No. 19-333

In The
Supreme Court of the United States

ARLENE'S FLOWERS, INC. d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,

Petitioners,

v.

STATE OF WASHINGTON, ROBERT INGERSOLL, and CURT FREED,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

BRIEF AMICUS CURIAE ON BEHALF OF SAMARITAN'S PURSE AND THE BILLY GRAHAM EVANGELISTIC ASSOCIATION IN SUPPORT OF PETITIONERS

JOHN G. KNEPPER
LAW OFFICE OF
JOHN G. KNEPPER, LLC
2122 Warren Avenue,
Suite 310
Cheyenne, Wyoming 82001
(307) 632-2842
John@KnepperLLC.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI[1]

After telling the Parable of the Good Samaritan, who cared for a stranger when others would not, Jesus commanded his followers: "Go and do the same." Luke 10:37. For almost fifty years, Samaritan's Purse has provided emergency relief to those who suffer throughout the World, including in the United States.

The primary goal of Samaritan's Purse is not, however, disaster relief. Samaritan's Purse is an evangelistic organization that shares the Christian Faith with those in the gutters and ditches of the world at their darkest times of desperate need. The staff and volunteers of Samaritan's Purse live Jesus's command to stop and help those harmed by war, disease, and famine, and—in so doing—they earn respect and the opportunity to share their faith. Bob Pierce, the organization's founder, stated, "When we help somebody, like the Samaritan did, we earn the right to be heard. We must take advantage of that right to present Jesus."

The Billy Graham Evangelistic Association was founded in 1950, and continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to

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[1] Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of Amici's intent to file this brief and granted written consent. No counsel for a party authored this brief, in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

everyone by every effective means available and by equipping the church and others to do the same. The Association ministers to people around the world through a variety of activities, including evangelistic prayer rallies, festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, the Association seeks to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel. Thus, the Association is concerned whenever government restricts or inhibits the free expression of the Christian faith or seeks to compel individuals to act in a manner contrary to sincerely held religious beliefs.

Many Christians wake up each morning, delve into the Scriptures, pray, and desire to apply those Scriptures to their day. That is a part of Christian discipleship, becoming a disciple.

Samaritan's Purse and the Billy Graham Evangelistic Association are founded with the conviction that one can love and care for people with different beliefs without compromising one's own religious faith. Amici serve all people—the same faith, different faith, and even no faith—every day and all over the world. Consistent with this mission to share God's love, truth and hope worldwide, Amici advocate that Barronelle be able to live within the boundaries of her faith convictions and that others have freedom to do the same.

SUMMARY OF ARGUMENT

Petitioners have amply explained the need for this Court's review. Amici present two additional concerns. First, as expressly acknowledged in *Masterpiece Cakeshop*, the importance of religious faith to all aspects of life makes it inevitable that this Court will need to consider conflicts between faith and the demands of civil society. This case presents an optimal vehicle for the Court to begin to delineate how lower courts should analyze these disputes. Second, the Washington Supreme Court's novel theory—that only open hostility by adjudicators raises a Free Exercise concern under *Masterpiece*—does not just distort existing law but it also suppresses development of the future caselaw envisioned by this Court.

The First Amendment guarantees that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring). This Court's current Free Exercise jurisprudence, however, generally does not permit "an individual's religious beliefs" to justify non-compliance "with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990).

Through its "Law Against Discrimination," Wash. Rev. Code Ann. § 49.60.010 *et seq.*, the State of Washington imposes the broadest possible restrictions on its citizens to ensure 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 (2018). The conflict presented in Barronelle's petition is one *Masterpiece* anticipated: to what extent has Washington's non-discrimination statute become so intrusive that it now suppresses "the religious and philosophical objections to gay marriage" that are "protected views and in some instances protected forms of expression" under the First Amendment. *Id.*

When this Court remanded Barronelle's case to the Washington Supreme Court, with an order to reconsider its opinion in light of the *Masterpiece* decision, 138 S.Ct. 2671-72 (mem.) (2018), this Court likely expected the lower court to discern the "shadings that had altogether escaped the attention" of advocates and judges thus far, Henry J. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 Brook. L. Rev. 6, 13 (1962) (describing Judge Hand's acumen). If the Washington Supreme Court's careful reconsideration resolved this dispute successfully, then no further intervention by this Court would be needed. If not, this case, or one like it, could return with "further elaboration" for review. *Masterpiece*, 138 S.Ct. at 1732.

