proposed judgment to the court, including injunctive relief, civil penalties in an amount up to $2,000 to be determined by the court under RCW 19.86.140, and one dollar in costs and attorneys' fees under RCW 19.86.080(1). CP 2413-16. Defendants objected to the requested penalties as well as the State's proposed injunctive relief, but not to the State's request for one dollar in costs and fees. CP 2378-87, 2390-97.

The court entered judgment for the State awarding $1,000 in civil penalties and the uncontested one dollar in fees and costs. CP 2419. The superior court permanently enjoined and restrained Defendants from violating the CPA by discriminating against persons based on their sexual orientation. CP 2419-20. The superior court made clear that only services "customarily provided" "for a fee" are covered by the injunction and must be offered on a non-discriminatory basis. CP 2339 n.19, 2347 n.23. The court held that "[t]he degree to which [Ms. Stutzman] voluntarily involves herself in an event outside of the scope of the services she must provide to all customers on a non-discriminatory basis (if she provides the service in the first instance) is not before the Court." CP 2347 n.23.

3. This Court respectfully considered and rejected Defendants' claims

This Court likewise neutrally and respectfully considered and rejected each of Defendants' arguments in a unanimous decision entered February 16, 2017, affirming the superior court. *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 820-25, 329 P.3d 543 (2017), *cert. granted, judgment vacated sub nom Arlene's Flowers, Inc. v. State*, 138 S. Ct. 2671 (2018). Defendants cite no statement or action of this Court that they claim evidences hostility towards Ms. Stutzman's religious beliefs.

Rather than ruling based on hostility, this Court carefully reviewed the U.S. Supreme Court's decisions according free speech protection for conduct and found that they all dealt with conduct that was clearly expressive without further explanation. *Id.* at 835. This Court found selling floral arrangements falls outside this category. *Id*. at 832-36 (citing *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (per curiam); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)).

Similarly, this Court rejected Defendants' free exercise claim, holding that the WLAD is both neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), and *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). *Arlene's Flowers*, 187 Wn.2d at 842-43. Relying on those decisions, the Court applied rational basis review and held that the WLAD is rationally related to the government's legitimate interest in ensuring equal access to public accommodations. *Id*. at 843. This Court also held that the WLAD would survive even if strict scrutiny applied. *Id*. at 849-50. It described the government's compelling interest in eliminating discrimination in public accommodations and found there is no less restrictive means to achieve that goal than to prohibit such discrimination. *Id*. This Court explained that public accommodations laws do not simply guarantee access to goods or services. "[T]hey serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined." *Id*. at 851-52 (footnote omitted).

This Court also rejected Defendants' argument that Mr. Ingersoll was not harmed by the refusal to serve him, because other florists were willing to serve him. *Arlene's Flowers*, 187 Wn.2d at 851. It agreed with Mr. Ingersoll and Mr. Freed that "[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to

sandwiches." *Id*. (alternations in original) (quoting Br. of Resp'ts Ingersoll and Freed at 32).

This Court rejected Defendants' free association claim because it found no decision by the U.S. Supreme Court holding that a commercial enterprise, open to the general public, is an "expressive association" for purposes of First Amendment protections. *Id.* at 852-53.

Finally, this Court rejected Defendants' attempt to invoke the "hybrid rights" doctrine because Defendants had not demonstrated that their rights to speech and association were burdened by the WLAD. *Id*. at 853-54. This Court also reiterated its earlier conclusion that even if strict scrutiny applied, the WLAD satisfied that standard. *Id*. at 854.

4. The U.S. Supreme Court remanded based on *Masterpiece*

Defendants petitioned for certiorari in the U.S. Supreme Court. On June 25, 2018, that Court granted the petition, vacated this Court's decision issued February 16, 2017, and remanded for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727, 201 L. Ed. 2d 35 (2018).

The petitioner in *Masterpiece* was a baker who refused, because of his religious belief, to make a cake for a reception to celebrate a same-sex wedding. *Id.* at 1724. The wedding itself was to be held in another state because it was not yet legal for same-sex couples to marry in

Colorado. *Id.* The couple who were refused filed a discrimination complaint against the baker and his bakery. The complaint was investigated by the Colorado Division of Civil Rights, a state agency charged with enforcing Colorado's anti-discrimination laws. The investigation found that the baker "had a policy of not selling baked goods to same-sex couples for this type of event" and had followed that policy with other same-sex couples; the case was then referred to the Colorado Civil Rights Commission to adjudicate the charges. *Id.* at 1726. An administrative law judge ruled for the couple; the Commission, and then the Colorado Court of Appeals, affirmed. *Id.* at 1726-27. The U.S. Supreme Court granted certiorari and reversed.

In the Supreme Court, the baker made three of the same federal constitutional arguments the Defendants here made to this Court. He argued that requiring him to make a "custom wedding cake" compelled speech in violation of the Free Speech Clause of the First Amendment.[4] He argued that the Commission was not applying the Colorado Anti-Discrimination

[4] *See* Br. for Pet'rs at 16-37, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-ts.pdf. Compare Br. of Appellants 24-31, filed Oct. 16, 2015, in this case.

Act in a neutral and generally applicable manner to his religious objections.[5] And he argued the same "hybrid rights" theory for strict scrutiny.[6]

The Supreme Court did not decide the free speech claim and never mentioned any hybrid right. It did not grant the baker a free speech or free exercise right to discriminate. The decision left in place all public accommodations laws barring discrimination, including the Colorado law at issue. As explained below, the Court held only that the hearing provided by the Colorado Civil Rights Commission was tainted by impermissible hostility towards the baker's beliefs, in violation of the Free Exercise Clause.

The Court's analysis began by affirming that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. It also acknowledged that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression" under the First Amendment. *Id.* Then, reiterating a half-century of public accommodation case law barring discrimination, the Court rejected the argument that businesses have a constitutional right to discriminate: "[W]hile those religious and philosophical objections are protected, it is a general rule that

[5] *See id*. at 38-46. Compare Br. of Appellants 36-39, filed Oct. 16, 2015, in this case.

[6] *See id.* at 46-48. Compare Br. of Appellants 40-41, filed Oct. 16, 2015, in this case.

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.*; *see also id.* at 1748 (Ginsburg, J., dissenting).

