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,

Respondent.

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,

Petitioners,

—v.—

ROBERT INGERSOLL and CURT FREED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION FOR RESPONDENTS ROBERT INGERSOLL AND CURT FREED

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QUESTIONS PRESENTED

1. Whether the Free Speech Clause gives a business the right to discriminate in making sales to the public in violation of a regulation of commercial conduct that does not target speech?

2. Whether the Free Exercise Clause gives a business the right to discriminate in making sales to the public in violation of a state law that is neutral and generally applicable?

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INTRODUCTION

Two Terms ago, this Court reaffirmed in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), that "religious and philosophical 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.* at 1727. At the same time, the Court held that official hostility to religion in applying such laws violates the Free Exercise Clause. The Washington Supreme Court faithfully applied these principles to the facts here. It searched the record for evidence of religious hostility and found none. Its decision that the state's Law Against Discrimination had been neutrally applied and, therefore, did not violate the business's free speech or free exercise rights does not conflict with the decisions of any other court. Accordingly, this case affords no basis for certiorari.

Petitioner Arlene's Flowers, Inc. (the "Flower Shop") argues that the decision below warrants review because it compels the Flower Shop's owner to participate in a religious ceremony, but the courts below expressly disclaimed any such obligation on the owner's part. The injunctions at issue do not require the Flower Shop or its owner to "go to a sacred event" or "participate in celebrating" its customers' weddings. Pet. 21. Indeed, Respondents Robert Ingersoll and Curt Freed, the gay couple who sought to purchase flower arrangements in this case, intended to pick up the flowers themselves. And even where delivery is part of the service requested, mere delivery to a wedding site does not amount to

participation in a religious ritual. Thus, the principal premise of the Flower Shop's petition is unfounded.

Nor has the Flower Shop identified any other basis for reviewing its free speech or free exercise claims. It has identified no conflict among the lower courts and merely disagrees with the state court's application of settled precedent. *But see* Sup. Ct. R. 10. The Flower Shop contends that to require "expressive" businesses that choose to open their doors to the public to serve all customers equally compels them to "speak" against their will; in effect, it seeks a "floral art" exception from Washington's public accommodations law. But the Flower Shop is unable to explain why a florist should get a First Amendment exemption but not a makeup artist, hairstylist, tailor, chef, or architect—all creative professionals that counsel for the Flower Shop argued, while counsel for Masterpiece Cakeshop, should *not* receive such protection. Tr. of Oral Arg. at 12-18, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) ("*Masterpiece* Tr."). The notion of a First Amendment right to discriminate has been rejected as often as it has been raised, for the reason this Court explained in *Masterpiece Cakeshop*: when the state regulates commercial conduct pursuant to a generally applicable regulation of conduct, irrespective of expression, there is no First Amendment right to exempt oneself from compliance.

Nor does the Flower Shop identify any conflict with free exercise precedents. Unlike in *Masterpiece Cakeshop*, this case involves no evidence of religious hostility on the state's part. The only evidence proffered demonstrates consistent treatment by the state. And in any event, the injunctions below rest

independently on a separate action brought by private plaintiffs, Mr. Ingersoll and Mr. Freed, so even if the Attorney General's action were invalid, the private parties' identical injunction would stand. Thus, this case is a poor vehicle to address any alleged religious hostility.

This case does not present an urgent question for the Flower Shop or for other businesses. As for the Flower Shop, the Washington Attorney General's action does not threaten to "bankrupt" the store or its owner. *But see* Pet. i. Wedding services make up just 3% of the Flower Shop's total business, Pet. App. 8a, 150a, and the state obtained only $1,001 in civil penalties and fees, Pet. App. 136a. That is hardly a "ruinous judgment[]." Pet. 7. Nor does this case raise a pressing issue for businesses more broadly. The Flower Shop points to a handful of similar disputes from across the country, but those instances do not indicate a crisis. Rather, they reflect what one would fully expect from case-by-case adjudication applying the principles this Court set forth in *Masterpiece Cakeshop*. There is no reason to disturb the rule, reflected in over a century of public accommodations laws, that all people, regardless of status, should be able to receive equal service in American commercial life.

STATEMENT OF THE CASE

A. Respondents Robert Ingersoll and Curt Freed.

In the fall of 2012, Curt Freed proposed marriage to Robert Ingersoll, his partner of eight years. Pet. App. 5a. Mr. Ingersoll accepted, and the two threw themselves into wedding planning. They intended to marry on their ninth anniversary, in

September 2013, in front of more than 100 friends and family members, and they reserved a well-known venue near their home in eastern Washington State that could accommodate such a large party. Pet. App. 5a, 152a.

Mr. Ingersoll had purchased flowers many times at the Flower Shop, and he considered it "our florist." Pet. App. 5a. In February 2013, a few months after his engagement, he drove there to ask the Flower Shop to "do the flowers" for his wedding to Mr. Freed. Pet. App. 5a, 153a. An employee told him he would have to speak with the store's owner, Barronelle Stutzman. Pet. App. 5a-6a, 153a.

Mr. Ingersoll returned the following day on his lunch hour to speak with Ms. Stutzman. Pet. App. 6a. He envisioned something simple and understated, which he planned to pick up from the Flower Shop. Pet. App. 154a; CP 1768.[1] But before he could even describe what the couple wanted, Ms. Stutzman told him that the Flower Shop would not provide any flower arrangements for his wedding because he and Mr. Freed are a same-sex couple. Pet. App. 6a, 153a-155a. It is undisputed that the Flower Shop would have provided flowers for the wedding of a different-sex couple. Pet. App. 150a.