The Washington Supreme Court decided upon a third approach. Pet.App.1a-73a. The court blinded itself to any intervening decisions by this Court other than *Masterpiece* itself. Pet.App.21a n.7. Then, the court used *Masterpiece* to twist Free Exercise

jurisprudence in a manner that is likely to preclude the thoughtful consideration that *Masterpiece* demands.

The Washington Supreme Court has held that *Masterpiece* forbids hostility only when *stated on the record in that case by the judge or judges involved*. Pet.App.3a. Finding no written evidence the state judiciary failed to act as a "fair and neutral adjudicator," the court had "no reason to change our original decision" and re-issued "major portions" of the prior opinion "verbatim." Pet.App.3a & n.1.

In *Masterpiece*, this Court refused to overlook evidence that the Colorado Civil Rights Commission's order against Jack Phillips was "infected by religious hostility or bias." *Masterpiece*, 138 S.Ct. at 1734 (Kagan, J., concurring). The lower court's analysis here, however, demonstrates none of that solicitude for "protecting unpopular religious beliefs." *Id.* at 1737 (Gorsuch, J., concurring). Indeed, the inquiry on remand was so narrow that Jack Phillips himself would have been hard pressed to prevail.

Without this Court's review, government officials will continue to punish individuals like Barronelle for obedience to "principles that are so fulfilling and so central to their lives and faiths." *Id.* at 1727.

Even worse, these officials will conceal their bias from review by citing the very decision in which this Court excoriated "clear and impermissible hostility" toward "sincere religious beliefs." *Id.* at 1729. *See also id.* at 1732 (Kagan, J., concurring) ("[S]tate actors cannot show hostility to religious views."); *id* at 1737

(Gorsuch, J., concurring) (State demonstrated "anything but the neutral treatment of religion."); *id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment) (State treated Jack Phillips differently "for reasons that can only be explained by hostility toward Phillips' religion.").

Barronelle's case is an ideal vehicle to reinforce *Masterpiece*'s command that "cases like this in other circumstances" "must be resolved with tolerance" and "without undue disrespect to sincere religious beliefs." *Id.* at 1732. Barronelle's sincere faith, and her long history of service to Robert Ingersoll and Curt Freed alleviate the concern that recognition of her religious faith will inevitably protect others motivated by hatred, anger, or bias. Moreover, the Washington State law is so broad in its application and so inflexible in its exceptions that it presents an opportunity for this Court to begin to delineate the boundaries of religious protection "without subjecting gay persons to indignities when they seek goods and services in an open market." *Id.* This Court should grant the Petition for a writ of certiorari.

ARGUMENT

I. The importance of religious faith to all aspects of life, and an increasingly diverse society, have made it inevitable that this Court will need to guide lower courts on how to resolve conflicts between religious faith and the demands of civil society.

A. Religious faith commands adherents to live their beliefs in all aspects of life.

For the many millions of Christians, Jews, Muslims, and others of religious belief throughout the United States, faith is not a ritual confined to a place of worship. Religious faith calls adherents to live out their beliefs in every aspect of their lives.

"Genuine Christianity is more than a relationship with Jesus, as expressed in personal piety, church attendance, Bible study, and works of charity." Charles Colson & Nancy Pearcey, *How Now Shall We Live?* 14-15 (1999). "Genuine Christianity is a way of seeing and comprehending *all* reality. It is a worldview." *Id.* at 15. "The Christian who neglects his temporal duties, neglects his duties toward his neighbor and even God, and jeopardizes his eternal salvation." Pope Paul VI, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes*, Libreria Editrice Vaticana ¶ 43 (Dec. 7, 1965). "Christians should rather rejoice that, following the example of Christ Who worked as an artisan, they are free to give proper exercise to all their earthly activities and to their humane, domestic, professional, social and technical enterprises by gathering them into one vital synthesis with

religious values, under whose supreme direction all things are harmonized unto God's glory." *Id.*

Barronelle Stutzman seeks to live her Christian Faith, but the integration of faith and civil life is no less important for those of other faiths. "No matter how sincerely a person may believe, Islam regards it as meaningless to live life without putting that faith into action and practice." Oxford Islamic Information Centre, *Five Pillars of Islam* at https://bit.ly/2n14VGu. "Fulfilling these obligations provides the framework of a Muslim's life and weaves their everyday activities and their beliefs into a single cloth of religious devotion." *Id.*

