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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

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

Defendants/Appellants.

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ROBERT INGERSOLL and CURT FREED,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation is a not-for-profit corporation organized under Washington law and a supporting organization to Washington State Association for Justice. The Foundation has an interest in the protections against discrimination afforded under the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD), and under what circumstances the Free Exercise Clause of the First Amendment to the United States Constitution offers a defense to its enforcement.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This case is before the Court following an order from the U.S. Supreme Court granting Arlene's Flowers' Petition for Certiorari, vacating the judgment, and remanding for further consideration in light of *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018) (GVR Order). The facts are drawn from this Court's opinion and the parties' briefs. *See State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 389 P.3d 543 (2017), *cert. granted, judgment vacated*, 138 S.Ct. 2671, 201 L.Ed.2d 1067 (2018) (*Arlene's I*); Arlene's Op. Br. at 4-17; State Resp. Br. at 3-24; Ingersoll/Freed Resp. Br. at 3-10; Arlene's Reply Br. at 1-2.<sup>1</sup>

Barronelle Stutzman owns Arlene's Flowers, a floral shop located in Richland, Washington. Ingersoll asked her to provide floral services for his same-sex wedding. Before he was able to specify the services he wanted, she refused to serve him, explaining her religion prohibits her from providing same-sex wedding services. The Attorney General contacted Stutzman,

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<sup>1</sup> Unless otherwise specified, brief citations in this amicus brief are to briefs in *Arlene's II*.

informing her that her refusal constituted a violation of the WLAD and requesting that she agree to offer the same services to same-sex and opposite-sex couples. Stutzman refused. The State then sued Arlene's and Stutzman (Arlene's) under Washington's Consumer Protection Act, Ch. 19.86 RCW (CPA). Ingersoll and Freed sued separately under the CPA and the WLAD. These actions were consolidated.

The superior court granted summary judgment to the State and Ingersoll/Freed, concluding Arlene's violated the WLAD, and no state or federal constitutional protection excused the violation. A judgment and order for injunctive relief was entered, requiring Arlene's to offer the same services to same-sex and opposite sex couples. This Court granted direct review, and in an opinion examining all issues, affirmed the superior court.

Arlene's filed a Petition for Certiorari, seeking review of the federal constitutional issues in *Arlene's I*. While the Petition was pending, the U.S. Supreme Court issued *Masterpiece Cakeshop*, a case that presented similar federal constitutional issues. It then granted Arlene's Petition, vacated the state court judgment and remanded the case "for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*."

### **III. ISSUES PRESENTED**

- 1) What issues are properly before this Court and within the scope of the U.S. Supreme Court's GVR Order?
- (2) Does recognition of an inextricable link between the status of sexual orientation and same-sex marriage require recognition of an inextricable link between religion and religiously-motivated conduct?

### **IV. SUMMARY OF ARGUMENT**

The GVR Order remanded *Arlene's I* for further consideration in light of *Masterpiece Cakeshop*. A GVR Order determines the scope of remand, and matters resolved in earlier proceedings and outside the scope of the order become the law of the case. In *Masterpiece Cakeshop*, the United States Supreme Court ruled on narrow Free Exercise grounds based on evidence of religious animus, and left undisturbed the other issues. Based on this limited holding, only the issue of religious animus under the Free Exercise Clause is at issue on remand. This Court should decline to address Arlene's other arguments, including free speech and forced participation.

In *Arlene's I*, this Court recognized an inextricable link between sexual orientation and same-sex marriage. The nexus between sexual orientation and closely-linked conduct, like marriage or sex, is so close that such conduct "defines the class." This link is grounded in constitutional principles related to fundamental rights of privacy, and belongs to a circumscribed category of interests that is limited in scope. While freedom of religion is a constitutional right, recognition of a link between religion and religiously-motivated conduct in this context does not follow from recognition of the link between sexual orientation and same-sex marriage.

## V. ARGUMENT

### **Introduction:**

In *Masterpiece Cakeshop*, the United States Supreme Court was faced with the same essential question in *Arlene's I*: Under what circumstances an asserted "expressive" business that provides opposite sex wedding services to the public has a right under the U.S. Constitution to refuse

to also provide those services for same-sex couples. In a 7-2 ruling with three concurring opinions and one dissent, a majority of the Court resolved the case on narrow grounds, holding the State of Colorado’s adjudication of the constitutional claims there infringed upon the business owner’s Free Exercise of Religion, because it evidenced animus in two ways: 1) Comments by the adjudicators of his claim denigrating his religious beliefs; and 2) inconsistent enforcement of the Colorado Antidiscrimination Act (CADA).