Both Mr. Ingersoll and Mr. Freed were deeply hurt by the Flower Shop's refusal to sell them flowers for their wedding. Pet. App. 6a-7a, 155a. The couple cancelled their plans for a large wedding on their anniversary in September, in part because they

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[1] "CP" refers to the Clerk's Papers transmitted by the trial court as the record on appeal to the Washington Supreme Court.

feared being turned away by other wedding vendors. Pet. App. 7a. Instead, they settled for a small event at their home, requiring virtually no services from outside businesses. Pet. App. 7a. They were married in July with just eleven people in attendance. Pet. App. 7a, 155a. A friend took the pictures. Pet. App. 155a. They bought a single arrangement from another florist and boutonnieres from a friend. Pet. App. 7a, 155a.

B. Petitioners Arlene's Flowers, Inc. and Barronelle Stutzman.

The Flower Shop is a closely-held Washington corporation that operates a retail store that sells flowers and other goods to the public. Pet. App. 150a. Weddings make up approximately 3% of the corporation's business. Pet. App. 8a, 150a. Customers may seek a variety of goods and services for weddings, including raw materials, premade flower arrangements, and custom flower arrangements. Pet. 40. When it comes to deciding on the look of custom arrangements, the customer, not the Flower Shop, has "the last say." App. 43a (deposition of Barronelle Stutzman).[2]

The majority of the Flower Shop's wedding customers choose to pick up their flowers at the retail store, but some request delivery. App. 25a.[3] For delivery orders, Ms. Stutzman does not deliver the

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[2] "App." refers to the Appendix to Respondent State of Washington's Brief in Opposition.

[3] From May 2010 to January 2013, the Flower Shop provided flowers for 28 weddings in all. Of those, 21 couples chose to pick up their flowers themselves, while 8 requested delivery. CP 1341-43 (Resp. to Pl.'s First Set of Discovery Requests).

flowers herself. Flower Shop staff who deliver flowers typically leave the site immediately after dropping off the flowers and do not stay for the wedding ceremony. App. 37a-38a.

The Flower Shop also sells specific services for weddings, such as transporting flowers from the ceremony location to the reception, for a fee of $45 per hour. App. 39a. In that case, staff who deliver the flowers may wait on site, or they may leave and return. App. 37a-38a. According to Ms. Stutzman, delivery staff do not "participate in the wedding." App. 38a.

Petitioner Barronelle Stutzman is the owner of the Flower Shop. Pet. App. 5a, 150a. Ms. Stutzman testified at her deposition that providing flowers for the wedding of a Muslim couple or an atheist couple would not constitute her endorsement of Islam or atheism. Pet. App. 8a, 43a. She refuses, however, to allow the Flower Shop to provide flowers for the wedding of Mr. Ingersoll and Mr. Freed (or any other same-sex couple who plan to marry) because of her religious beliefs opposing marriage for same-sex couples. Pet. App. 5a.

C. The Washington Attorney General's investigation.

Washington's Law Against Discrimination, first enacted in 1957, expressly prohibits public accommodations from discriminating on the basis of race, religion, and other characteristics, including since 2006 sexual orientation. 2006 Wash. Sess. Laws 12-13; 1957 Wash. Sess. Laws 107-09. A violation of the Law Against Discrimination is by statutory definition an unfair business practice that violates the Consumer Protection Act. Wash. Rev.

Code § 49.60.030(3); *see also* Pet. App. 162a. Both laws authorize the Attorney General or an aggrieved private party to file suit to enforce their provisions.

When Washington's Attorney General learned that the Flower Shop had refused to provide flowers to Mr. Ingersoll and Mr. Freed in violation of the Law Against Discrimination, he sent the Flower Shop a letter requesting an Assurance of Discontinuance, essentially a voluntary agreement not to violate state law in the future by refusing service based on sexual orientation. Pet. App. 9a; *see* Pet. App. 365a-370a. The letter noted that a voluntary agreement would make any further enforcement action unnecessary. Pet. App. 366a. The Flower Shop refused to provide assurance that it would not violate the law. Pet. App. 9a. Accordingly, the Attorney General filed a civil action against the Flower Shop pursuant to his authority to enforce the state's Consumer Protection Act. Pet. App. 350a-356a.

D. Mr. Ingersoll and Mr. Freed's civil action.

Mr. Ingersoll and Mr. Freed also filed their own independent civil action against the Flower Shop alleging violations of both the Law Against Discrimination and the Consumer Protection Act. Pet. App. 357a-364a. The Flower Shop moved to consolidate the private plaintiffs' case with the Attorney General's action for all purposes. The trial court granted the Flower Shop's motion to consolidate for pretrial discovery and dispositive motions, Pet. App. 156a, but reserved decision on whether the cases should be consolidated for trial, CP 27.

E. The trial court's decision and orders.

On cross-motions for summary judgment, the trial court granted Mr. Ingersoll and Mr. Freed's motion for partial summary judgment, granted the Attorney General's motion for partial summary judgment, and denied the Flower Shop's motion for summary judgment. Pet. App. 226a.