Maimonides counseled a young man "that the perfection, in which man can truly glory, is attained by him when he has acquired—as far as this is possible for man—the knowledge of God, the knowledge of His Providence, and of the manner in which it influences His creatures in their production and continued existence." Moses ben Maimon (Maimonides), *Guide of the Perplexed* 305 (M. Friedlander trans., 1881). "Having acquired this knowledge he will then be determined always to seek loving-kindness, judgment, and righteousness, and thus to imitate the ways of God." *Id.*

This Court's caselaw acknowledges the all-encompassing nature of religious belief. Past writings by some members of this Court suggested one could distinguish "whether an activity is religious or secular," *Corp. of Presiding Bishop of Church of Jesus Christ of*

Latter-day Saints v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring in judgment). Recent decisions recognize this distinction is difficult if not impossible: for example, "[a] monument may express many purposes and convey many different messages, both secular and religious." *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2087 (2019).

In this light, the Court recognizes that First Amendment protections extend beyond worship services in churches. Non-profit corporations, and even for-profit corporations, can engage in religious activity. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (noting "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within" the definition of religious acts). Nor must an individual "be responding to the commands of a particular religious organization" to claim the protection of the Free Exercise Clause. *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989). *But see Burwell*, 573 U.S. at 717 n.28 (to qualify for protection under the Religious Freedom Restoration Act, an asserted belief must be sincere); *Frazee*, 489 U.S. at 833 (no "problems about sincerity").

Government officials, "whether high or petty, bear no license to declare what is or should be orthodox when it comes to religious beliefs or whether an adherent has correctly perceived the commands" of religious faith. *Masterpiece*, 138 S.Ct. at 1738 (Gorsuch, J., concurring) (internal punctuation and citations omitted). But that is precisely what the Washington Supreme Court has done to Barronelle.

When Barronelle objected that "at a minimum, the Constitution guarantees that government may not coerce" her participation in Robert and Curt's ceremony, *Lee v. Weisman*, 505 U.S. 577, 587 (1992), the court below redefined her activity as the "commercial sale of floral wedding arrangements," Pet.App.41a-42a. The "other aspects of her involvement" in a sacred wedding ceremony—"singing, standing for the bride, clapping to celebrate the marriage"—were not things "she was being paid to do." Pet.App.12a.

For Barronelle and many, many others, however, marriage has "spiritual significance," and a wedding ceremony is "an exercise of religious faith as well as an expression of personal dedication." *Turner v. Safley*, 482 U.S. 78, 96 (1987). Barronelle's work for weddings is "very satisfying" because she "has an opportunity to participate" in the creation of a relationship that "God designed." Pet.App.381a. The rewards for service to God's purpose are not just monetary; Barronelle uses her "artistic skill in floral design and creation to celebrate and commemorate" a couple's wedding: a "religious event[ ] where worship takes place." *Id.*

The court below rejected her argument that religious faith can imbue an activity with a sacred character and thereby justify relief from Washington law. The court invoked the slippery slope: if any consideration were given to Barronelle's religious beliefs, then "a patchwork of exceptions for ostensibly justified discrimination" would make it impossible to "eradicate[] barriers to the equal treatment of all citizens in the commercial marketplace." Pet.App.66a-67a.

The actions that have brought Barronelle once again to this Court were never ones of hatred, born of a desire to harm or exclude. She has now, however, been presented with the command of the Washington Supreme Court: she must compromise her faith or she must withdraw from this aspect of civil society and cease floral arranging for "weddings and commitment ceremonies." Pet.App.135a-136a.

B. This case presents an ideal vehicle to guide lower courts as they undertake the "difficult task" of resolving similar conflicts with tolerance and without undue disrespect, as *Masterpiece* requires.

Masterpiece left for another day the underlying conflict facing Jack Phillips: "proper reconciliation" of the "fundamental freedoms under the First Amendment" with "the authority of a State . . . to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." *Masterpiece*, 138 S.Ct. at 1723. That outcome would "await further elaboration," recognizing "that these disputes must be resolved with tolerance." *Id.* at 1732. This petition presents the optimal record for this Court to begin to analyze how lower courts should address religious faith when it conflicts with society's need for anti-discrimination laws.

First, as this Court has noted, "religions, and those who adhere to religious doctrines," have long

advocated "with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015). Barronelle's views on marriage are "sincerely-held" and "entirely consistent" with the beliefs of others of her faith. Pet.App.20a.