Masterpiece relied on and reaffirmed *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) (per curiam), which denied a business owner's claim, based in part on his religion, for an exemption from the prohibition on race discrimination in the 1964 Civil Rights Act. By relying on *Piggie Park*, the *Masterpiece* Court made clear that principles and decisions from the race discrimination context apply in the context of sexual orientation discrimination.[7]

The Court also explained that constitutional exemptions to anti-discrimination laws, such as for clergy, must be narrowly confined. Otherwise, "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting

[7] It also is worth noting that *Piggie Park* was decided before *Smith*, at a time when the "compelling interest" standard of *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), governed religious exercise claims—arguably a higher standard than that articulated in *Smith*. The public accommodations antidiscrimination provisions of the 1964 Civil Rights Act served a compelling government interest under that higher standard. *See Piggie Park*, 390 U.S. at 402 n.5. The government's compelling interest in securing equal opportunities for the beneficiaries of antidiscrimination law was confirmed in the free exercise context in *Bob Jones University v. United States*, 461 U.S. 574, 602-04, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (addressing discrimination based on race), and in the associational freedom context in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (addressing discrimination based on gender).

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. Paralleling this Court's conclusion regarding the WLAD in *Arlene's Flowers*, 187 Wn.2d at 843, the *Masterpiece* Court repeatedly referred to public accommodations laws barring discrimination as "neutral" and "generally applicable" within the meaning of its governing free exercise decision, *Smith*, 494 U.S. at 881.[8]

Masterpiece's holding is thus rooted in the specific facts of that case. The Court held that the adjudicator—the Colorado Civil Rights Commission—did not treat the baker's religious claims with the neutrality the Free Exercise Clause requires. *Masterpiece*, 138 S. Ct. at 1729. The Court stressed that Commission members made hostile remarks about the baker's religious beliefs and that those comments showed "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection" and "cast doubt on the fairness and impartiality of the Commission's adjudication of [the baker's] case." *Id.* at 1729-30.

[8] *See, e.g.*, *Masterpiece*, 138 S. Ct. at 1723-24 ("The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws."); *id.* at 1728 (referring to petitioner's concession that "a baker who offers goods and services to the general public . . . is subject to a neutrally applied and generally applicable public accommodations law").

The Court also criticized the Commission for treating the petitioner differently from other bakers who refused to create cakes while the Colorado Civil Rights Commission was considering the *Masterpiece* case. *Masterpiece*, 138 S. Ct. at 1730. Those refusals were in response to requests from an individual who asked three bakeries to make cakes with specific written messages conveying disapproval of same-sex marriage; that individual then filed complaints alleging discrimination. *Id.* at 1749 (Ginsburg, J., dissenting). The Commission concluded that these refusals were not discriminatory. *Id.* The Court considered the Commission's differential treatment of the bakers a second "indication of hostility" by the Commission. *Id.* at 1730.[9]

The requirement that the government give the religious claimant "neutral and respectful consideration" in an adjudication, *id.* at 1729, does not translate into an obligation to provide the religious claimant an exemption from public accommodations law. The Court imposed a requirement of respect and neutrality on the adjudicator, *id.*, not an obligation to exempt the religious claimant from the law.

[9] Four Justices strongly disagreed with the majority's suggestion that the other three bakers violated the Colorado Anti-Discrimination Act. *See Masterpiece*, 138 S. Ct. at 1733-34 (Kagan, J., concurring, joined by Breyer, J.); *id.* at 1749-51 (Ginsburg, J., dissenting, joined by Sotomayor, J.).

F. Subsequent Events

Over four years after Defendants refused to serve Mr. Ingersoll and this case began, two and a half years after the superior court proceedings in this case ended, and months after this Court issued its decision, a series of events occurred that Defendants now try to make a centerpiece of this case. Br. of Appellants 20-23. Their description of those events is incomplete.

On the weekend of September 23-24, 2017, rainbow-colored notes folded into origami butterflies and other shapes began appearing in public parks and other locations in Seattle.[10] When unfolded, the notes said in block letters: "YOU ARE NOT SAFE," and included a date, "9/28/2017," and a website, "allgodsmustdie.com."[11] The notes also contained Seattle-specific images that were "threatening" and "creepy"—such as mirror images of the Seattle skyline, but with the Space Needle removed from one of the images; "the Fremont troll crying and surrounded by a *[sic]* what could be anything from a river of blood to a river of mud to a river of coffee"; or an image that included a prominent Seattle Seahawks player with

[10] Neal McNamara, *Threatening Origami In Seattle: Mystery Notes Warn 'You Are Not Safe'*, Patch: Seattle, Washington, Sept. 26, 2017, https://patch.com/washington/seattle/threatening-origami-seattle-mystery-notes-warn-you-are-not-safe (Exhibit A attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[11] *Id.*

"devil horns" and a Starbucks "mermaid" with scars on her chest.[12] The origin of the notes was unclear, and they became a topic of local media interest and some people saw them as a threat of violence against the city.[13]

By September 27, 2017, there were reports that the notes might have been placed by anti-abortion activists.[14] That theory was confirmed the next day when "groups of uniformed anti-abortion protesters" appeared at several locations in Seattle,[15] and an internet site conveying anti-abortion messages began displaying the same images as were on the origami notes.[16] A prominent image on the site was of rainbow-colored hands dripping blood