The trial court held that the Flower Shop had discriminated against Mr. Ingersoll and Mr. Freed because of their sexual orientation, in violation of state law. Pet. App. 143a-227a. It rejected the Flower Shop's First Amendment defenses, finding that the Law Against Discrimination is a content-neutral, generally applicable regulation of conduct, and does not target speech or religious exercise. Pet. App. 197a-206a. The trial court also rejected the Flower Shop's claim of religiously biased selective enforcement against the Attorney General. Pet. App. 217a-219a.

Because there were two independent cases, the trial court entered independent but largely parallel judgments against the Flower Shop. *See* Pet. App. 132a-137a (judgment in No. 13-2-00871-5, *State v. Arlene's Flowers, Inc.*, in favor of Washington State); Pet. App. 138a-142a (judgment in No. 13-2-009653-3, *Ingersoll v. Arlene's Flowers, Inc.*, in favor of Mr. Ingersoll and Mr. Freed).

In the Attorney General's action, the court entered judgment enjoining the Flower Shop from discriminating based on sexual orientation in the sale of any goods or services it chooses to offer the general public for a fee. Pet. App. 135a-136a. The trial court expressly stated that its injunction would *not* require Ms. Stutzman or Flower Shop employees

to participate in wedding ceremonies. Pet. App. 197a n.23. It also entered judgment for a civil penalty in the amount of $1,000 and attorney's fees and costs in the amount of $1. Pet. App. 136a.

The trial court entered an identical injunction in the private plaintiffs' action. Pet. App. 140a. It deferred judgment on private damages until additional proof could be offered, Pet. App. 141a, but noted that the private plaintiffs sought only $7.91 in damages, reflecting the cost of mileage to visit another florist. Pet. App. 155a. The private plaintiffs do not seek damages for non-economic harms. Pet. App. 172a n.9.

F. The Washington Supreme Court's 2017 decision.

The Flower Shop appealed. The Washington Supreme Court accepted direct review of the trial court decision, Pet. App. 83a, and affirmed in all respects, Pet. App. 76a. Like the trial court, the Washington Supreme Court concluded that application of the Law Against Discrimination did not trigger heightened constitutional review because the regulation of commercial sales does not compel speech and because the law constituted a generally applicable, neutral prohibition on discriminatory conduct by businesses that choose to open their services to the public.

The court emphasized that, even if strict scrutiny applied, the Law Against Discrimination's application in this case would survive such review. Pet. App. 121a. The Flower Shop argued that no harm had been done—and the government could therefore have no compelling interest in regulating its conduct—because Mr. Ingersoll and Mr. Freed

ultimately obtained flowers from other businesses. Pet. App. 124a-125a. The Washington Supreme Court "emphatically reject[ed]" that argument. Pet. App. 125a. The court held that this case is "'no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches,'" and that the Law Against Discrimination exists to "eradicat[e] barriers to the equal treatment of all citizens in the commercial marketplace." Pet. App. 125a. Allowing the exception requested by the Flower Shop, it held, would fatally undermine that legislative purpose. Pet. App. 125a.

G. The Washington Supreme Court's 2019 decision.

After this Court decided *Masterpiece Cakeshop*, it granted the Flower Shop's 2017 petition for certiorari, vacated the Washington Supreme Court's 2017 decision, and remanded the matter to the Washington Supreme Court for further consideration in light of *Masterpiece Cakeshop*. Pet. App. 74a.

In *Masterpiece Cakeshop*, this Court set aside a judgment of the Colorado Civil Rights Commission requiring a bakery not to discriminate in its sales of wedding cakes because the Court found evidence that the state commission showed hostility to religion. 138 S. Ct. at 1724. The Court cited remarks by a commissioner that disparaged religion, and it expressed concern about the difference in treatment of several other complaints. *Id.* at 1730. On remand, the Washington Supreme Court "painstakingly reviewed the record for any sign of intolerance" or animus toward religion. Pet. App. 3a. Finding none, the court affirmed its prior decision. Pet. App. 3a.

The court also considered the Flower Shop's motion to supplement the record concerning an unrelated incident that occurred in 2017, four years after the Flower Shop denied service to Mr. Ingersoll and eight months after the Washington Supreme Court had rendered its initial opinion in this case. Pet. App. 22a. In that incident, a coffee shop refused to serve a group of anti-abortion protestors. Pet. App. 22a. The Washington State Human Rights Commission, which shares jurisdiction over complaints under the Law Against Discrimination, notified the owner of the coffee shop that refusing to serve customers because of their religious beliefs would violate the public accommodations law. App. 109a. The coffee shop's owner publicly stated that he would not deny service to patrons, including the same group of protestors, based on their religious beliefs, App. 109a, making further enforcement by the state unnecessary. The Washington Supreme Court concluded that this additional evidence failed to meet the standard for supplementing the record or taking judicial notice under Washington appellate procedure and denied the Flower Shop's motion. Pet. App. 21a-23a.

As for the Flower Shop's selective enforcement claim, the court noted that the Flower Shop failed to seek review on that issue and, therefore, abandoned it on appeal. Pet. App. 23a-24a.

Finally, the Washington Supreme Court specifically addressed and rejected the Flower Shop's "suggestion that the permanent injunction requires [Ms. Stutzman] to 'personally attend and participate in same-sex weddings.' As the court noted, 'The degree to which [Ms. Stutzman] voluntarily involves herself in an event . . . is not before the Court' and

therefore 'would not be covered by an injunction.'" Pet. App. 4a (internal citations omitted).