Second, Barronelle neither desires nor acts in a manner calculated to "subject[] gay persons to indignities when they seek goods and services in an open market." *Masterpiece*, 138 S.Ct. at 1732. Barronelle has served Robert and Curt outside of the marriage context, and she would be happy to serve them again. Pet.App.5a. She engaged personally, privately, and respectfully with Robert, and she identified alternatives within their marketplace. *Id.* Barronelle has always been willing to provide any customers with "non-wedding-related flower orders." Pet.App.8a. She is also willing to sell flowers and other materials that individuals would use at same-sex weddings. *Id.* Her objection is to her active participation, which includes floral arranging, in a religious ceremony that her faith does not condone. *Id.*

Barronelle's case, then, does not present the more difficult question of actions intended to exclude individuals from society more broadly. *Cf. Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987) (considering the practice of "shunning"). Indeed, the lower courts acknowledged that Barronelle has not engaged in any conduct that would endorse "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions toward gay men or women." Pet.App.20a.

Third, Washington's Law Against Discrimination is the most intrusive possible. The law applies to all places "maintained for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services." Pet.App.28a. Indeed, the text is so broad that it could reach *free* goods and services provided by a religious non-profit organization. Pet.App.34a-35a & 34a n.13 (Exemption for "religious organization" extends only to "entities whose principal purpose is the study, practice, or advancement of religion," such as "churches, mosques, synagogues, temples"). Moreover, Washington does not protect "proprietors of public accommodations to the same extent as it protects their patrons," so there is no possibility of a "fact-specific, case-by-case, constitutional balancing test" that could consider Barronelle's sincere religious beliefs. Pet.App.38a.

Fourth, under the Washington law, the motive for Barronelle's behavior is irrelevant. Pet.App.32a n.10 (no requirement to demonstrate animus). Discrimination exists whenever an act "directly or *indirectly*" results in a "distinction" based on sexual orientation. Pet.App.33a-34a. In Washington, "those who adhere to religious doctrines" may possess the "utmost, sincere conviction" of the sacredness of marriage, *Obergefell*, 135 S.Ct. at 2607, but they may not live that conviction if they want to do business in Washington State. *But see Masterpiece*, 138 S.Ct. at 1729 (such a view is some evidence of hostility to free exercise rights). In Washington, only the First Amendment's guarantee of free speech could protect Barronelle, and the court

below limited that protection to "conduct that is clearly expressive, in and of itself, without further explanation." Pet.App.46a. *But see JJR Inc. v. City of Seattle*, 891 P.2d 720, 722 (Wash. 1995) (nude dancing is protected expression under both Washington and U.S. Constitutions).

Last term, five members of this Court noted that First Amendment analysis requires "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." *Am. Legion*, 139 S.Ct. at 2089; *id.* at 2094 (Kagan, J., concurring). Where Barronelle has demonstrated "respect and tolerance," Washington provides none. This Court need not resolve all future disputes to conclude that, in this case, the First Amendment protects Barronelle's ability to live her faith.

II. The Washington Supreme Court has misinterpreted *Masterpiece* in a manner that makes the First Amendment's protection against religious hostility unenforceable.

A. As confirmed by *Masterpiece*, the Free Exercise Clause's protection against hostility toward religious faith protects the integration of faith into public life.

The First Amendment "ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so

fulfilling and so central to their lives and faiths." *Masterpiece*, 138 S.Ct. at 1719 (quoting *Obergefell*, 135 S.Ct. at 2607). This Court has concluded that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879. When "the object of a law is to infringe upon or restrict practices because of their religious motivation," however, "the law is not neutral." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

At times, government officials violate this prohibition against hostility toward religion openly in public comments. Colorado requires that all agency deliberations be public, so the *Masterpiece* Court could learn that one Commissioner viewed Jack Phillips's religious convictions as "despicable" and "something insubstantial and even insincere." *Masterpiece*, 138 S.Ct. at 1729. *See also Lukumi*, 508 U.S. at 540-42 (recounting statement by President of City Council, "What can we do to prevent the church from opening?").

