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

SUPREME COURT OF THE STATE OF WASHINGTON

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

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

BRIEF OF CHURCH-STATE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-RESPONDENTS

Ryan D. Dreveskracht
Bree R. Black Horse
Galanda Broadman PLLC
8606 35th Ave NE
Suite L1
Seattle, WA 98115
(206) 909-3842
ryan@galandabroadman.com

Joshua Matz
David Shieh
Kaplan Hecker & Fink LLP
350 Fifth Avenue
Suite 7110
New York, NY 10118
(212) 763-0883
jmatz@kaplanhecker.com

Counsel for Amici Curiae

March 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF THE *AMICI CURIAE*

Amici are Church-State scholars. They submit this brief to explain that *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, __ U.S. __, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018), does not require reversal. A full list of *Amici* is attached as an appendix to this brief.

STATEMENT OF THE CASE

Amici adopt Plaintiffs-Respondents' Statements of the Case.

SUMMARY OF ARGUMENT

Like many free exercise claimants before her, Barronelle Stutzman presents a sympathetic case. Her sincere religious beliefs conflict with legal obligations imposed on all who undertake to engage in commerce with the public. As a result, she must decide whether to follow her conscience or obey the law. We do not minimize the gravity of this dilemma for Stutzman, or for other people of faith who confront similar situations.

In *Masterpiece*, the U.S. Supreme Court held that religious objectors are entitled to "neutral and respectful consideration" of their objections. *Id.* at 1729. The question here is whether that holding, or anything else in *Masterpiece*, requires reversal of the judgment below. The answer is *no*.

First, *Masterpiece* reaffirmed that states are free to enact neutral and generally applicable laws securing equality in public accommodations—and to shield gay men and lesbians under such statutes. Its reasoning

strongly supports this Court's original holding regarding the constitutionality of the Washington Law Against Discrimination (WLAD).

Second, *Masterpiece* is properly read as prohibiting the government from targeting persons *because of* their religious beliefs or practices. In the broader context of free exercise precedent, intentional discrimination is the core evil to which the Free Exercise Clause is directed.

Third, assessments of religious targeting must be undertaken with sensitivity to institutional context. Unlike prior cases involving adjudicative or legislative entities, this case involves a challenge to the Washington State Attorney General—an office within the executive branch. In assessing Defendants' claim, this Court can and should look to precedents governing allegations of discrimination by the executive branch. That is especially true of Defendants' primary argument: namely, that the Attorney General has targeted and burdened religion through a pattern of selective enforcement. As a matter of institutional competence and the separation of powers, the executive branch is entitled to a powerful presumption of regularity in its enforcement discretion. Only the most extraordinary evidence of disparate intent *and* disparate impact can overcome that presumption.

Fourth, on the law and on the facts, there is no merit whatsoever to Defendants' claims regarding selective enforcement. A close examination of the two cases identified by Defendants reveals profoundly important

differences. It was not only justifiable, but eminently reasonable, for the Attorney General to bring one case and not the other. Defendants' arguments to the contrary rest on mistaken and quite offensive premises about the nexus between religious identity and belief. Regardless, even if the Attorney General *should* have brought a case for anti-Christian bias and failed to do so, under settled precedent that single instance of non-enforcement comes nowhere close to demonstrating anti-religious animus.

Fifth, contrary to some of Defendants' most far-reaching claims, *Masterpiece* did not render it unconstitutional for the Attorney General to invoke the history, rhetoric, and precedents of civil rights law in addressing denials of service—even denials based on religious belief.

Finally, *Masterpiece* has no effect on the WLAD claims brought by the Individual Plaintiffs, Ingersoll and Freed.

ARGUMENT

MASTERPIECE DOES NOT REQUIRE REVERSAL

A. *The State of Washington Did Not Violate the Free Exercise Clause as Interpreted by* Masterpiece

1. *Masterpiece* reaffirms the constitutionality of neutral and generally applicable laws such as the WLAD.

The WLAD is central to a fair framework for civil rights protection in our diverse and pluralistic society. Along with other anti-discrimination statutes, it safeguards a social order in which people of many faiths,

backgrounds, and worldviews can co-exist in peace. The WLAD achieves this worthy goal by identifying certain personal characteristics as impermissible grounds on which to deny any person the right to participate in commerce on equal footing.