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[12] *Id.*

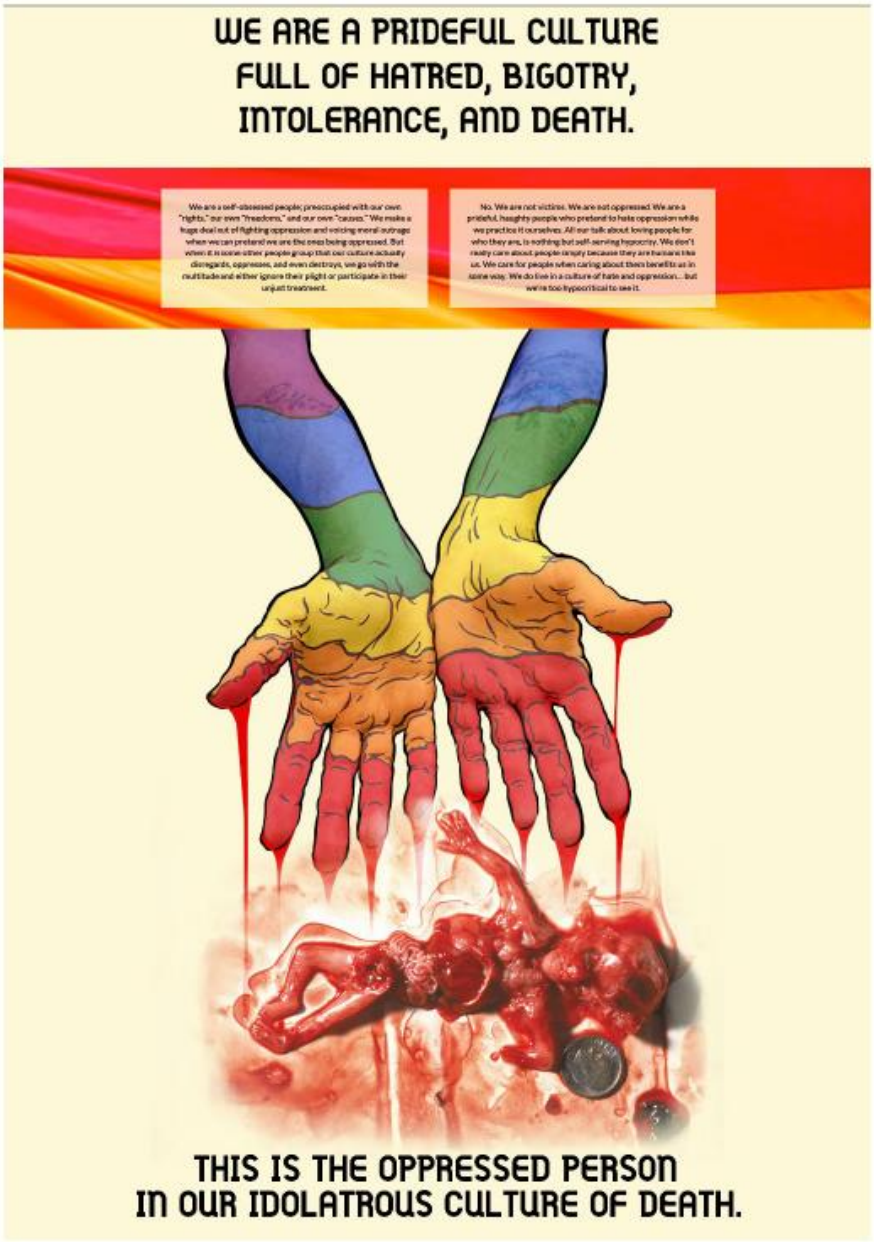
[13] Neal McNamara, *Seattle's Creepy Origami Mystery is Solved, And Many Are Disappointed*, Patch: Seattle, Washington, Sept. 28, 2017, https://patch.com/washington/seattle/amp/27280969/seattles-creepy-origami-mystery-is-solved-and-many-are-disappointed (Exhibit C attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[14] Neal McNamara, *Ominous Origami Notes In Seattle Might Be About Abortion*, Patch: Seattle, Washington, Sept. 27, 2017, https://patch.com/washington/seattle/amp/27278972/ominous-origami-notes-in-seattle-might-beabout-abortion (Exhibit B attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[15] Neal McNamara, *Seattle's Creepy Origami Mystery is Solved, And Many Are Disappointed*, Patch: Seattle, Washington, Sept. 28, 2017, https://patch.com/washington/seattle/amp/27280969/seattles-creepy-origami-mystery-is-solved-and-many-are-disappointed (Exhibit C attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[16] Ted Land, *Anti-abortion campaign appears to be behind ominous origami butterflies*, King5 News, Sept. 28, 2017, https://www.king5.com/article/news/local/seattle/anti-abortion-campaign-appears-to-be-behind-ominous-origami-butterflies/281-478869546 (Exhibit D attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

onto an aborted fetus.[17] That image is reproduced here:



[17] http://thetenthmark.com/ (Exhibit E attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

The same image—rainbow-colored hands dripping blood onto an aborted fetus—was prominent in fliers left in various places around Seattle. On October 1, 2017, members of the group disseminating those fliers entered a Seattle coffee shop, Bedlam Coffee, apparently after placing fliers outside.[18] When Ben Borgman, the owner of Bedlam Coffee, learned that the persons in his shop had been distributing the fliers, he asked them to leave.[19] They objected, the situation escalated into a confrontation, and they began recording video of the incident.[20] It is that video that Defendants submitted to the Court with their motion to supplement.[21]

In public statements after the incident, Mr. Borgman explained that he did not ask the patrons to leave because they were Christian: "They were put out because they print ugly crap and hand it out in my town, period. I would have thrown out a group that tried to print ugly crap about Christians, too. Trying to stir up hate and discontent is not how to fix things."[22]

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[18] Dori Monson, *Bedlam Coffee owner: I didn't kick them out for being Christian*, MyNorthwest Staff, KIRO Radio (Oct. 10, 2017), http://mynorthwest.com/780768/seattle-bedlam-coffee-ben-borgman/ (Exhibit J attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[19] *Id.*

[20] *Id.*

[21] Appellants' Motion to Supplement Record or for Judicial Notice (filed Nov. 13, 2018), Ex. C.

[22] Curtis M. Wong, *Gay Coffee Shop Owner Blasts Anti-Abortion Activists In Viral Video*, Huffington Post, Oct. 10, 2017, https://www.huffingtonpost.com/entry/seattle-coffee-shop-anti-choice-activists_us_59dbd39de4b0b34afa5b77d9 (Exhibit H attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice); *see also* Douglas Ernst, *Christian activists booted from Seattle coffee*

A local talk radio host interviewed the activists and Mr. Borgman. Mr. Borgman reiterated that religion had nothing to do with his actions: "This wasn't about Christianity. I'm not anti-Christian[.] . . . I'm anti-people who print garbage and spread it around the city. If you want to hand out stuff, you put it in an adult's hand. You don't leave it wrapped up like a toy for a child to find. That's what it's all about."[23] Mr. Borgman also stated that members of the anti-abortion group have been back into Bedlam Coffee since the incident and that he will serve them in the future.[24]

The chair of the Washington State Human Rights Commission learned of the incident from the radio interviews and called in to the radio show.[25] She explained that the Commission would send Mr. Borgman a letter informing him that "in the State of Washington you can't discriminate