Cases where claimants can identify overt hostility to religion are rare, however, and the effect of such evidence is mixed. Some lower courts permit government officials to overtly attack the views of religious officials. When San Francisco's city council enacted a resolution calling a religious leader's views on church doctrine "discriminatory and defamatory,"

Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco, 624 F.3d 1043, 1047 (9th Cir. 2010), some members of the court of appeals *en banc* found such statements acceptable because "duly-elected government officials have the right to speak out in their official capacities on matters of secular concern to their constituents, even if their statements offend the religious feelings of some of their other constituents." *Id.* at 1060 (Silverman, J., concurring in judgment). Other courts have been reluctant to identify specific statements as clear evidence of bias. *See*, *e.g.*, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 155 F. Supp. 2d 142, 164 (D.N.J. 2001) (upholding refusal to permit Orthodox Jews to construct an *eruv* despite statement by councilmember in opposition that *eruv* would create a "community within a community") *rev'd*, 309 F.3d 144 (3d Cir. 2002) (panel decision does not directly address councilmember comments).

Usually, lower courts identify hostility when a government "advance[s] its interests solely by targeting religiously motivated conduct" or "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 241-42 (3d Cir. 2008) (citing *Lukumi*, 508 U.S. at 534, 543).

The need for certiorari in this case arises because the lower court's approach to detect "subtle departures from neutrality" or the "covert suppression of particular religious beliefs" will now fail to detect anything. *Lukumi*, 508 U.S. at 534. As this Court has noted elsewhere, statutes can be so sweeping as to

"encourage arbitrary and discriminatory enforcement." *McDonnell v. United States*, 136 S.Ct. 2355, 2373 (2016). This is the challenge Barronelle faces and the sensitive analysis that *Masterpiece* requires. The State of Washington, however, provides no forum for her concerns. Only resolution of the question left open by *Masterpiece* can provide relief.

B. The analytic approach of the Washington Supreme Court twists *Masterpiece* in a manner that undermines the ability to identify hostility to religious faith.

The Washington Supreme Court evaded the respectful evaluation that *Masterpiece* demands. For that court, *Masterpiece* means only "that the *adjudicatory* body tasked with deciding a particular case must remain neutral." Pet.App.2a (emphasis added). Therefore, the Washington Supreme Court needed to examine only its own conduct and that of the Benton County Superior Court. Pet.App.3a.

The court looked at "the record, including transcripts of hearings and written orders" and "carefully review[ed]" its prior opinion. Pet.App.20a. The result of this limited review should surprise no one: the Washington Supreme Court found it had "adjudicated 'with the religious neutrality that the Constitution requires.'" Pet.App.19a. "Throughout the course of this litigation, appellants have never alleged

that the adjudicatory bodies tasked with deciding this case failed to remain neutral." *Id.*

The lower court "decline[d] to expansively read *Masterpiece Cakeshop* to encompass the 'very different context' of executive branch discretion." Pet.App.24a. Any examination of the conduct and statements by the Attorney General of the State of Washington would be a "broad expansion" of *Masterpiece*'s condemnation of hostility to religion. Pet.App.23a. The court's refusal transformed a claim of executive branch hostility into one of "selective enforcement" under the due process clause. *Id.* Of course, there is an obvious distinction: the guarantees of due process apply to all government action whereas "the First Amendment itself . . . gives special solicitude" to religious liberty. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012).

The Washington Supreme Court's interpretation of *Masterpiece* is wrong. As an initial matter, the term "adjudicatory" slides past the reality that the Colorado Civil Rights Commission in *Masterpiece* was an executive branch agency. *See* Colo. Rev. Stat. Ann. § 24-34-303(a)(1) (Civil Rights Commission is within the Civil Rights Division); Colo. Rev. Stat. § 24-34-302 (Civil Rights Division is within the Colorado Department of Regulatory Agencies); Colo. Rev. Stat. § 24-34-101(1)(a) (Colorado Department of Regulatory Agencies is, unsurprisingly, within the executive branch). While the challenge against Jack Phillips began with a citizen complaint, *Masterpiece* J.A.31-52, the Colorado Civil Rights Division, represented by

the Colorado Attorney General, litigated in favor of that complaint and against Jack Phillips, *Masterpiece* J.A.132, just as the Washington Attorney General did here.

Second, the *Masterpiece* Court did not limit its analysis to adjudications. While hostility "surfaced" at the Commission's formal hearings, the Court's review included the behavior of the Colorado Civil Rights *Division*: the investigative body that "found probable cause that Phillips violated [Colorado law] and referred the case to the Civil Rights Commission." *Id.* at 1726. The Division's investigations of other bakers who refused to create cakes opposed to same-sex marriage had been referred to the Commission only to affirm the Division Director's decision that there was no probable cause to proceed. This entire history, not just the Commission's final affirmance, demonstrated the "difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission." *Id.* at 1730.