In some circumstances, the WLAD may require business owners to choose between their sincere religious beliefs and their legal obligations. That dilemma, however difficult it may be, is not the sole measure of a Free Exercise Clause violation. If it were, this would soon become a nation in which "each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S 872, 890, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

America has always offered a home to many religions, each with unique teachings. In untold circumstances, commands of conscience may clash with laws that protect civil rights, health and safety, free markets, equal opportunity, or other social goods. To maintain balance and order, the U.S. Supreme Court has emphasized that "the right of free exercise does not relieve an [objecting] individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879 (citation omitted).[1]

[1] Some *amici* would strike that balance in a different place, but they recognize the binding nature of *Smith*, *Lukumi*, and *Boerne*, and for the

Masterpiece reaffirmed the principle that religious objections do not normally justify exemptions from non-discrimination laws. While properly recognizing that "religious and philosophical objections to gay marriage are protected views," 138 S. Ct. at 1727, the U.S. Supreme Court made clear in *Masterpiece* that "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.*

Masterpiece further held that this analysis controls in the realm of religious objections to gay rights. *See id.* ("The exercise of their freedom on terms equal to others must be given great weight and respect by the courts."). Rather than carve out a distinct rule, *Masterpiece* affirmed that states "can protect gay persons, just as [they] 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. Otherwise, "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." *Id.* at 1727. *Masterpiece* thus bolsters this Court's holding that Defendants are not entitled to an exemption from the WLAD.

---

reasons herein they agree that *Masterpiece* does not change the law in a manner requiring a religious exemption in this case.

2. *Masterpiece* held that government cannot target religious objectors *because of* their religious beliefs or practices.

Masterpiece reversed a determination by the Colorado Civil Rights Commission on the ground that the Commission failed to afford a religious objector "neutral and respectful consideration" of his free exercise claims. *Id.* at 1729. This holding followed directly from precedents recognizing that government actors violate the Free Exercise Clause when they intentionally target or disadvantage people because of their religious beliefs or practices.

In *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), the U.S. Supreme Court clarified that *Smith*'s core requirements of neutrality and general applicability share the unifying objective of preventing *intentional* discrimination against religious beliefs and practices. Thus, a law does not qualify as neutral if it "targets religious conduct," *id.* at 534, or if its "object . . . is to infringe upon or restrict practices because of their religious motivation," *id.* at 533. A failure of general applicability, in turn, occurs "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43.

This focus on intentional discrimination was reaffirmed in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

There, the U.S. Supreme Court invalidated the federal Religious Freedom Restoration Act (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, as applied to the states. *Boerne* held that RFRA exceeded federal power under § 5 of the Fourteenth Amendment. *See* 521 U.S. at 511. In particular, RFRA was deemed unlawful because it "alter[ed] the meaning of the Free Exercise Clause," and thus could not "be said to be enforcing the Clause." *Id.* at 519. And how did RFRA depart from the Free Exercise Clause? Writing for the majority, Justice Kennedy explained: "Laws valid under *Smith* would fall under RFRA without regard to whether they had *the object* of stifling or punishing free exercise." *Id.* at 534 (emphasis added). *Boerne* thus reinforced the understanding that the Free Exercise Clause is offended only when official action reflects "animus or hostility to the burdened religious practices," or has the imposition of such a burden as its object. *Id.* at 531.

Read together, *Smith*, *Lukumi*, and *Boerne* establish the general principle that government may not target people because of their religious beliefs or motivations. *Masterpiece* applied that principle in the context of an adjudicative hearing that the U.S. Supreme Court described as tainted by "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the religious] objection." 138 S. Ct. at 1729. To support this conclusion, *Masterpiece* emphasized statements by two Commissioners disparaging a baker's religious objections to serving a

same-sex couple. That conduct "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731. The Commission thus failed to provide "neutral and respectful consideration of his claims." *Id.* at 1729.

Masterpiece thus stands for the proposition that officials must treat religious objectors with respect. Consistent with *Smith*, *Lukumi*, and *Boerne*, officials cannot intentionally target religious objectors or act with "hostility toward [their] sincere religious beliefs." *Id.*

3. Defendants must provide "clear evidence" of intentional discrimination to establish a free exercise claim against the Attorney General based on selective enforcement.