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shop: 'I'm gay. You have to leave', Washington Times, Oct. 6, 2017, https://www.washingtontimes.com/news/2017/oct/6/christian-activists-booted-from-seattle-coffee-sho/ (Exhibit F attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice); Dan Avery, *Is It Okay For A Gay Business Owner To Refuse To Serve Anti-Abortion Activists?*, Logo.newnownext, Oct. 10, 2017, http://www.newnownext.com/christian-group-gay-coffee-shop-ben-borgman/10/2017 (Exhibit G attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[23] Dori Monson, *Bedlam Coffee owner: I didn't kick them out for being Christian*, MyNorthwest Staff, KIRO Radio (Oct. 10, 2017), http://mynorthwest.com/780768/seattle-bedlam-coffee-ben-borgman/ (Exhibit J attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[24] *Id.*

[25] Decl. Laura Lindstrand (Exhibit L attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice). No complaint involving Bedlam Coffee was received by the Human Rights Commission. *Id.*

against someone in your place of business based on your beliefs."[26] Defendants submitted a copy of that letter to the Court with their motion to supplement.[27] Neither the Attorney General's Office nor the Human Rights Commission has received any complaint alleging that Bedlam Coffee or Mr. Borgman has a policy of turning away customers based on their religion.[28]

III. RESTATEMENT OF ISSUES

The U.S. Supreme Court remanded this case for further consideration in light of the decision in *Masterpiece*. *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). In *Masterpiece*, 138 S. Ct. at 1729-30, the Court held that the Colorado Civil Rights Commission "showed elements of a clear and impermissible hostility" towards the sincere religious beliefs motivating the baker's refusal to bake a cake for a same-

[26] Dori Monson Show, *Seattle cafe can expect an education in discrimination from the state*, KIRO Radio, Oct. 11, 2017, http://mynorthwest.com/779684/seattle-cafe-richland-florist-beliefs/? (Exhibit K attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[27] Appellants' Mot. to Suppl. R. or for Judicial Notice (filed Nov. 13, 2018), Ex. A at 089-090.

[28] Exhibit A, attached to Appellants' Motion to Supplement the Record or for Judicial Notice, includes a number of communications received by the Attorney General's Office about the Bedlam Coffee incident, Ex. A at 002-088, all from individuals who apparently had no personal contact with Bedlam Coffee and who were responding to news reports or social media accounts. Three of those communications were received by the Consumer Protection Division of the Attorney General's Office, which the Division handled as consumer complaints, offering the informal dispute resolution process routinely provided to facilitate communication between the complainant and Bedlam Coffee. Ex. A at 002-044. Neither Bedlam Coffee nor the complainants accepted the offer. The other communications were sent to the general email address of the Attorney General's Office and were treated as commentary on the Office's performance.

sex wedding. The Court did not decide any other legal issue raised by the petitioners. Therefore, there are only two issues requiring reconsideration:

(1) In determining that Defendants violated the Consumer Protection Act, did the Benton County Superior Court evidence "clear and impermissible hostility" towards Ms. Stutzman's religious beliefs?

(2) In affirming the superior court's ruling, did the Washington Supreme Court evidence "clear and impermissible hostility" towards Ms. Stutzman's religious beliefs?

No other issues decided by this Court in its prior decision require reconsideration based on the decision in *Masterpiece*, and this Court may adhere to and reaffirm that decision in all other respects.[29]

IV. ARGUMENT

A. The Hostility Towards Religion That Prompted the Supreme Court's Ruling in *Masterpiece* Is Absent Here

In *Masterpiece*, the Supreme Court vacated the Colorado Civil Rights Commission's order because the Commission exhibited "hostility to a religion or religious viewpoint." *Masterpiece*, 138 S. Ct. at 1731. This rationale has no application here for two reasons.

First, the Court's concern in *Masterpiece* focused on evidence of hostility by the adjudicative body deciding the baker's claim, a concern that Defendants never meaningfully raise here. The Court found two indicators

[29] Contrary to Defendants' contention, Br. of Appellants 17, the State has not conceded otherwise.

of impermissible hostility: (1) remarks by members of the Colorado Civil Rights Commission, which the Court emphasized were made "by an adjudicatory body deciding a particular case," *Masterpiece*, 138 S. Ct. at 1730; and (2) that "the Commission's consideration of [the baker's] religious objection did not accord with its treatment of . . . other objections." *Id.* Both of these concerns "cast doubt on the fairness and impartiality of the Commission's adjudication of [the baker's] case." *Id.*; *see also id.* at 1732 (holding that the baker "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection").

Here, by contrast, the "adjudicatory bodies" that decided Defendants' claims were the Benton County Superior Court and this Court. And Defendants never even argue that either court showed hostility towards Ms. Stutzman's beliefs. Neither court did so, as detailed below. The complete absence of any evidence of hostility by either court towards Ms. Stutzman's beliefs removes this case from the ambit of *Masterpiece*.

Second, even if actions or statements by others were relevant under *Masterpiece*, Defendants' attempt to demonstrate hostility by the Attorney General's Office towards Ms. Stutzman's beliefs fails. As detailed below, the record shows no hostility towards Ms. Stutzman's beliefs, but rather an appropriate action initiated to achieve compliance with the WLAD.

1. The adjudicators in this case exhibited no hostility towards Ms. Stutzman's religious belief

The *Masterpiece* Court set aside the Colorado Civil Rights Commission's decision on the grounds that "[t]he Commission's hostility" towards the baker's religious beliefs "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Masterpiece*, 138 S. Ct. at 1732. The baker "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection." *Id.* Here, Defendants never even argue that the decisionmakers who reviewed their claims—the courts—demonstrated impermissible hostility towards Ms. Stutzman's religious beliefs.

The claims against Defendants were adjudicated initially by the Benton County Superior Court. There is no evidence whatsoever that the superior court was hostile towards Ms. Stutzman's religious beliefs. In fact, Defendants' argument based on impermissible hostility never even mentions the superior court's conduct in this case, instead focusing exclusively on the Attorney General's Office. *See* Br. of Appellants 18-25.

Defendants' failure even to argue impermissible hostility by the superior court is understandable given that the superior court clearly acted as "a neutral decisionmaker who [gave] full and fair consideration to [Ms. Stutzman's] religious objection." *Masterpiece,* 138 S. Ct. at 1732. The

superior court repeatedly described Ms. Stutzman's conduct as rooted in her "firmly-held religious belief, based on her adherence to the principals of her Christian faith, that marriage can only be between a man and a woman." CP 2200; *see also* CP 2315 (same). The court never denigrated Ms. Stutzman's views or their sincerity; instead, the court recognized that "a central tenet of Stutzman's firmly-held religious belief is in direct conflict with the Laws of the State of Washington." CP 2346; *see also* CP 2355. Ultimately, the superior court rejected Defendants' arguments without once disparaging the sincerity or substance of Ms. Stutzman's beliefs.