As noted above, the Colorado Civil Rights Division had "enforcement power" that included "its discretionary power" to determine which cases should proceed to further evaluation by the Commission. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (authority to initiate cases and bring to federal court is executive authority). "The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers," *Masterpiece*, 138 S.Ct. at 1732, was therefore not solely the result of "a lack of neutrality on behalf of the adjudicatory bodies that heard" that case, Pet.App.23a.

The lower court's focus only on adjudication misapplies *Masterpiece*.

More broadly, the First Amendment does not protect only against religious hostility by a legislative body or a state judge. "The Free Exercise Clause commits *government itself* to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, *all officials* must pause to remember their own high duty to the Constitution and to the rights it secures." *Lukumi*, 508 U.S. at 547 (emphasis added). "*Official action* that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. *See also Murphy v. Collier*, 139 S.Ct. 1475, 1476 (mem.) (2019) (statement of Kavanaugh, J., concurring in the grant of stay) ("As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Constitution."); *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1140 (10th Cir. 2006) ("[T]he First Amendment applies to exercises of executive authority no less than it does to the passage of legislation.").

In its effect, the lower court's limited review for hostility—only the record of the adjudications—means that even Jack Phillips would have been hard pressed to prevail.

First, the statements that raised concern in *Masterpiece* are hidden in Washington State. Colorado law requires the Colorado Civil Rights Commission to deliberate in public. *Bagby v. Sch. Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974) (holding that Open Meetings Act requires substantive deliberations be public). Washington does not. Its open meetings act does not apply to "quasi-judicial" agency decisions or to contested cases conducted pursuant to Washington's Administrative Procedure Act. Wash. Rev. Code § 42.30.140(2), (3). If Jack Phillips lived in Washington, review 'on the record' would omit the deliberative statements that raised concern.

Moreover, people of religious faith have limited ability to identify bias of adjudicators outside of a direct appeal. Adjudicators are immune to the civil rights statutes that permit discovery into the motives of government officials generally. "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away." *Bradley v. Fisher*, 80 U.S. 335, 348 (1871); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (extending absolute immunity to state judges). Absolute immunity applies to adjudicators in the executive branch as well. *Butz v. Economou*, 438 U.S. 478, 511 (1978) ("Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities.").

The Washington Supreme Court's insistence that *Masterpiece* applies only to expressions of hostility by the adjudicators therefore creates an empty promise. The "purity of [the] motives" of the Justices of the Washington Supreme Court cannot "be the subject of judicial inquiry." *Bradley*, 80 U.S. at 347. Only in those states that have chosen to require open deliberation, as a matter of policy, will victims of religious hostility ever be able to find evidence of discriminatory intent.

The false promise of court review is amplified by ambiguity about the evidence that should—and should not—be considered.

Judicial opinions rarely express open hostility. The Colorado Court of Appeals opinion "sent a signal of official disapproval of Phillips' religious beliefs" when it distinguished his conduct from that of other bakers, but this Court did not identify why that particular unpersuasive distinction rose to the level of hostility. *Id*. at 1730-31.

As a result, those with religious beliefs are forced to infer hostility. For example, the trial court below characterized Barronelle's participation at a wedding as "speech, including singing, standing for the bride, clapping to celebrate the marriage, and in one instance counseling the bride." Pet.App.12a. That summary is notably incomplete. When Barronelle attends wedding ceremonies, she has "frequently stood for the bride, clapped in appreciation of the married couple, and *prayed along with the officiant as the officiant leads the wedding attendees*." Pet.App.383a-384a (emphasis

added). What is not clear, however, is whether the misleading summary of her participation reflects the trial court's hostility or a desire to gloss over a difficult fact when writing a judicial opinion.

It is similarly unclear what one should discern from the Washington Supreme Court's quotation from *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403 n.5 (1968). Pet.App.15a. Barronelle provided "numerous floral arrangements" to Robert and Curt and has served other "gay and lesbian customers in the past for other, non-wedding-related flower orders." Pet.App.5a, 8a. She claims only that her religious faith prevents her involvement in a wedding that is not between a bride and a groom. Pet.App.6a. Despite this, the Washington Supreme Court likened her legal theory to the "patently frivolous" assertions of the 1964 South Carolina restaurant owner who claimed serving food to African-Americans "contravenes the will of God." Pet.App.15a. In doing so, the court below suggests that accommodation of religious faith could justify harming others, although there is no evidence in the record that Barronelle desires to harm or exclude. *Cf. Masterpiece*, 138 S.Ct. at 1729 (Commissioner's statement that "religion has been used to justify all kinds of discrimination throughout history" is evidence of hostility.).