Defendants portray their free exercise claim as a straightforward application of *Masterpiece*, but that overlooks the context in which their claim arises. *Lukumi* involved a legislative body; *Masterpiece* involved an adjudicatory body. *See Masterpiece*, 138 S. Ct. at 1730 (emphasizing that free exercise analysis must account for the significant differences between legislative and adjudicative contexts). Here, Defendants contend that they were targeted by an executive actor: the Attorney General of Washington.

This is a distinction with a difference. Nowhere is that clearer than in Defendants' contention that *Masterpiece* requires reversal on the ground that the Attorney General has selectively enforced the WLAD. Earlier in this litigation, Defendants advanced a similar theory as an affirmative

defense under the Equal Protection Clause. In a well-reasoned decision, Judge Ekstrom found that Defendants' position could not stand. *See State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213, at *27-28 (Wash. Super. Ct. Feb. 18, 2015). In light of that ruling, Defendants abandoned their selective prosecution argument on appeal—until now. Citing *Masterpiece*, and invoking a recent dispute over developments at Bedlam Coffee in Seattle, they have attempted to repackage their failed Equal Protection Clause defense as a winning Free Exercise Clause claim.

This effort ignores *Masterpiece*'s clear sensitivity to the institutional context in which the government allegedly engaged in religious targeting. *See Masterpiece*, 138 S. Ct. at 1730. It also misses the U.S. Supreme Court's frequent reliance on equal protection precedent to address discrimination claims under the Free Exercise Clause. *See, e.g.*, *id.* at 1730 (drawing on equal protection principles to assess whether the Commission discriminated because of religion); *Lukumi*, 508 U.S. at 540 (Opinion of Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

Under black letter equal protection law governing claims against the executive branch, Defendants cannot prove religious hostility based on a pattern of selective enforcement decisions without meeting a "particularly demanding" standard. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525

U.S. 471, 489, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999). Specifically, Defendants must offer "'clear evidence' [of discrimination] displacing the presumption that a prosecutor has acted lawfully." *Id.* (citation omitted).

This requirement stems from the U.S. Supreme Court's recognition that executive bodies, unlike their adjudicative or legislative counterparts, are vested with broad prosecutorial discretion and charged with the sensitive task of determining which claims to pursue. *See United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). In light of these separation-of-powers concerns, courts afford a "presumption of regularity . . . to prosecutorial decisionmaking," *Hartman v. Moore*, 547 U.S. 250, 263, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006), and are wary of second-guessing the manner in which prosecutors have "discharged their official duties," *Armstrong*, 517 U.S. at 464 (citation omitted).

That presumption applies with full force against claims that officials acted with improper motives in deciding when and where to bring charges. To overcome the presumption of regularity—and consistent with settled equal protection principles—claimants must produce clear evidence of "both discriminatory *effect* and discriminatory *intent*." *United States* v. *Bass*, 536 U.S. 862, 863, 122 S. Ct. 2389, 153 L. Ed. 2d 769 (2002) (emphasis added). By virtue of this "particularly demanding" standard, a sound "selective prosecution claim is a *rara avis*." *Reno*, 525 U.S. at 489.

Defendants ignore this line of precedent in their latest brief. Instead, they act as though *Masterpiece* suspended all of the usual rules applicable to claims that the Attorney General exercised his charging discretion in a discriminatory manner. In these respects, as in others that we identify below, Defendants fail to recognize that a finding of religious targeting under *Masterpiece* must respect the principles of constitutional law that ordinarily govern judicial review of executive branch decision-making.

4. The enforcement pattern here offers no evidence at all—let alone "clear evidence"—of religious targeting.

Under *Masterpiece*, Defendants cannot prevail without proof that they were targeted because of their religious beliefs. Defendants attempt to meet that burden by arguing that the Attorney General brought claims against them, but did *not* pursue claims against one other individual in Washington—namely, Ben Borgman, the owner of Bedlam Coffee. In their view, Borgman violated the WLAD when he refused to allow inside his coffeeshop flyers that contained an image of rainbow-colored hands dripping blood onto an aborted fetus. Defendants add that the Attorney General's decision against charging Borgman reflects an improper double standard: florists who oppose same-sex marriage on religious grounds must provide flowers to gay couples for their weddings, but coffeeshop owners who oppose Christian messages may exclude them without penalty.