This Court then independently reviewed the superior court's rulings and the record and also rejected Defendants' claims. Like the superior court, this Court acted as a neutral decisionmaker and showed no hostility towards Ms. Stutzman's religious beliefs. Defendants never even argue otherwise, pointing to no conduct or statement by this Court in their argument based on impermissible hostility. *See* Br. of Appellants 18-25.

Particularly relevant here, this Court actually gave more rigorous review to Defendants' religion-based challenge to the WLAD than federal law requires. Defendants' primary free exercise challenge was that the WLAD violated the of the First Amendment by not exempting religious objectors. *Arlene's Flowers,* 187 Wn.2d 839-40. Because the WLAD is

neutral and generally applicable,[30] the federal free exercise challenge to the law is subject to rational basis review under the controlling U.S. Supreme Court decisions, *Smith* and *Lukumi*. But rather than simply applying rational basis review, this Court went on to apply strict scrutiny to Defendants' claim, assuming without deciding that Defendants' claim under article I, section 11 of the Washington Constitution required such review (Defendants have abandoned that claim on remand). *Arlene's Flowers*, 187 Wn.2d at 848-52.

In sum, *Masterpiece* held that "[t]he Commission's hostility" towards the baker's religious beliefs "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion," and the baker "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection." *Masterpiece,* 138 S. Ct. at 1732. Defendants here received the neutral decisionmaker and full and fair consideration the law requires.

2. Even if the conduct of others is relevant, there is no evidence that the Attorney General's Office exhibited hostility towards Ms. Stutzman's religious beliefs

As explained above, *Masterpiece* requires neutrality by the

[30] The Court concluded (1) that WLAD is a neutral, generally applicable law subject to rational basis review, and (2) that it clearly meets that standard because it is rationally related to the government's legitimate interest in ensuring equal access to public accommodations. *Arlene's Flowers*, 187 Wn.2d at 843.

adjudicator, and Defendants never even argue that the adjudicators here—the Benton County Superior Court and this Court—exhibited any hostility. Instead, Defendants attack the Attorney General's Office. But even if the conduct of the Attorney General's Office is relevant, every one of Defendants' attacks is false or irrelevant.

To begin with, contrary to Defendants' claim, Br. of Appellants 20, there is nothing improper or extraordinary about the Attorney General's Office investigating Defendants' conduct without first receiving a consumer complaint. As explained above, the Attorney General's Office often opens investigations and files enforcement actions without having first received a consumer complaint—the record includes dozens of recent examples.[31]

Defendants also suggest that the Attorney General's enforcement efforts have "never been about neutrally enforcing the law," but rather have been part of a "crusade" to "publicly decr[y] the morality of [Ms. Stutzman's] decision not to celebrate same-sex marriages[.]" Br. of Appellants 22. The record belies this claim. When the Attorney General's Office first learned of Defendants' conduct and policy of refusing to serve gay and lesbian couples for their weddings, the Office sent a letter to

[31] Decl. Shannon Smith in Supp. State's Reply in Supp. Pl.'s Mot. Partial Summ. J. on Def.'s Non-Constitutional Defenses at 2, *State v. Arlene's Flowers*, No. 13-2-0081-5 (Benton Cty. Super. Ct. Nov. 24, 2014) (Exhibit M attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

Ms. Stutzman asking her to agree that in the future she and her business would not discriminate against customers based on their sexual orientation. CP 1325-29; *Arlene's Flowers*, 187 Wn.2d at 818. The letter explained that if Ms. Stutzman agreed, the matter would be resolved and she would bear no costs. CP 1325. Ms. Stutzman refused. In short, the goal of the Attorney General's Office has always been neutrally enforcing the law. It was Defendants' refusal to comply with the law that led to this litigation.

Most prominently, and most misleadingly, Defendants suggest that an incident that occurred at a Seattle coffee shop demonstrates that the Attorney General's Office displayed unfair animus by treating Defendants differently from others. But the two events differ dramatically and show no evidence of animus by the Attorney General's Office.

Nearly five years after the incidents giving rise to this case, the owner of Bedlam Coffee kicked a group of people out of his business. The group had been distributing fliers, including some in public parks folded into origami shapes, that included threatening and repulsive images. The shop's owner immediately made clear that the reason he kicked the patrons out of his store was not their religious beliefs. He said: "These people were not thrown out for being Christian."[32] "We have religious

[32] Curtis M. Wong, *Gay Coffee Shop Owner Blasts Anti-Abortion Activists In Viral Video*, Huffington Post, Oct. 10, 2017, https://www.huffingtonpost.com/entry/seattle-coffee-shop-anti-choice-activists_us_59dbd39de4b0b34afa5b77d9 (Exhibit

organizations that meet here regularly."[33] "They were put out because they print ugly crap and hand it out in my town, period. I would have thrown out a group that tried to print ugly crap about Christians, too."[34] In particular, the owner explained, he was disturbed that the group had been distributing threatening fliers targeted at children. "This wasn't about Christianity. I'm not anti-Christian[.] . . . I'm anti-people who print garbage and spread it around the city. If you want to hand out stuff, you put it in an adult's hand. You don't leave it wrapped up like a toy for a child to find. That's what it's all about."[35] The owner also stated that the same patrons have been back into Bedlam Coffee since the incident and that he will serve them in the future.[36] There was thus no clear evidence that the business owner was discriminating based on religion in violation of the WLAD.

By contrast, Defendants' refusal to serve Mr. Ingersoll for his wedding was very clearly based on his sexual orientation, as this Court previously recognized. *Arlene's Flowers*, 187 Wn.2d at 823 ("By refusing

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H attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[33] *Id.*

[34] *Id.*

[35] Dori Monson, *Bedlam Coffee owner: I didn't kick them out for being Christian*, MyNorthwest Staff, KIRO Radio (Oct. 10, 2017), http://mynorthwest.com/780768/seattle-bedlam-coffee-ben-borgman/ (Exhibit J attached to Respondent State of Washington's Motion to Supplement Record or for Judicial Notice).

[36] *Id.*

to provide services for a same-sex wedding, Stutzman discriminated on the basis of 'sexual orientation' under the WLAD."). Defendants then adopted a policy of refusing to provide any gay or lesbian couples the same wedding services that they provided to heterosexual couples, in clear violation of the WLAD. *Id.* at 817. While Defendants' conduct was unquestionably religiously motivated, it was clearly illegal.

