No. 17-108

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

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Elizabeth O. Gill
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Emily Chiang
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, WA 98164

Michael R. Scott
Counsel of Record
Jake Ewart
HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
(206) 623-1745
michael.scott@hcmp.com

Ria Tabacco Mar
James D. Esseks
Louise Melling
Rachel Wainer Apter
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

QUESTIONS PRESENTED

1. Whether the Free Speech Clause permits a business 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 permits a business 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

Petitioners, a Washington State flower shop and its owner, raise the same factual and legal claims advanced in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. cert. granted June 26, 2017), which will be argued on December 5th. Petitioners here, like the petitioners in *Masterpiece Cakeshop*, were found to have discriminated based on sexual orientation when they turned away a gay couple seeking goods that they routinely sell to heterosexual couples for their weddings. And petitioners here, like the petitioners in *Masterpiece Cakeshop*, seek an exemption from a content-neutral, generally applicable public accommodations law under the Free Speech Clause, the Free Exercise Clause, and some combination of the two. Because the legal and factual issues raised in both cases are the same, the Court should hold this petition for certiorari pending disposition of *Masterpiece Cakeshop*.

STATEMENT OF THE CASE

A. Factual Background.

Respondents Robert Ingersoll and Curt Freed are gay men who have been in a committed relationship since 2004. Pet. App. 3a. In 2012, not long after Washington State recognized the freedom to marry for same-sex couples, Mr. Freed proposed marriage to Mr. Ingersoll, and the two became engaged. *Id.*; Pet. App. 78a.

The wedding Mr. Ingersoll and Mr. Freed originally planned was supposed to take place on their nine-year anniversary in September 2013. Pet. App. 3a. The couple envisioned a ceremony and reception complete with a minister, catered dinner, photographer, and wedding cake. *Id.*; Pet. App. 78a. They planned to celebrate with over 100 friends and family members, and they reserved a well-known outdoor wedding venue where they lived in eastern Washington State. Pet. App. 3a; Pet. App. 78a. The couple intended to buy flowers for the wedding from Petitioner Arlene's Flowers, Inc. (the "Florist"). Pet. App. 4a; Pet. App. 78a. The Florist is a Washington corporation that sells flowers and other goods and services to the public. Pet. App. 12a; Pet. App. 76a. It is not a religious organization. Pet. App. 18a n.7; Pet. App. 120a. Mr. Ingersoll had purchased flowers at the Florist on many occasions, and viewed it as "their florist." Pet. App. 3a.

On February 28, 2013, Mr. Ingersoll drove to the Florist to talk to someone about ordering flowers for his wedding. Pet. App. 4a; Pet. App. 79a. He told one of the Florist's employees that he was marrying Mr. Freed and that he and Mr. Freed wanted the

Florist to do the flowers. Pet. App. 4a; Pet. App. 79a. The employee told Mr. Ingersoll he would have to speak to the owner, Petitioner Barronelle Stutzman.[1] Pet. App. 4a.

The next day, March 1, 2013, Mr. Ingersoll returned to the Florist during his lunch hour to speak with Ms. Stutzman. *Id.*; Pet. App. 79a. Before Mr. Ingersoll could describe what the couple wanted, Ms. Stutzman told him categorically that the Florist would not provide services for his wedding because of Ms. Stutzman's religious views. Pet. App. 4a; Pet. App. 79a.

The Florist sells to the general public. Ms. Stutzman testified at her deposition that she does not believe herself to be endorsing the Florist's customers or their actions when the Florist sells them floral arrangements. Ms. Stutzman testified, for example, that when the Florist sells flowers to atheists for a wedding, Ms. Stutzman is not endorsing atheism. Pet. App. 7a. Similarly, when the Florist sells flowers to a Muslim couple for a wedding, Ms. Stutzman is not endorsing Islam. *Id.*

Nevertheless, Ms. Stutzman refused to allow the Florist to provide flowers for Mr. Ingersoll and Mr. Freed's wedding because of her belief that "biblically marriage is between a man and a woman." Pet. App. 6a. She also decided that, going forward, the Florist would decline to sell goods and services for any marriage or commitment ceremony for same-sex couples. *Id.*

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[1] Ms. Stutzman is owner and president of Arlene's Flowers, Inc. Pet. App. 3a; Pet. App. 12a n.1.