There are two principal problems with this argument. First, the comparison is entirely inapt. Borgman did not exclude the flyers because of their religious character—and thus did not violate the WLAD. Second, even if there were a plausible basis for the Attorney General to pursue WLAD claims against Borgman, a single non-enforcement decision by the Attorney General comes nowhere close to the clear evidence required by *Armstrong* to prove religious targeting under a selective enforcement theory.

a. The Attorney General's Decision Against Prosecuting Borgman Does Not Demonstrate Religious Targeting

In September and October 2017, a group of anti-abortion protesters distributed flyers around Seattle. In these flyers, rainbow-colored hands drip blood onto an aborted fetus. Many people would reasonably find the flyers shocking, brutal, offensive, and deeply disturbing.

On October 1, 2017, persons distributing these flyers entered Borgman's coffeeshop, Bedlam Coffee. Borgman asked them to leave; the situation rapidly deteriorated. Ultimately, Borgman expelled them from the store. In the course of doing so, he made a crude comment when one of the protestors invoked Jesus Christ. As the Attorney General recounts, Borgman subsequently gave a series of interviews in which he emphasized that he expelled the protesters because he opposes stirring up hate, inciting discontent, and distributing graphic content to children. *See* Wash. Resp.

Br. at 21-24. Borgman also noted that some of the protesters had since returned to his store and received service without incident. *See id.* Borgman expressly disclaimed anti-religious motives for his conduct: "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." *Id.* at 23.

According to Defendants, Borgman's case proves that the Attorney General does nothing about those who refuse to serve Christians, while actively pursuing charges against Christians who refuse to serve gay people. When tested against the facts, however, this analogy collapses.

To start, Borgman did not discriminate on the basis of religion. There is substantial evidence in the public record that Borgman would have refused entry to any customer, of any background (religious or not), who distributed flyers with such graphic and offensive content. There is no evidence that Borgman expelled the protesters because of the religious character of their anti-gay, pro-life message. Rather, the public record indicates that Borgman cared about what the flyers portrayed, their extremely graphic character, and the reactions they might incite. Store owners undoubtedly have the right to exclude persons and literature from their premises on the basis of such religion-neutral considerations. At the

very least, the Attorney General could reasonably conclude that these facts—as known to the public—did not state a violation of the WLAD.

In contrast, Stutzman's violation of the WLAD was clear as day. She declined to provide, to a same-sex couple, wedding flowers that she would readily have provided to an opposite-sex couple. Her refusal of service was thus based on Ingersoll and Freed's sexual orientation. The Attorney General reasonably decided to prosecute this unlawful act.

On these facts, there is no hint of discriminatory enforcement. The purposes of a public accommodations law like the WLAD include equal access to services in the market regardless of one's race, gender, religion, or sexual orientation. Denying services on those bases strikes at the heart of equal access. By contrast, denying service for reasons that would apply equally to customers of any religion—or none at all—does not undermine the State's interests. Religious objectors to abortion and same-sex marriage must be welcome in places of public accommodations to the same extent as all other customers; but they are not specially entitled to ignore neutral, non-religious criteria governing acceptable behavior in commercial settings.

In an effort to evade this reasoning, Defendants imply that Borgman necessarily engaged in anti-Christian discrimination when he refused to allow the protesters (and their flyers) in his store. This argument assumes that flyers expressing anti-gay, anti-abortion views are inextricably linked

to Christian beliefs, just as same-sex marriage is inextricably linked to being gay. But that is simply incorrect. Virtually the only reason a person would want to have a same-sex wedding (or engage in same-sex intimacy) is because of his or her sexual orientation. That is why the U.S. Supreme Court has rejected status/conduct distinctions in gay rights cases. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010). And it is why refusing to serve only same-sex couples—while offering identical services to opposite-sex couples—is understood to constitute a form of sexual orientation discrimination.