Defendants may respond that the Bedlam Coffee patrons' conduct was inextricably tied to their religious beliefs, so the refusal to serve them is religious discrimination. But there is nothing in the record suggesting that the patrons' religious views required them to distribute threatening leaflets in public parks. More generally, under the WLAD, business owners are allowed to reject patrons based on neutral principles—such as "No shirt, no shoes, no service," or "I won't serve patrons that distribute threatening fliers targeted at children"—that are unrelated to the patron's membership in a protected class. *See Arlene's Flowers*, 187 Wn.2d at 821-22 (explaining that a WLAD plaintiff must show discrimination occurred "because of the plaintiff 's status or, in other words, that the protected status was a substantial factor causing the discrimination" (internal quotation marks omitted)).

While the Bedlam Coffee owner certainly used vulgar language (unlike Ms. Stutzman), and the Attorney General's Office in no way condones his statements, the WLAD regulates discriminatory conduct based on

race, religion, sexual orientation, and other characteristics. It does not regulate rude behavior based on patrons' conduct. *See generally Floeting v. Grp. Health Coop.*, 200 Wn. App. 758, 773-75, 403 P.3d 559 (2017) ("The WLAD is not a general civility code." (Internal quotation marks omitted.)).

In any event, even if there were some equivalence between these two incidents that would have required the State to respond to the Bedlam Coffee incident, the State did respond to that incident. The Washington State Human Rights Commission—which shares jurisdiction over complaints of discrimination in public accommodation—notified the owner of Bedlam Coffee by letter that if he refused to admit or serve persons because of their religious beliefs, he would violate the WLAD. Appellants' Mot. to Suppl. R. or for Judicial Notice (filed Nov. 13, 2018), Ex. A at 089-090. Similarly, although Defendants misleadingly state that the Attorney General's Office received dozens of complaints and did nothing in response, Br. of Appellants 21, the truth is that the Attorney General's Office did not receive a complaint from anyone who had been denied service at Bedlam Coffee. *Supra* note 29. All communications received were from individuals who heard of the incident through media reports. And

in any event the Attorney General's Office did initiate the informal dispute resolution process commonly used for consumer protection complaints.[37]

Defendants suggest that anything less than a lawsuit by the Attorney General's Office against the owner of Bedlam Coffee demonstrates impermissible differential treatment. Br. of Appellants 21. But this overlooks two crucial facts. First, before suing Defendants, the Attorney General's Office sent them a letter asking them simply to agree to comply with the law, a course that would have involved no further action by the State. But Defendants refused. Second, and in sharp contrast, by the time the Attorney General's Office received any complaints about the Bedlam Coffee incident, the owner of Bedlam Coffee had already publicly stated that he would not deny service to people based on their religious beliefs and that he would even serve the persons involved in the incident if they returned. *See supra* pp. 23. The Bedlam Coffee owner's publicly affirmed willingness to comply with the WLAD fundamentally distinguishes him from Defendants.

Defendants also claim evidence of impermissible hostility towards religion by falsely alleging that the Attorney General's Office has described Ms. Stutzman's "religious beliefs as a mere excuse for discrimination."

[37] Appellants' Mot. to Suppl. R. or for Judicial Notice (filed Nov. 13, 2018), Ex. A at 002-044.

Br. of Appellants 23. But that has never been the claim. Unlike in *Masterpiece*, where the adjudicators' statements suggested that the baker's religious objections were "insubstantial and even insincere," *Masterpiece*, 138 S. Ct. at 1729, the Attorney General's Office has never suggested that Defendants' true motive is anything other than sincere religious beliefs. The Office has simply said what courts have long held: that even religiously motivated discrimination is still discrimination and can be prohibited. CP 431-32 ("While the State does not dispute that Ms. Stutzman's religious beliefs are sincerely held, article I, section 11 does not provide absolute freedom to act based on one's beliefs—it explicitly allows the State to secure 'the peace and safety' of its citizens. . . . Washington courts have repeatedly held that the 'freedom to believe' what one wishes is absolute, but the 'freedom to act' cannot be."); *see also, e.g.*, *Masterpiece*, 138 S. Ct. at 1727 (holding that religious "objections do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law"); *id.* at 1733 n.* (Kagan, J., concurring) ("As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait." (citing *Piggie Park*, 390 U.S. at 402 n.5)).

Equally unavailing is Defendants' claim that the Attorney General's Office demonstrated impermissible hostility by equating Ms. Stutzman's religious views "to racism." Br. of Appellants 24. Again, that has never been the argument. The argument the Attorney General's Office has made is that religious objections have been asserted to seek exemptions from a range of anti-discrimination laws, including laws prohibiting racial discrimination, and if religious objections were sufficient to create exemptions from anti-discrimination laws, the exemptions would undermine not just protections for gays and lesbians, but also protections against discrimination based on race, sex, and religion. *See, e.g.*, AG's Resp. Br. at 1-2, 38. This is an uncontroversial point that the U.S. Supreme Court acknowledged in *Masterpiece*, 138 S. Ct. at 1727 (citing case involving invocation of religion to justify race discrimination in explaining that religious "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"). And it was a point made by Defendants' own expert, who testified that if business owners could refuse to serve gay couples based on their religious beliefs, they should also be allowed to refuse service to interracial couples. CP 2155-56.

Finally, Defendants suggest that the Attorney General's Office has demonstrated hostility by arguing that Ms. Stutzman and other religious persons are not welcome in the business community. Br. of Appellants

24-25. But that is just not true. The Attorney General's Office has made clear throughout this case that Ms. Stutzman has several options that would allow her to continue her business, adhere to her beliefs, and comply with the WLAD. AG's Resp. Br. at 30-31 (noting that Ms. Stutzman could continue her business but stop serving weddings, which account for only three percent of her business, or could delegate the arrangement of flowers for weddings to her staff, many of whom have no objection to serving gay couples for their weddings). But violating the WLAD is not an option. Saying that Defendants must comply with state law in operating their business is not impermissible hostility, as the U.S. Supreme Court has long recognized. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

In sum, even if the conduct of the Attorney General's Office is relevant here, the Office has not demonstrated hostility towards Ms. Stutzman's religious faith. The Office sought to resolve this case without litigation or cost to Defendants. But Defendants—unlike others, such as the Bedlam Coffee owner—steadfastly refused to comply with the

law. The Attorney General's Office is not required to ignore such conduct, nor is it required to keep quiet about the negative consequences that would follow for antidiscrimination law generally if the courts accepted Defendants' arguments. Neutrally enforcing the law and arguing for its proper interpretation are not religious animus.