Mr. Ingersoll was deeply hurt by the Florist's refusal to provide services. Pet. App. 4a; Pet. App. 8a. Mr. Freed also felt the "emotional toll." Pet. App. 5a.

Mr. Ingersoll and Mr. Freed lost enthusiasm for a large wedding in September. *Id.* They stopped their wedding planning, in part because they feared being denied service by other wedding vendors. *Id.* They also feared that increased public attention threatened the safety and security of their wedding guests, and that their wedding might attract the media or protestors, such as the Westboro Baptist Church. *Id.* They settled instead on a small private wedding at their home. *Id.* Mr. Ingersoll and Mr. Freed were married on July 21, 2013, with 11 people in attendance. *Id.* They bought one flower arrangement from another florist, and boutonnieres and corsages from a friend. *Id.*

B. Proceedings Below.

On April 9, 2013, the State of Washington filed a complaint based on the Washington Consumer Protection Act, Wash. Rev. Code § 19.86 ("CPA"), against the Florist and Ms. Stutzman, alleging that their refusal of service based on sexual orientation constituted an unfair business practice in violation of the CPA. Pet. App. 258a-264a. Mr. Ingersoll and Mr. Freed filed their own action several days later based on the CPA and the Washington Law Against Discrimination, Wash. Rev. Code § 49.60, which prohibits discrimination by places of public accommodation because of race, creed, color, sex, sexual orientation, or disability. Pet. App. 265a-272a. Both lawsuits sought injunctive relief. *Id.*;

Pet. App. 258a-264a. The cases were consolidated for all purposes except trial. Pet. App. 76a n.6.

On February 18, 2015, the trial court entered an order granting summary judgment in favor of the State, Mr. Ingersoll, and Mr. Freed. Pet. App. 69a-153a. In a carefully reasoned, lengthy opinion, the trial court held that Petitioners had discriminated against Mr. Ingersoll and Mr. Freed because of their sexual orientation, and had violated both the Law Against Discrimination and the CPA. *Id.* The trial court rejected Petitioners' constitutional defenses. It rejected Petitioners' free speech claim because the Law Against Discrimination requires only non-discriminatory conduct, not any particular speech. Pet. App. 125a. The trial court also rejected Petitioners' free exercise claim:

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

Pet. App. 151a.

The court entered permanent injunctions in both actions barring the Florist from discriminating based on sexual orientation in the sale of any goods or services it chooses to offer the general public. Pet.

App. 58a-63a. The court also awarded Mr. Ingersoll and Mr. Freed actual damages, attorneys' fees, and costs in amounts to be determined.[2] Pet. App. 64a-68a.

Petitioners asked the Washington Supreme Court to review the trial court's decision directly. The Washington Supreme Court accepted review and affirmed. Pet. App. 2a. Like the trial court, the court concluded that the Law Against Discrimination regulates only discriminatory conduct—not speech—and therefore does not violate Petitioners' free speech rights under the First Amendment. Pet. App. 33a. The court also concluded that the Law Against Discrimination is a neutral law of general applicability that does not violate Petitioners' free exercise rights under the First Amendment. Pet. App. 40a.

The court emphasized that, in any event, the Law Against Discrimination's application in this case would survive strict scrutiny. Pet. App. 51a. Petitioners argued that no harm had been done—and the government could therefore have no compelling interest in regulating Petitioners' conduct—because Mr. Ingersoll and Mr. Freed could, and did, obtain flowers from other local florists. Pet. App. 50a-51a. The court "emphatically reject[ed]" that argument. Pet. App. 51a. The court agreed that this case is "no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches," Pet.

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[2] Mr. Ingersoll and Mr. Freed have claimed $7.91 in economic damages resulting from gas and mileage spent obtaining flowers from other sources. *See* Pet. App. 114a-115a. They do not seek damages for emotional distress or other non-economic harms.