In contrast, people who object to same-sex marriage or abortion may do so for many reasons. It would be improper to lump them all together, acting as though their opinions are intrinsically linked to any specific religious or secular belief. The state, through its judges or otherwise, may not make conclusive presumptions about the moral beliefs associated with particular faiths. Yet Defendants' brief asks this Court to do just that. In their telling, Borgman's hostility to graphic pro-life/anti-gay protestors was necessarily anti-Christian—and must be treated as such under the WLAD—because espousing such messages is inherently Christian. This presumption apparently extends even to protesters who distribute shocking flyers.

At bottom, Defendants ignore the diversity of religious belief. On the one hand, many Christians support same-sex marriage and/or abortion

rights. On the other hand, many persons (including Christians) who agree with the views held by Bedlam protestors might disagree with their chosen methods. Treating as anti-Christian any opposition to the means or ends of the Bedlam protestors is an effort to paint political disagreement as an attack upon Christians. This Court should emphatically reject such an effort.

Borgman's decision to expel the protestors at Bedlam Coffee cannot be treated as unlawful in the absence of a reason to believe that he targeted the protesters *because of* their religion, instead of the many other neutral reasons applicable to this situation. It is also why the Attorney General's decision not to charge Borgman is properly seen as a reasonable interpretation of the WLAD, rather than as an act proving religious animus.

b. A Single Instance of Alleged Non-Enforcement Does Not Substantiate A Claim of Religious Targeting

Even if Defendants were correct about the Borgman case, it does not follow that the Attorney General has violated the Free Exercise Clause. A single instance of non-enforcement by the Attorney General, with virtually no other evidence of religious animus or targeting, is patently insufficient to demonstrate discriminatory enforcement under *Reno* and *Armstrong*.

To start, Defendants have offered an incredibly thin record. Having canvassed the state, Defendants manage to identify only *one* case that they allege the Attorney General should have pursued (but did not) under the

WLAD. And the proper characterization of that case is deeply contested.

Although a demonstrated pattern of selective prosecution could support a free exercise claim, this is not that case. It hardly requires an expansive reading of *Armstrong* and *Reno* to recognize that a claim based on one alleged comparator—without credible proof of discriminatory motive, or any evidence of a broader disparate impact—is deficient as a matter of law. *See Armstrong*, 517 U.S. at 464. Defendants come nowhere close to offering the "clear evidence" required to displace the presumption of prosecutorial regularity and make out a selective prosecution claim.

Accepting Defendants' position would create a wholly anomalous doctrine of free exercise selective enforcement—one that collapses disparate impact and disparate intent; incorporates a presumption against prosecutors; draws large inferences of official bad faith from miniscule evidence; and disregards the institutional expertise and checks-and-balances concerns found in the law of prosecutorial discretion.[2]

Masterpiece offers no warrant for such free exercise exceptionalism, in which the normal rules of constitutional law are suspended or inverted. To the contrary, as noted above, *Masterpiece* emphasizes its own continuity

[2] Even if Defendants were able to show discriminatory enforcement against them, it is unclear whether the appropriate remedy would be dismissal of the state's claims. *See Armstrong*, 517 U.S. at 461 n.2.

with precedent, as well as the importance of institutional context and the relevance of equal protection precedents. *See* 138 S. Ct. at 1727-32. Adherence to *Masterpiece* thus requires rejection of Defendants' position.

5. The Attorney General's invocation of civil rights law and precedent does not demonstrate religious hostility.

Defendants attempt to support their targeting claim by contending that the Attorney General has used rhetoric disrespectful of Stutzman's religious beliefs. This argument is without foundation.

In *Masterpiece*, the U.S. Supreme Court rebuked the Colorado Civil Rights Commission for implying that "religious beliefs cannot legitimately be carried into the public sphere or commercial domain," and for suggesting that "religious beliefs and persons are less than fully welcome in Colorado's business community." 138 S. Ct. at 1729. In particular, *Masterpiece* took issue with a Commissioner's comparison of religious beliefs about same-sex marriage to "defenses of slavery and the Holocaust." *Id.* This comparison "disparage[d] [the objecting baker's] religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere." *Id.*

There is no evidence here that the Attorney General has committed that sin. It is one thing to say the State may not disparage religion; it is quite another to say the State is forbidden to describe religious objectors as being

engaged in "discrimination" when they refuse service to customers on the basis of protected characteristics. *Masterpiece* recognized that line. Even as it reprimanded the Commission, it repeatedly drew on the familiar rhetoric and precedent of anti-discrimination law to explain why religious objectors must still comply with neutral laws of general applicability. *See id.* at 1727 (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, n.5, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968)). To argue that the State is barred from using any anti-discrimination language in cases involving religious objectors is to egregiously misread *Masterpiece*.