B. Nothing in *Masterpiece* Suggests That This Court Should Revise Its Analysis of Defendants' Other Claims

Unable to prevail based on the narrow issue actually decided in *Masterpiece,* Defendants argue that this Court should rule in their favor on various other grounds. But this Court already considered and rejected Defendants' arguments, and nothing in *Masterpiece* suggests that the Court's approach was improper. This Court should reiterate what it has already correctly held on the remaining issues Defendants raise.

1. As this Court previously recognized, there is no evidence that Ms. Stutzman would have been compelled to "physically attend" the wedding in this case

Defendants ask this Court to rule in their favor because *Masterpiece* "identified personal attendance at a wedding as a factor impacting" constitutional claims like this one. Br. of Appellants 26. But that issue simply is not presented here, as this Court previously recognized.

There is no evidence supporting Ms. Stutzman's argument that she would have been required to attend the wedding in this case. As this Court

previously recognized, Ms. Stutzman refused to serve Mr. Ingersoll before they discussed the services he wanted. CP 426-29. Mr. Ingersoll never invited Ms. Stutzman to the wedding. CP 429. He testified that, if provided the opportunity, he would have just requested some "sticks or twigs" to use with candles to create a simple display. CP 1773-74. Defendants never disputed this evidence, and indeed, moved for summary judgment on the ground that the lawsuit was moot because "Ingersoll and Freed only wanted to purchase raw materials," which Defendants argued, years after the fact, they would have willingly provided. CP 2311, 546.

Unable to show that she would have been required to attend the wedding here, Ms. Stutzman argues that the superior court's injunction required her to "physically attend" and "personally participate" in same-sex weddings going forward. Br. of Appellants 25, 44-45. But that hypothetical challenge rests on a mischaracterization of the evidence and the scope of the superior court's injunction. Br. of Appellants 25, 44-45. Defendants submitted no evidence that they charged customers for personal participation in weddings, such as clapping, singing, or "counseling" wedding participants. CP 2347 n.23; Br. of Appellants 26-27. Even delivering or setting up flowers in advance of a wedding is not usually part of the services Defendants provide; most of Defendants' wedding business (which is only three percent of their business to start with) involved

customers "picking up" floral arrangements. CP 117, 1677, 2163-64. Even when Defendants deliver flowers to a wedding venue, they typically do not attend the wedding. CP 129. Defendants thus exaggerate wildly in claiming that their only choice under the injunction is to personally attend same-sex weddings or exit the wedding business altogether.

In rejecting this same argument, the superior court made clear that only services "customarily provided" "for a fee" are covered by the injunction and must be offered on a non-discriminatory basis. CP 2339 n.19, 2347 n.23. The superior court held that "[t]he degree to which [Ms. Stutzman] voluntarily involves herself in an event outside of the scope of the services she must provide to all customers on a non-discriminatory basis (if she provides the service in the first instance) is not before the Court." CP 2347 n.23. That question is likewise not before this Court. If a case arises in the future in which a business owner would be compelled to attend and participate in a wedding, the Court can address those issues at that time.

2. Nothing in *Masterpiece* calls into question this Court's free speech analysis

Defendants mischaracterize *Masterpiece* to suggest that it "provides direct support" for their argument that prohibiting discrimination in the provision of wedding flowers amounts to "compelled speech." Br. of Appellants 32. Specifically, Defendants selectively quote from the Court's

characterization of how the baker in that case "would see the case," not the Court's actual holding. *Compare* Br. of Appellants 33 *with Masterpiece*, 138 S. Ct. at 1728. Contrary to Defendants' mischaracterizations, the Court in *Masterpiece* decided the case solely on free exercise grounds and specifically did *not* create new free speech law, much less a broad "free speech" exception to public accommodations statutes. *Id.* at 1731.

Indeed, the Court in *Masterpiece* affirmed the long-established framework for analyzing public accommodations laws and recognized the disastrous problems that would come from a broad new category of free speech exceptions. The Court acknowledged that, while religious objections to marriage equality are protected, such objections generally "do *not* allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.* at 1727 (emphasis added) (citing *Piggie Park*, 390 U.S. at 402 n.5; *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)). The Court further affirmed that antidiscrimination laws "do not, as a general matter, violate the First or Fourteenth Amendments[.]" *Id.* at 1727 (citing *Hurley*, 515 U.S. at 572). Defendants' suggestion that *Masterpiece* transformed public accommodations law cannot be supported.

Defendants also mischaracterize *Masterpiece* and this Court's prior ruling by suggesting that this Court erred in failing to focus on Defendants' floral arrangements directly, rather than on the conduct of selling wedding flowers. Br. of Appellants 37. *Masterpiece* noted only that few people would see free speech implications in a case involving wedding cakes; it did not create new standards for analyzing expressive conduct. *Masterpiece*, 138 S. Ct. at 1723. The law this Court applied in determining that Defendants' services did not constitute "inherently expressive" conduct remains controlling.

Further, contrary to Defendants' claims, this Court expressly addressed the creation of floral arrangements and not just the conduct of selling such services. *See, e.g.*, *Arlene's Flowers*, 187 Wn.2d at 836 ("Stutzman's conduct—whether it is characterized as creating floral arrangements, providing floral arrangement services for opposite-sex weddings, or denying those services for same-sex weddings—is not like the inherently expressive activities at issue in these cases."). This Court held that, while Defendants may *intend* to communicate a specific message in creating floral arrangements, this alone does not make the conduct "inherently expressive." *Id.* at 832. Defendants failed to demonstrate that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id*. (citing *Spence*, 418 U.S.

at 410-11). By Defendants' own admission, creating and providing floral arrangements for members of other faiths or for atheists does not endorse their views. *Id.* at 833. This Court rightly held that the conduct at issue was not "clearly expressive, in and of itself[.]"*Id*. at 835.

Masterpiece provides no basis for revisiting these determinations. It did not impact the analytical framework for determining whether Defendants' services constituted inherently expressive conduct. *Masterpiece*, 138 S. Ct. at 1730. Further, in confirming that States may enforce generally applicable public accommodations law without issue under the First or Fourteenth Amendments, the Court signaled a rejection of Defendants' arguments for a broad "artistic" exception to public accommodations law. *Id*. at 1727. As this Court aptly recognized, establishing such an exception would create "a 'two-tiered system' that carves out an enormous hole in public accommodations laws[.]" *Arlene's Flowers*, 187 Wn.2d at 837.