In *Masterpiece*, the formal decision of the Colorado Civil Rights Commission did not express the hostile comments identified by this Court. The *Masterpiece* Court was primarily troubled by the *silence* in the subsequent state-court rulings and in the briefs filed

by the Colorado Attorney General. 138 S.Ct. at 1729-30. Which silence, in this case, becomes evidence of hostility? Does the lower court's refusal to augment the record to review the biased comments of the Washington Attorney General create an inference of hostility? Pet.App.21a-26a. What of the court's decision not to schedule oral argument on remand? Pet.App.12a n.3. Must an adjudicator expressly "disavow" views hostile to religious belief to demonstrate an adjudication is free of bias? *Masterpiece*, 138 S.Ct. 1719, 1729-30 (suggesting answer is yes).

The challenge with such textual analysis becomes evident quickly: it devolves into an *ad hominem* attack on the judiciary. No party is served by such an approach.

Fundamentally, the Washington Supreme Court's narrow interpretation prevents analysis and encourages disrespect for the judiciary. For example, the lower court notes that "[t]hroughout the course of this litigation, appellants have never alleged that the adjudicatory bodies tasked with deciding this case failed to remain neutral." Pet.App.19a. Attorneys have a strong incentive to avoid precisely this allegation. The Washington Rules of Professional Conduct, like the ABA Model Rules, provide that "[a] lawyer shall not make a statement . . . with reckless disregard as to its truth or falsity concerning the qualifications, integrity, or record of a judge, adjudicatory officer or public legal officer. . . ." Wash.R.Prof.Conduct 8.2(a). Such allegations are for extreme cases only as they "tend to discredit the public's trust and confidence in the judiciary and judicial system." *Att'y Grievance*

Comm'n of Md. v. Frost, 85 A.3d 264, 274 (Md. 2014). Nonetheless, the court below faults Barronelle's attorneys for failing to assert judicial bias in an ongoing case—an assertion that can compromise one's license to practice law—without any ability to seek discovery into judicial decisionmaking to verify that allegation. Pet.App.19a-21a.

CONCLUSION

Throughout the world, people of deep faith sacrifice their health and their very lives to care for individuals who do not share their beliefs. As but one example, faith brought Dr. Kent Brantly to Liberia on a two-year medical mission for Samaritan's Purse in 2013. Faith sustained Dr. Brantly when he contracted Ebola in 2014 while caring for others during an outbreak that claimed more than 11,300 lives. Kent Brantly, *This Is What It Feels Like to Survive Ebola*, in Time (Sept. 5, 2014) available at https://bit.ly/2oSEALo. And faith is why Samaritan's Purse is right now—in 2019—operating an Ebola Treatment Center in the Democratic Republic of Congo as that country suffers from the second worst Ebola outbreak in history.

Barronelle Stutzman's Christian faith is Kent Brantly's Christian faith.

The decision of the court below not only threatens Barronelle Stutzman's livelihood; it constricts the ability of religious believers to live their faith freely in all aspects of their lives. This Court has acknowledged

"the difficult task presented by these disputes" between religious faith and civil law will need "further elaboration in the courts." *Masterpiece*, 138 S.Ct. at 1732. Where *Masterpiece* saw the possibility of tolerance and a sensitive resolution of these disagreements, the Washington Supreme Court's approach cuts off thoughtful, step-by-step resolution.

This Court should reject the notion that accommodation of one's Christian Faith in civil society will inevitably justify discrimination against those who do not share that faith. The process of making distinctions, and avoiding a tumble down the slippery slope, is the essence of common law adjudication. The lower courts can be trusted with this difficult work, but they must be allowed to proceed on free exercise claims, and individuals must be allowed to gather the evidence needed to prevail.

Amici respectfully request that this Court grant a writ of certiorari to review the decision of the Supreme Court of the State of Washington and reverse.

Respectfully submitted,

JOHN G. KNEPPER
LAW OFFICE OF
JOHN G. KNEPPER, LLC
2122 Warren Avenue,
Suite 310
Cheyenne, Wyoming 82001
(307) 632-2842
John@KnepperLLC.com