Yet that is the Defendants' position. They insist that the Attorney General acted with animus when he stated that "[w]e can't go back to the 1960s and lunch counters." Br. 24. They add that he violated *Masterpiece* by noting in a U.S. Supreme Court brief that some who share Stutzman's faith "for decades offered a purportedly 'reasoned religious distinction' for race discrimination." Br. 24. But if *Masterpiece* can cite *Piggie Park* while noting limits on the scope of religious exemptions from civil rights laws, there is no reason why state officials cannot recognize the painful history that led to laws against denying service based on race or other characteristics. It is not unconstitutional for state officials to call discrimination by its name. They should not gratuitously demean those who discriminate based on religious objections, but they are free to explain and

vindicate the historical purposes of civil rights laws—including the WLAD.

B. Masterpiece *Does Not Apply to the Individual Plaintiffs' Case*

The Free Exercise Clause and the Fourteenth Amendment limit state action. They do not apply to private parties unless those parties are acting under color of state law. *See, e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982).

Masterpiece is not to the contrary: there, the Court held that the Commission "violated the *State*'s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." 138 S. Ct. at 1731 (emphasis added). The Individual Plaintiffs here are not state actors, nor are they acting under color of state law. Invoking a state law and coordinating litigation strategy with a state official do not transform a private party into an arm of the state. Thus, *Masterpiece* does not bear on the Individual Plaintiffs' reasons for pursuing private WLAD claims. Defendants' contrary view would work a revolution in the law of state action and turn countless private plaintiffs into unsuspecting state actors. There is no warrant in *Masterpiece* for such a radical holding.

CONCLUSION

For the foregoing reasons, *Amici* submit that *Masterpiece* does not require reversal of the Superior Court.

Respectfully submitted this 5th day of March, 2019.

/s Ryan D. Dreveskracht
Ryan D. Dreveskracht
Bree R. Black Horse
Galanda Broadman PLLC
8606 35th Ave NE
Suite L1
Seattle, WA 98115
(206) 909-3842
ryan@galandabroadman.com

Joshua Matz
David Shieh
Kaplan Hecker & Fink LLP
350 Fifth Avenue
Suite 7110
New York, NY 10118
(212) 763-0883
jmatz@kaplanhecker.com

Counsel for Amici Curiae

APPENDIX

Amici Curiae are constitutional law scholars. Their titles and institutional affiliations are listed for identification purposes only.

Caroline Mala Corbin
Professor of Law
University of Miami Law School

Frederick Mark Gedicks
Guy Anderson Chair & Professor of Law
Brigham Young University Law School

Steven K. Green
Fred H. Paulus Professor of Law and Director
Center for Religion, Law and Democracy
Willamette University

Ira C. Lupu
F. Elwood and Eleanor Davis Professor Emeritus of Law
George Washington University School of Law

Peter Nicolas
William L. Dwyer Chair in Law
Professor of Law
University of Washington School of Law

Lawrence Sager
Alice Jane Drysdale Sheffield Regents Chair
University of Texas at Austin School of Law

Richard C. Schragger
Perre Bowen Professor of Law
University of Virginia School of Law

Micah J. Schwartzman
Joseph W. Dorn Research Professor of Law
University of Virginia School of Law

Elizabeth Sepper
Professor of Law
Washington University in Saint Louis School of Law

Andrew Siegel
Associate Professor of Law
Seattle University School of Law

Nelson Tebbe
Professor of Law
Cornell Law School

Laurence H. Tribe
Carl M. Loeb University Professor
Professor of Constitutional Law
Harvard Law School

Robert W. Tuttle
David R. and Sherry Kirschner Berz Research Professor of Law and Religion
George Washington University School of Law