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW DID NOT REQUIRE THE FLOWER SHOP OR ITS OWNER TO PARTICIPATE IN RELIGIOUS CEREMONIES, AND THEREFORE THIS CASE DOES NOT PRESENT ANY ISSUE OF SUCH PARTICIPATION.

The Flower Shop's principal argument for granting certiorari rests on a demonstrably false assertion. It claims that the judgments below require its owner to "go to a sacred event" and "attend the [wedding] ceremony," thereby "participat[ing] in celebrating" the marriage, and it argues that the Court should grant review to determine whether a business can be compelled to participate in a wedding in this way. Pet. 21. But the courts below expressly stated that the judgments do no such thing. Pet. App. 4a, 197a n.25. This case thus provides no occasion for considering whether the Constitution would bar a state from applying its anti-discrimination law to compel participation in a religious ceremony.

As an initial matter, the service that Mr. Ingersoll sought did not require anyone from the Flower Shop to attend his wedding because Mr. Ingersoll planned to pick up the flowers from the Flower Shop himself. CP 1768. As a result, no Flower Shop employee would have been required to deliver or set up the flowers at the wedding site or to remain for the wedding ceremony. (Ms. Stutzman refused

service without even *asking* whether Mr. Ingersoll would pick up the flowers or wanted them delivered.)

Most of the Flower Shop's wedding business involves pick ups by customers rather than delivery. App. 25a (deposition of Barronelle Stutzman). In no circumstance do Flower Shop staff who deliver flowers have to "participate in the wedding," as Ms. Stutzman conceded. App. 38a. And where customers request delivery, that service is performed by other staff, not Ms. Stutzman herself. App. 37a-38a.

Both the trial court and the Washington Supreme Court made clear that the injunctions do not require the Flower Shop or Ms. Stutzman to attend, much less participate in, any wedding ceremonies. The injunctions' requirement to offer service without discrimination applies only to "service provided for a fee." Pet. App. 187a n.19. The core wedding services that the Flower Shop offers for a fee include the arrangement of flowers that can be picked up or delivered, and neither option involves actual participation in the wedding ceremony. The Washington Supreme Court specifically considered whether the injunctions would require Ms. Stutzman to "'personally attend and participate in same-sex weddings'" and concluded that they do not. Pet. App. 4a; *see also* Pet. App. 197a n.25 (trial court noting that, to the extent Ms. Stutzman has voluntarily participated in past wedding ceremonies, that is not a service she provides for a fee and therefore not covered by the injunction to halt discriminating in providing goods and services to the public). Thus, the factual predicate for the petition is false. This case involves no participation in a religious ceremony, compelled or otherwise.

The Flower Shop claims it must "go to" and "attend" customer events, an apparent reference to additional services it offers, such as transporting flowers from the ceremony location to the reception—services Mr. Ingersoll never sought. In any event, transporting flowers from one venue to another is not tantamount to "participating in sacred ceremonies." If the Flower Shop means to suggest that mere delivery of flowers to a venue, or from one venue to another, constitutes "participation in a religious ceremony," that definition would encompass any vendor who must be physically present at the wedding site to perform a service they sell. A rental company could refuse to deliver and arrange the tables and chairs, or a caterer could refuse to deliver and set out the plates and cutlery. No party has suggested that the First Amendment requires such a blanket exemption from the Law Against Discrimination. As this Court has noted, if rules applicable to clergy, who certainly may choose which weddings they perform, were extended to all the businesses that service weddings, "then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

Because the injunctions below do not require the Flower Shop to participate in its customers' weddings or to perform any religious rites, they pose no conflict with decisions of this Court precluding compelled participation in religious exercise. Pet. 21 (citing *Lee v. Weisman*, 505 U.S. 577 (1992)

(compulsory school prayer violates free exercise)). Moreover, Washington law recognizes the very exemption for clergy that this Court discussed in *Masterpiece Cakeshop*. Wash. Rev. Code § 26.04.010(4) ("No regularly licensed or ordained minister or any priest, imam, rabbi, or similar official of any religious organization is required to solemnize or recognize any marriage."); *see also* Pet. App. 203a. The Law Against Discrimination does not apply to clergy by its own terms. *See* Wash. Rev. Code § 49.60.040(2).

Finally, the lack of any participation in this case (forced or otherwise) makes this case a poor vehicle to decide whether *Employment Division v. Smith*, 494 U.S. 872 (1990), is the proper framework for evaluating compelled-participation claims. The Flower Shop asserts that *Smith* should not be read to mandate participation in a religious ceremony, Pet. 25, but as detailed above, this case involved no such mandate. There is no basis to question how *Smith* would apply to a case of compelled participation in a religious ceremony, because the Flower Shop is simply not required to attend its customers' weddings, let alone participate in their religious ceremonies.

Since the central predicate for the petition is demonstrably false, this case provides no occasion to address any issue of compelled participation in a religious ceremony.