App. 51a (internal quotation marks omitted), and that the Law Against Discrimination exists instead to "eradicat[e] barriers to the equal treatment of all citizens in the commercial marketplace." *Id.* A "patchwork of exceptions," the court concluded, would fatally undermine that legislative purpose. *Id.*

REASONS FOR HOLDING THE PETITION

The legal issues presented by the petition are the same as those presented in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, which is currently pending before the Court and will be argued on December 5th. Petitioners in both cases ask this Court to hold that the Free Speech Clause, the Free Exercise Clause, or some combination of the two, exempt them from complying with a state law barring discrimination by places of public accommodation. Accordingly, the Court should hold this petition pending the resolution of *Masterpiece Cakeshop*.

The factual background of this case is similar to the factual background in *Masterpiece Cakeshop*. Both sets of petitioners operate retail businesses that provide goods and services to the public. Pet. App. 2a; Joint App. at 71, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. filed Aug. 31, 2017) ("*Masterpiece* J.A."). Both operate in states that have chosen to prohibit discrimination by places of public accommodation based on certain personal characteristics, including sexual orientation. *Compare* Wash. Rev. Code §§ 49.60.030, 49.60.040, *with* Colo. Rev. Stat. § 24-34-601(1), (2). And, in both cases, the petitioners refused to provide same-sex couples with goods or services that they

routinely sell to different-sex couples for their weddings, thereby discriminating on the basis of sexual orientation. Pet. App. 2a; *Masterpiece* J.A. 71-72.

The Law Against Discrimination is also functionally interchangeable with the Colorado Anti-Discrimination Act for purposes relevant here. *Compare* Wash. Rev. Code §§ 49.60.030, 49.60.040, *with* Colo. Rev. Stat. § 24-34-601(1), (2). The Law Against Discrimination, like the Colorado Anti-Discrimination Act, is a content-neutral law that regulates business conduct. It does not regulate speech. It simply requires retail stores and other places of public accommodation to make their goods and services available on an equal basis regardless of customers' sexual orientation, race, creed, color, sex, sexual orientation, national origin, or disability. Wash. Rev. Code §§ 49.60.030(1)(b), 49.60.040(14); *see also* Colo. Rev. Stat. § 24-34-601(1), (2). The Law Against Discrimination, like the Colorado Anti-Discrimination Act, does not require any business to offer any particular good or service for sale. The law simply insists that, to the extent a retail business chooses to offer goods or services to the general public, it may not refuse to sell them to customers based on certain enumerated characteristics including sexual orientation. In so doing, the Law Against Discrimination, like the Colorado Anti-Discrimination Act, is not unusual. To the contrary, such antidiscrimination laws have a long and venerable place in our nation's history. *Romer v. Evans*, 517 U.S. 620, 627-28 (1996).

Moreover, the Law Against Discrimination, like the Colorado Anti-Discrimination Act, is neutral

and generally applicable under this Court's precedent in *Employment Division v. Smith*, 494 U.S. 872 (1990), as the Washington Supreme Court recognized. Pet. App. 40a; *see also* App. to Pet. for Writ of Cert. at 37a, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. filed July 22, 2016) ("*Masterpiece* Pet. App."). It is thus subject only to rational basis review, which it "clearly" satisfies. Pet. App. 40a; *see also Masterpiece* Pet. App. 49a (concluding that the Colorado Anti-Discrimination Act "easily" survives rational basis review). Indeed, the government has not only a legitimate, but a compelling interest, in eliminating discrimination in places of public accommodation. Pet. App. 40a; *see also Masterpiece* Pet. App. 49a.

Petitioners here, like the petitioners in *Masterpiece Cakeshop*, seek an exemption from this content-neutral, generally applicable anti-discrimination law, and for the same reasons as the petitioners in *Masterpiece Cakeshop*. Indeed, the legal arguments offered in support of certiorari here are nearly identical to the arguments presented in *Masterpiece Cakeshop*. Whatever the merit of those arguments—and Mr. Ingersoll and Mr. Freed submit there is none, *see* Br. in Opp., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. filed Nov. 28, 2016) ("*Masterpiece* Opp.")—they are the same arguments being advanced by the same counsel in *Masterpiece Cakeshop*. Like *Masterpiece Cakeshop*, Petitioners here argue that a retail business's provision of custom goods or services for a wedding is "pure speech" entitled to First Amendment protection. *Compare* Pet. 17-24, *with* Br. for Pet. at 18-23, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, No. 16-111 (U.S. filed Aug.