GALANDA BROADMAN

March 05, 2019 - 10:17 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	91615-2
Appellate Court Case Title:	Robert Ingersoll, et al. v. Arlene's Flowers, Inc., et al.
Superior Court Case Number:	13-2-00953-3

The following documents have been uploaded:

- 916152_Briefs_20190305101032SC565695_5001.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Brief.pdf
- 916152_Motion_20190305101032SC565695_6050.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Motion for Leave to File as Amicus Curiae.pdf

A copy of the uploaded files will be sent to:

- EGill@aclunc.org
- JAbernathy@FreedomFoundation.com
- Jamila.johnson@splcenter.org
- VLBabani@perkinscoie.com
- akeim@becketfund.org
- alanc@atg.wa.gov
- amici.cooper@outlook.com
- amit.ranade@hcmp.com
- anton.sorkin@emory.edu
- arossiter@adflegal.org
- attorneyappel@gmail.com
- bchandler@terrellmarshall.com
- beth@terrellmarshall.com
- bgould@kellerrohrback.com
- bmarvin@connelly-law.com
- bree@galandabroadman.com
- caso@chapman.edu
- chelsdon@thehelsdonlawfirm.com
- chris.mammen@wbd-us.com
- csipos@perkinscoie.com
- cstoll@nclrights.org
- danhuntington@richter-wimberley.com
- daniel@fahzlaw.com
- daviddewhirst@gmail.com
- dlaycock@virginia.edu
- dperez@perkinscoie.com
- dshih@susmangodfrey.com
- dverm@becketfund.org
- echiang@aclu-wa.org

- feivey@3-cities.com
- feldman@pwrfl-law.com
- gabe@galandabroadman.com
- gahrend@ahrendlaw.com
- green@au.org
- hank@budgeandheipt.com
- hbalson@pilg.org
- iruiz@kellerrohrback.com
- ishapiro@cato.org
- jake.ewart@hcmp.com
- jcampbell@ADFlegal.org
- jconnelly@connelly-law.com
- jeastman@chapman.edu
- jessew@mhb.com
- jessica.ellsworth@hoganlovells.com
- jhelsdon@thehelsdonlawfirm.com
- jneedlel@wolfenet.com
- jpizer@lambdalegal.org
- jtedesco@ADFlegal.org
- judyg@atg.wa.gov
- jweber@cato.org
- kah@stokeslaw.com
- kaitlyn.golden@hoganlovells.com
- katskee@au.org
- kcolby@clsnet.org
- kim.gunning@columbialegal.org
- kkemper@elmlaw.com
- krista.stokes@hcmp.com
- kwaggoner@adflegal.org
- laura.szarmach@hoganlovells.com
- lawoffice@tomolmstead.com
- leccles@susmangodfrey.com
- lnowlin@aclu-wa.org
- map@pattersonbuchanan.com
- mark.aaron.goldfeder@emory.edu
- mark@holadylaw.com
- marshall@mcaseylawfirm.com
- mcpartland.bryce@mcpartlandlaw.com
- mdeutchman@adl.org
- mpr@stokeslaw.com
- mrienzi@becketfund.org
- nicole.schiavo@hoganlovells.com
- noahp@atg.wa.gov
- noemiv@mhb.com
- pleadings@aclu-wa.org
- pmr@pattersonbuchanan.com
- rtucker@adflegal.org
- ryan@galandabroadman.com
- rzotti@maronmarvel.com
- scanet@ahrendlaw.com
- sethcooper.law@gmail.com
- sfreeman@adl.org
- shendricks@klinedinstlaw.com
- smarnin@adl.org

- sminter@nclrights.org
- solson@klinedinstlaw.com
- tcberg@stthomas.edu
- toddb@atg.wa.gov
- valeriemcomie@gmail.com
- wendy@galandabroadman.com

Comments:

Sender Name: Wendy Foster - Email: wendy@galandabroadman.com
Filing on Behalf of: Ryan David Dreveskracht - Email: ryan@galandabroadman.com (Alternate Email:)

Address:
PO Box 15146
Seattle, WA, 98115
Phone: (206) 557-7509

Note: The Filing Id is 20190305101032SC565695