II. THE WASHINGTON SUPREME COURT'S DECISION DOES NOT CONFLICT WITH FREE SPEECH DECISIONS OF THIS COURT OR OTHER COURTS.

The Flower Shop contends that the decision below conflicts with decisions of this Court and lower courts regarding compelled speech. But there is no conflict. This Court has made clear that where public accommodations laws, like Washington's Law Against Discrimination, prohibit discriminatory conduct regardless of whether it is communicative, they do not impermissibly compel speech. Here, application of the Law Against Discrimination was entirely routine: it involved a retail store that sells flower arrangements to its customers' specifications. The lower court decisions the Flower Shop cites as conflicting are plainly distinguishable on their facts. Accordingly, the Washington Supreme Court's decision comports fully with precedent of this Court and other courts. Moreover, as the oral argument in *Masterpiece Cakeshop* illustrated, there is no principled basis on which to exempt businesses that sell "expressive" goods and services from a generally applicable ban on discrimination in sales.

A. The decision below does not conflict with the compelled speech cases because generally applicable laws that regulate commercial conduct regardless of what it communicates do not violate the First Amendment.

The Washington Supreme Court's decision conflicts with no decisions of this Court, other courts of appeals, or state supreme courts. Its conclusion

that the Law Against Discrimination may be lawfully applied to the Flower Shop is fully consistent with this Court's compelled speech decisions.

When interpreting the Free Speech Clause, "this Court has distinguished between regulations of speech and regulations of conduct." *Masterpiece Cakeshop*, 138 S. Ct. at 1741 (Thomas, J., concurring). Public accommodations laws, such as the Law Against Discrimination, generally "do not 'target speech' but instead prohibit the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Id.* Accordingly, it is well-settled that anti-discrimination laws do not violate the First Amendment absent extraordinary circumstances. *See id.*; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995). As this Court has held for more than fifty years, and reaffirmed two years ago in *Masterpiece Cakeshop*, "religious and philosophical 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." 138 S. Ct. at 1727. The court below faithfully applied these principles to find that the Flower Shop's religious objections do not allow it to "deny protected persons equal access to goods and services."

The Flower Shop's suggestion that the decision below conflicts with this Court's decision in *Hurley* is unfounded. *Hurley* involved a "peculiar application" of a public accommodations law, not to a business that serves the general public, but to a privately organized non-profit parade, a classic form of collective speech. 515 U.S. at 568. This Court held

that application impermissible because it directly regulated *nothing but expression*—the content of the private parade sponsor's speech. *Id.* at 573. Here, by contrast, the state has applied its Law Against Discrimination not to the speech of a private expressive association, but to the conduct of a retail store—namely, its refusal to sell a product to someone because of his sexual orientation. Pet. App. 29a n.7.

The Flower Shop's attempt to manufacture a conflict with a decision of the Eighth Circuit fares no better, because that case is factually distinct. In *Telescope Media v. Lucero*, 936 F.3d 740 (8th Cir. 2019), the Eighth Circuit confirmed that, as a general matter, the Minnesota Human Rights Act does not target speech and that public accommodations laws targeting "*activities*" may incidentally affect expressive conduct without offending the First Amendment. *Id.* at 757. But it concluded that a particular application of the Human Rights Act to a company that sought to produce wedding videos would impermissibly compel speech. *Id.* at 753. That conclusion rested on three facts the Eighth Circuit found critical. First, the video company alleged that it would "retain ultimate editorial judgment and control" over any videos it might produce, making the films the company's own speech. *Id.* at 751. Second, the Human Rights Act would be applied to the production of a film, which is indisputably a protected form of speech. *Id.* at 749. Third, the video company would be compelled to convey a "'positive'" message about its customers' weddings. *Id.* at 753.

This case differs from *Telescope Media* in each respect. First, the Flower Shop, unlike the video

company, agreed that "the customer," not the Flower Shop, "gets the last say as to what they want in [their] flowers." App. 43a (deposition of Barronelle Stutzman). Thus, the Flower Shop, unlike the video company, does not exercise "ultimate editorial judgment and control" over its flowers or control any message conveyed; any message is thus the customer's, not the Flower Shop's. *Cf. Telescope Media*, 936 F.3d at 751. Second, while arranging flowers involves artistry, unlike films, the business of selling flower arrangements has never been considered "speech itself." *Cf. id.* at 757. Third, nothing in the injunctions challenged here requires the Flower Shop to express a particular viewpoint; indeed, the Flower Shop's owner acknowledged that providing flowers does not constitute an endorsement of an event. Pet. App. 8a, 43a.

Nor does the Washington Supreme Court's decision conflict with the Arizona Supreme Court's opinion in *Brush & Nib Studio LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019), which involved a company that sought to produce custom wedding invitations. The Arizona court reaffirmed that Phoenix's Human Relations Ordinance "is a facially content-neutral law that generally targets discriminatory conduct, not speech," and is therefore valid as a general matter. *Id.* at 914. It did not create a broad license to violate the Human Relations Ordinance whenever creative products or weddings are involved, nor whenever a business owner has a religious or philosophical objection to complying with a nondiscrimination mandate. *Id.* at 895-96. Rather, the court found a narrow, fact-specific free speech violation limited to the "creation of custom wedding invitations that are materially similar to those

contained in the record." *Id.* at 895. In reaching that conclusion, the Arizona Supreme Court likewise focused on the complete artistic control that the owners exercised over the final invitations, *id.* at 911, and expressly distinguished the Washington Supreme Court's decision in this case, *id.* at 917.

In the absence of a conflict with the actual holding of the court below, the Flower Shop attempts to manufacture a split of authority by conflating the question in this case—whether the Law Against Discrimination targets speech or conduct—with different questions presented in distinct free speech contexts.