Tellingly, beyond their initial mischaracterizations of *Masterpiece*, Defendants' compelled speech arguments rely primarily on other cases that are either irrelevant or already considered by this Court.

Defendants first reiterate an interpretation of *Hurley* that this Court already rejected. As this Court explained, *Hurley* was "peculiar" because in

that case the "*parade itself* was a place of public accommodation." *Arlene's Flowers*, 187 Wn.2d at 834. The U.S. Supreme Court held that requiring the organizers to allow others' messages in the parade would alter the message of the organizers. *Hurley*, 515 U.S. at 572-73. Here, in contrast, Defendants' business is a public accommodation traditionally subject to antidiscrimination laws like the WLAD. *Arlene's Flowers*, 187 Wn.2d at 834-35.

Defendants' citations to *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018), and *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018), are equally unavailing. Neither case had anything to do with the type of public accommodations statute at issue here. *Janus* held that a state statute authorizing compulsory "agency" fees by non-union members constituted "compelled" subsidization of speech. *Janus*, 138 S. Ct. at 2460. And *Becerra* invalidated a state law requiring women's health clinics to post certain license-notice requirements and about the availability of state-sponsored services, including abortion. Neither case altered the framework for determining whether conduct constitutes "speech" or "inherently expressive conduct" in the first instance. This Court has already determined that Defendants' conduct constitutes neither literal speech nor inherently expressive conduct, and neither *Janus* nor *Becerra* has any impact on that. *See also Rumsfeld*, 547 U.S. at 64-66 (federal statute

requiring law schools to grant military recruiters most-favorable-recruiter access not "compelled speech" because law school's denial of such status was neither speech nor "inherently expressive" conduct).

Masterpiece acknowledged that certain fact patterns might present more difficult free speech questions. For example, the Court noted that "[i]f a baker refused to design a special cake with words or images celebrating the marriage" or a cake "showing words with religious meaning," that might present a more difficult issue. *Masterpiece*, 138 S. Ct. at 1723. This case, however, does not involve any of those more difficult issues. As discussed above, Defendants never even discussed with Mr. Ingersoll what he wanted before denying him service, and he testified that if asked, he would have requested just some "sticks or twigs." CP 1773-74, 429. This Court should not use this case to address fact patterns not presented.

3. As this Court previously concluded, and as *Masterpiece* confirms, even if strict scrutiny applies, it is satisfied here

Even if strict scrutiny applied to this case, that standard is satisfied, as recognized by this Court and underscored by *Masterpiece*.

As this Court previously held, the State unquestionably has a compelling interest in "eradicating barriers to the equal treatment of all citizens in the commercial marketplace." *Arlene's Flowers*, 187 Wn.2d at 850-52. This compelling interest has long been enshrined in the

law. *Id*. (citing cases holding that antidiscrimination laws survive strict scrutiny; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 629, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (holding that "public accommodation [laws] protect[ ] a State's citizenry from a number of serious social and personal harms," including the stigmatizing impact of discrimination). "[C]arv[ing] out a patchwork of exceptions for ostensibly justified discrimination" would be inimical to the central purpose and effectiveness of public accommodations statutes. *Arlene's Flowers*, 187 Wn.2d at 851-52. As such, there is no more narrowly tailored method for accomplishing the State's goals than prohibiting discrimination outright.

The Court in *Masterpiece* confirmed the importance of these goals. As the Court acknowledged, "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. "It is unexceptional that [state] law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Id.* at 1728. The Court further recognized that religious objections to the provision of goods and services must be cabined, otherwise "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." *Id*. at 1727. *Masterpiece* thus provides no basis for revisiting this Court's determination that the WLAD survives strict scrutiny.

Defendants assert many of the same strict scrutiny arguments that this Court previously rejected. This Court already rejected Defendant's reliance on *Hurley*, which, contrary to Defendants' characterization, did not hold that protection of expressive activities always prevails over State interest in enforcing public accommodations statutes. *Arlene's Flowers*, 187 Wn.2d at 852-53. This Court likewise rejected Defendants' reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), noting that the case involved private expressive associations, not the type of clearly commercial activities engaged in by Defendants. *Arlene's Flowers*, 187 Wn.2d at 852.

Defendants also argue that the superior court injunction is a "content-based" regulation because it applies to them solely because of the "topic discussed or the idea or message expressed." Br. of Appellants 42. This argument, however, distorts the nature of Defendants' activity, the WLAD, the injunction, and the authority upon which Defendants rely. As this Court already recognized, the WLAD follows the mold of traditional public accommodations laws that have withstood strict scrutiny in courts

around the country. *Arlene's Flowers*, 187 Wn.2d at 850 (citing cases). It in no way references the content of speech or expressive activity. *Id.* at 849-50. And it applies to Defendants because Arlene's Flowers is a public accommodation, not because of the "content" of any floral arrangements. RCW 49.60.040(2). The injunction likewise does not prescribe or proscribe any specific commercial services; it requires only that any services that Defendants choose to offer be offered on a non-discriminatory basis.

Finally, Defendants badly mischaracterize *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), as a case finding a "similar law content based." Br. of Appellants. 43. The ordinance at issue in *R.A.V.* was nothing like a generally applicable public accommodations law; it directly regulated speech or expressive conduct by prohibiting the placement of symbols or objects "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender[.]" *R.A.V.*, 505 U.S. at 380. In striking down the statute as a content-based regulation of speech, the Court confirmed that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 390. Here, the superior court did not enjoin Defendants because of the "expressive content" of their floral arrangements; it enjoined non-

expressive conduct in discriminating against individuals because of their sexual orientation. Defendants' activities cannot be shielded from regulation simply because Defendants intended their refusal to provide services to also express some other idea or philosophy.

V. CONCLUSION

Nothing in *Masterpiece* alters the outcome of this case. Defendants have not shown impermissible hostility towards religion by the courts that adjudicated this case or the Attorney General's Office. And nothing has changed about Defendants' remaining claims, which this Court should reject for the same reasons it did previously. Ms. Stutzman is entitled to express and adhere to her religious beliefs and to have those beliefs respectfully considered in the courts, but that does not mean she is entitled to violate Washington's neutral and generally applicable anti-discrimination laws. This Court should again affirm the superior court.

RESPECTFULLY SUBMITTED this 14th day of January 2019.

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