31, 2017) ("*Masterpiece* Br."); *see Masterpiece* Opp. 17-18. They object to the application of a neutral and generally applicable law to their retail businesses based on the business owners' religious opposition to marriage for same-sex couples. *Compare* Pet. 35-37, *with Masterpiece* Br. 38-46; *see Masterpiece* Opp. 19-23. And they suggest that this Court's decision in *Smith* recognized a "hybrid rights" doctrine that would trigger strict scrutiny in cases involving religious freedom and speech claims, even when those claims fail standing alone. *Compare* Pet. 32-35, *with Masterpiece* Br. 46-48.

Contrary to Petitioners' suggestion, "combining" this case with *Masterpiece Cakeshop* would not "aid this Court" in deciding the questions presented. Pet. 37. First, Petitioners claim that "exhaustive evidence" in this record "will facilitate" this Court's determination of whether flower arrangements or wedding cakes are protected speech. Pet. 37. But they point to no specific facts in this case that might help the Court resolve the issues raised in *Masterpiece Cakeshop*. Second, Petitioners contend that the Florist's course of conduct in serving lesbian and gay customers seeking different goods and services on different occasions and for different purposes "negate[s] any concern that she discriminates against individuals based on their sexual orientation." Pet. 37-38. The petitioners in *Masterpiece Cakeshop* make the same assertion, *see Masterpiece* Br. 52-53, but both sets of petitioners are wrong. That both the bakery and the florist have provided baked goods and flowers to gay and lesbian people in the past does not mean that they do not discriminate on the basis of sexual orientation when they refuse to sell baked goods or flowers to a gay

couple for their wedding that they would sell to a heterosexual couple for their wedding. In any event, Petitioners have not asked this Court to review the Washington Supreme Court's conclusion that they discriminated against Mr. Ingersoll and Mr. Freed because of their sexual orientation. Nor could they, given that the Washington Supreme Court made that determination as a matter of state law. Pet. App. 13a-17a. Instead, Petitioners ask the Court to excuse their discrimination under the same First Amendment theories already raised in *Masterpiece Cakeshop*.

In sum, Petitioners have not articulated any reason, let alone a "compelling" one, that this Court should grant certiorari in this case and consolidate it with *Masterpiece Cakeshop* for oral argument. *See* Sup. Ct. R. 10. Moreover, doing so would cause practical problems, as *Masterpiece Cakeshop* has been scheduled for argument on December 5th. Even if this petition were granted at the earliest possible conference, the merits briefing would not be completed until March 2018. *Masterpiece Cakeshop* would thus need to be removed from the December calendar and rescheduled for argument sometime next spring. Mr. Ingersoll and Mr. Freed respectfully submit that the Court should hold the petition pending the resolution of *Masterpiece Cakeshop*. If the Court affirms the decision of the Colorado Court of Appeals in *Masterpiece Cakeshop*, then the petition for a writ of certiorari should be denied. If the Court reverses the decision below in *Masterpiece Cakeshop*, then it should grant the petition, vacate the decision of the Washington Supreme Court, and remand for reconsideration in light of its opinion in *Masterpiece Cakeshop*.

CONCLUSION

The Court should hold the petition for certiorari pending disposition of *Masterpiece Cakeshop*.

Respectfully Submitted,

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Elizabeth O. Gill
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Emily Chiang
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, WA 98164

Michael R. Scott
Counsel of Record
Jake Ewart
HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
(206) 623-1745
michael.scott@hcmp.com

Ria Tabacco Mar
James D. Esseks
Louise Melling
Rachel Wainer Apter
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Counsel for Respondents Robert Ingersoll and Curt Freed

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