The Flower Shop points to language from decisions of this Court involving laws that targeted speech on their face. Pet. 26 (citing *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), and *Janus v. Am. Fed'n of State, Cty., & Municipal Employees*, 138 S. Ct. 2448 (2018)). *NIFLA* involved a state law mandating notice requirements that expressly dictated the content of what the petitioners were required to say. 138 S. Ct. at 2369-70 (law required petitioners to "provide" or "disseminate" a "government-drafted notice"). In *Janus*, the state law required the petitioners "to subsidize the *speech* of other private speakers." 138 S. Ct. at 2464 (emphasis added). Because both decisions involved laws that expressly regulated speech itself or the support of speech itself, they do not conflict with—or even address—the conclusion below that the Law Against Discrimination targets conduct, not speech.

The Flower Shop cherry picks snippets from circuit court opinions assessing the reasonableness of

"time, place, or manner" restrictions on certain forms of expression. Pet. 28 (citing, *e.g.*, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (ban on tattooing not a reasonable time, place, or manner restriction); *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006) (ban on unlicensed street vending was a reasonable time, place, or manner restriction)). Those decisions are simply inapplicable to the Law Against Discrimination, which is not a time, place, or manner restriction on speech, but a regulation of discriminatory business practices: it forbids the refusal to sell goods or services on the basis of protected characteristics.

The Flower Shop also argues that there is a conflict between the decision below and circuit court decisions assessing whether conduct is expressive. Pet. 28. The conduct that the Flower Shop seeks to define as expressive is the process of creating custom flower arrangements. But the Law Against Discrimination does not regulate the process or substance of arranging flowers; it prohibits only the discriminatory refusal to provide goods and services to same-sex couples on the same terms as other customers. It regulates conduct *regardless* of what it communicates, not *because* of what it communicates. That is perfectly permissible, even if flower arranging is expressive. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968).

B. The decision below was correct.

The Washington Supreme Court's decision was correct. As this Court reaffirmed in *Masterpiece Cakeshop*, there is no First Amendment right for any business that chooses to open its doors to the public to refuse to comply with a content-neutral anti-

discrimination law merely because the business deals in goods and services that involve creativity or expression. Bookstores are no more free to discriminate in sales on the basis of race or sex than are gas stations. The exception the Flower Shop advances is contrary to precedent,[4] would mire the courts in impossible and unprincipled line-drawing, and would leave the public uncertain about which businesses are legally entitled to refuse them service based on otherwise proscribed discriminatory grounds.

The Flower Shop argues for an exception "specific to participating in and creating custom arrangements that celebrate same-sex weddings." Pet. 40. But as shown above, that exception does not even encompass the facts of this case. The Flower Shop refused to sell *any* flower arrangements to Mr. Ingersoll for his wedding. Mr. Ingersoll did not ask the Flower Shop to "participat[e]" in his wedding. Indeed, he did not even request delivery; he planned to pick up the flowers himself. CP 1768. And Ms. Stutzman turned him away without even asking whether he wanted delivery. Moreover, as noted in Point I above, the courts below made clear that the injunctions do not require participation.

The proposed exception also fails as a matter of law. Nothing in this Court's jurisprudence supports drawing a distinction between a florist,

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[4] *See, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-50 (1987); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968); *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

which, according to counsel for the Flower Shop, may not be required to produce custom flower arrangements for the wedding of a same-sex couple, and a makeup artist, which, according to the same counsel when representing Masterpiece Cakeshop, may be required to create and personally apply a customized wedding-day look to a bride. *Masterpiece* Tr. 12-13. The Flower Shop also fails to explain why the sale of a custom flower arrangement gets First Amendment protection, while the sale of an identical product made in advance would not. Pet. 40 (Flower Shop freely "sells pre-made floral arrangements" "for customers to use at . . . same-sex weddings"). *Hurley* and this Court's other public accommodations cases demonstrate where the line is drawn: between regulations that prohibit discriminatory conduct by businesses open to the public and regulations or applications that target the speech or association of private, nonprofit expressive groups. This case falls squarely on the former side.

In addition, nothing about the Flower Shop's proposed exception is limited to retail flower shops or to weddings. The Flower Shop emphasizes the artistic nature of flower arrangements, but countless other businesses open to the public provide customized goods and services that are artistic or creative, including hairstylists, tailors, chefs, and architects. *Cf. Masterpiece* Tr. 12-18 (counsel for Masterpiece Cakeshop, also counsel here, arguing that none of these activities would be sufficiently "expressive" to be protected, but baking custom wedding cakes would be). And many life events beyond weddings are marked by religious ceremonies, including funerals, bar and bat mitzvahs, and confirmations. Could a florist refuse to

provide an arrangement for a gay person's funeral if it objected to commemorating LGBT lives? *Cf.* First Am. Compl., *Zawadski v. Brewer Funeral Servs., Inc.*, No. 55CI1-17-cv-00019-CM (Cir. Ct. Pearl River Cty., Miss. Mar. 7, 2017), Doc. No. 12 (funeral home refused to transport body of deceased man after learning that he was gay, communicating that they did not "'deal with their kind'"). Could a tailor shop refuse to alter a suit for a child's confirmation because it opposed the Catholic Church's teachings?

The Flower Shop's proposal would put courts in the untenable position of having to adjudicate, on a case-by-case basis, the artistry of particular businesses and lines of products. It offers no standards that courts might apply to this unenviable task—just as its counsel was unable to offer any such standard during oral argument in *Masterpiece Cakeshop*. *Masterpiece* Tr. 11-19. And it fails to explain why, if the Flower Shop has a constitutional right to refuse to provide flowers for Mr. Ingersoll and Mr. Freed's wedding, another florist would not have a right to refuse to provide flower arrangements for the wedding of an interracial, interfaith, or Muslim couple.

If these distinctions are elusive for the courts, they will be even more so for consumers. On the Flower Shop's view, notwithstanding the passage of public accommodations laws expressly designed to keep the commercial marketplace free of discrimination, members of minority communities would be left to guess which businesses they have a right to be treated equally by, and which have a right to turn them away for being Black, or Christian, or gay.

III. THE FLOWER SHOP HAS IDENTIFIED NO CONFLICT WITH RESPECT TO THE WASHINGTON SUPREME COURT'S FREE EXERCISE HOLDING, WHICH SIMPLY APPLIED THIS COURT'S LONGSTANDING JURISPRUDENCE.

The Flower Shop cites no conflict between the Washington Supreme Court's rejection of its free exercise claim and any decision of this Court or any other court. It argues that the court below erred in reading *Masterpiece Cakeshop* to refer specifically to religious animus in an adjudicatory body. Pet. 34-36. But that question does not warrant certiorari for two reasons: (A) the supplemental materials, which are not a part of the record in this case, do not establish religious animus on the Attorney General's part; and (B) even if the claim of hostility had merit, it would not alter the injunction below, which rests independently on the private plaintiffs' case.

A. There is no evidence of religious hostility from the Attorney General.

The Flower Shop's hostility theory is based almost entirely on the state's handling of an unrelated incident, more than four years after the incident in this case, involving a coffee shop that refused to serve a group of anti-abortion protestors. Far from showing hostility to either business, however, the facts show evenhanded treatment of both.

After the Attorney General learned that the Flower Shop had refused to serve Mr. Ingersoll, the Attorney General offered the Flower Shop the opportunity to sign an Assurance of Discontinuance

stipulating that the Flower Shop would not repeat its unlawful conduct. Pet. App. 155a-156a. The Flower Shop refused to provide such assurance and instead maintained that it could—and would—turn away same-sex couples in the future. After efforts to negotiate a resolution short of litigation failed, the Attorney General initiated a civil action against the Flower Shop. Pet. App. 156a. These facts establish no "animosity" against Ms. Stutzman's religious beliefs. Pet. 36. Indeed, while the Flower Shop argued that the Attorney General engaged in religiously biased selective enforcement in the trial court, it abandoned that argument on appeal to the Washington Supreme Court. Pet. App. 23a-24a.[5]

The state's treatment four years later of the coffee shop adds nothing to the Flower Shop's claim. There, after learning that a coffee shop had refused to serve a group of Christian customers, the Washington Human Rights Commission, which shares enforcement responsibility under the Law Against Discrimination with the Attorney General, notified the owner of the coffee shop that refusing to serve customers because of their religious beliefs would violate the Law Against Discrimination. App. 109a. But the coffee shop responded quite differently than the Flower Shop. Where the Flower Shop refused to comply with the law going forward, the

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[5] The Washington Supreme Court found that the Flower Shop had abandoned its claim that the Attorney General had engaged in biased enforcement by failing to raise it on appeal. Pet. App. 23a-24a. That procedural bar is an adequate and independent state ground for the decision to reject the Flower Shop's religious bias claim. *See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 398-99 (1990).

coffee shop stated that it would not repeat its conduct, App. 109a, making further enforcement by the executive unnecessary. That the Attorney General filed suit in the Flower Shop's case but not the coffee shop's is fully supported by the businesses' respective responses: the coffee shop agreed to comply with the law, while the Flower Shop, given that same opportunity, declined.[6]

B. Even if the Attorney General's enforcement were set aside, the outcome of this case would be the same because the private plaintiffs obtained judgment in a separate lawsuit.

Even if the Attorney General's actions were tainted by religious hostility, this case would be a poor vehicle to address that question because, as the court below recognized, Pet. App. 25a, the state court entered a separate but identical injunction in private litigation in which the Attorney General was not a party or counsel.

Washington's statutory scheme authorizes separate and independent enforcement of state law by private plaintiffs who are injured and who seek to

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[6] The Flower Shop's truncated argument that the Washington Supreme Court itself departed from religious neutrality simply by concluding that the standard set forth in *Masterpiece Cakeshop* was not met in this case, Pet. 38, is meritless. If that theory were accepted, any court that declined to find a free exercise violation in a particular case would be accused of religious hostility. Equally unfounded is the Flower Shop's suggestion that anti-religion animus is shown simply by the state court's conclusion that the Flower Shop violated state law when it refused to serve a gay couple.

enjoin future violations of the law. Pet. App. 173a. That law authorizes private plaintiffs to seek injunctive relief not only as to themselves, but also as to others to give full effect to the state's public policy. Pet. App. 173a (citing *Hockley v. Hargitt*, 510 P.2d 1123, 1132 (Wash. 1973)). Consequently, the private plaintiffs, Mr. Ingersoll and Mr. Freed, were entitled to file their own, separate action and to obtain injunctive relief regardless of whether the Attorney General filed. Pet. App. 162a. Thus, the injunction in the private plaintiffs' lawsuit would stand even if the Flower Shop could show that the Attorney General acted out of religious hostility.

The Washington courts consolidated the private plaintiffs' action with the Attorney General's action for discovery and held joint hearings on motions and appeals to expedite the cases and conserve judicial resources. Pet. App. 147a n.3, 156a. But the private plaintiffs' action remained separate at all stages of this litigation. Actions that are consolidated pursuant to Washington civil procedure "retain their separate identity." 4 Karl B. Tegland, Wash. Practice § 42 at 89 (6th ed. 2013); *see also Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933) ("Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."). That distinguishes this case from *Masterpiece Cakeshop*, in which the state civil rights commission brought the only action against the bakery, and the gay couple were merely

intervenors in the Commission's action.[7] Here, the private plaintiffs filed a separate complaint, retained a separate docket number and caption, filed their own briefing, and made separate oral arguments, "retain[ing] their separate identity" throughout. Wash. Practice § 42 at 89.

The trial court entered separate judgments in the state's case and in the private plaintiffs' case. Pet. App. 132a-137a (judgment in No. 13-2-00871-5, *State v. Arlene's Flowers, Inc.*, in favor of Washington State); Pet. App. 138a-142a (judgment in No. 13-2-009653-3, *Ingersoll v. Arlene's Flowers, Inc.*, in favor of Mr. Ingersoll and Mr. Freed). Consequently, even if the judgment in the Attorney General's action were set aside because of religious animus, the judgment in the private plaintiffs' action would be unaltered. That judgment contains an injunction identical to the one entered in the Attorney General's case. *Compare* Pet. App. 135a-136a *with* Pet. App. 140a. This Court should not grant discretionary review in a case where granting Petitioners' requested relief would not alter the Flower Shop's ongoing obligations under state law.

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[7] In *Masterpiece Cakeshop*, the couple opted to intervene in the state's enforcement action in lieu of initiating their own lawsuit. Though the couple in *Masterpiece Cakeshop* participated in briefing and argument, they did not seek or obtain any judgment apart from the state's.

IV. THIS CASE IS A POOR VEHICLE FOR THE FLOWER SHOP'S HYBRID RIGHTS CLAIM.

There is no basis for taking up the Flower Shop's "hybrid rights" theory—namely, that an unsuccessful free exercise claim paired with an unsuccessful free speech claim should receive heightened review. This Court has never held that two unsuccessful claims can be cobbled together under the rubric of "hybrid rights" to trigger heightened scrutiny. The Flower Shop offers no reason why it should do so here. In any event, this case is a poor vehicle for even asking that question because, even if heightened scrutiny were triggered here, the Law Against Discrimination satisfies strict scrutiny, as it furthers a compelling interest in eradicating discrimination in the marketplace and prohibiting discrimination in retail sales is narrowly tailored to achieve that goal. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (laws prohibiting race discrimination in employment are "precisely tailored" to further compelling government interest in "equal opportunity to participate in the workforce without regard to race"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-27 (1984) (state's public accommodations law was least restrictive means to further compelling government interest in "[a]ssuring women equal access to goods, privileges, and advantages"). Because the availability of the hybrid-rights theory for triggering strict scrutiny would not change the result here, this Court should not grant the petition to decide that question.

V. THERE ARE NO OTHER REASONS TO GRANT REVIEW HERE.

The Flower Shop attempts to portray a crisis warranting this Court's intervention. But, far from demonstrating a question of national importance, the handful of examples to which it points shows the opposite.

As for the Flower Shop itself, its claim of looming bankruptcy at the hands of the state rings hollow. The modest penalty of $1,000 and nominal fees of $1 obtained by the Attorney General pose no great threat. Moreover, wedding-related services make up just 3% of the Flower Shop's business overall. Pet. App. 8a, 150a. Indeed, the Flower Shop has continued its operations for years without providing any wedding services at all. Pet. App. 8a-9a.

As for other businesses in Washington, it is telling that no similar dispute has arisen in more than a decade since the Law Against Discrimination was updated to expressly prohibit discrimination on the basis of sexual orientation in 2006. And the Flower Shop can identify only a handful of examples from across the country during the 37 years that lesbian, gay, and bisexual people have had express protections from discrimination under one or more state laws.

For those businesses that object to marriage for same-sex couples, *Masterpiece Cakeshop* has provided sufficient guidance for the lower courts to make case-by-case adjudications: as a general matter, religious and philosophical objections do not provide an exemption from generally applicable nondiscrimination laws, but if the law's enforcement

is tainted by specific anti-religious animus, the Free Exercise Clause is violated.

Applying *Masterpiece Cakeshop*, some courts, such as the one below, have found no evidence of anti-religious targeting. Pet. App. 3a. In other cases, courts have ruled in favor of businesses whose products involved speech over which the vendor retained editorial judgment, raising distinct free speech concerns. *See, e.g.*, *Telescope Media*, 936 F.3d 740; *Brush & Nib*, 448 P.3d 890. In still other cases, including a second case between Masterpiece Cakeshop itself and the Colorado Civil Rights Commission, the parties have reached a voluntary resolution of the dispute. Joint Stipulated Notice of Dismissal, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074-WYD-STV (D. Colo. Mar. 5, 2019), ECF No. 143.

This "landscape" hardly amounts to a crisis. As these examples show, the lower courts are perfectly capable of ensuring that public accommodations laws are neutrally applied and that no one is targeted because of anti-religious bias. That is exactly what the Washington Supreme Court did here.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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