The Court’s majority declined to rule on the other federal constitutional issues, including free association, free speech and hybrid rights. This was not due to lack of opportunity. In addition to the parties’ briefs, at least 94 amicus briefs were filed in *Masterpiece Cakeshop*. See <https://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn>. Many of these briefs focused exclusively on freedom of speech.<sup>2</sup> See *id.* (see, e.g., Amicus Brief of Cato Institute; Amicus Brief of Freedom of Speech Scholars; Amicus Brief of First Amendment Scholars).

Nonetheless, Arlene’s argues for a broad scope of review that “requires this Court to reconsider the entire case through the prism of *Masterpiece*.” Arlene’s Op. Br. at 17 (internal quotations omitted). The opinion, however, presents one key issue to the Court on remand: Whether the

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<sup>2</sup> Scholars have noted, and some lamented, the Court’s restraint in *Masterpiece Cakeshop*. See, e.g., Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. Rev. Discourse 154 (2019) (noting *Masterpiece Cakeshop* “avoided reaching many of the main First Amendment issues in the case and had instead ruled narrowly, giving us a prime example of ‘judicial minimalism’”; Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 Harv. L. Rev. 133, 163 (2018) (“the free speech questions raised by *Masterpiece* remain unanswered,” as “[t]he Court in *Masterpiece* chose not to address free speech” (brackets added)); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 Yale L. Journal Forum 201, 202 & n.5 (2018) (surveying scholarly materials and noting scholars agree “the Court’s opinion is narrowly concerned with neutrality in the adjudication of religious exemption claims”).

State's conduct, including differing responses to alleged WLAD violations, evidenced animus toward Arlene's religion. On this issue, a State's differing responses should implicate constitutional concerns only if the owners and patrons in each case are similarly situated. This Court correctly recognized a link between sexual orientation and same-sex marriage, and discrimination based on same-sex marriage constitutes sexual orientation discrimination. Religion presents a different context with distinct concerns, and public accommodation discrimination based on creed should require proof that a substantial factor motivating discrimination was a patron's religion.

**A. The GVR Order Remanded For Further Consideration In Light Of *Masterpiece Cakeshop*; Free Speech And Forced Attendance Are Beyond The Scope Of Remand Because The Relevant Law On These Issues Was Neither Refined Nor Resolved In That Opinion.**

**1. Remand is limited to matters within the scope of the GVR Order, and issues resolved in earlier proceedings that are outside the scope of the GVR Order become the law of the case.**

28 U.S.C. § 2106 confers upon the U.S. Supreme Court the power to grant a petition for certiorari, vacate a lower court judgment and remand for further proceedings (GVR). When a case is remanded with instructions, courts should confine their review to the limitations established by the remand order. *See Gonzalez v. Justices of Mun. Court of Boston*, 420 F.3d 5, 8 (1<sup>st</sup> Cir. 2005) (noting "when the Supreme Court remands in a civil case, the court of appeals should confine its ensuing inquiry to matters coming within the specified scope of the remand" (citations omitted)). Courts generally lack authority to revisit issues outside the scope of remand, which become the law of the case. *See United States v. Haynes*, 468 F.3d 422, 426 (6<sup>th</sup> Cir. 2006) (stating law of the case generally bars revisiting prior rulings

unless “a subsequent contrary view of the law is decided by the controlling authority”); *Gradsky v. United States*, 376 F.2d 993, 996 (5<sup>th</sup> Cir. 1967) (“Except that which we are mandated to review, our previous rulings are the law of the case and will not now be reconsidered”).

**2. *Masterpiece Cakeshop* provides no basis for revisiting this Court’s free speech ruling in *Arlene’s I*.**

Arlene’s argues *Masterpiece Cakeshop* “provided general guidance for lower courts tasked with deciding the difficult and delicate free-exercise and free speech questions raised in cases like this one.” Arlene’s Op. Br. at 17. Its citations to that opinion, however, are scarce, and its argument rests primarily on authorities presented and argued in *Arlene’s I*. A careful reading of *Masterpiece Cakeshop* reveals the Court neither clarified nor resolved the scope of free speech protection in this context, and instead issued a restrained opinion that avoided the issue and left it for a future case.<sup>3</sup>

Despite extensive free speech argument, the majority declined to reach the issue.<sup>4</sup> In concurrence, Justice Thomas noted the majority’s re-

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<sup>3</sup> Arlene’s also cites two cases issued after *Masterpiece Cakeshop*: *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018) (regarding free speech rights of crisis pregnancy center to refuse to disseminate abortion information), and *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (regarding free speech rights of union nonmembers to refuse to pay compulsory union fees). The GVR Order did not direct this Court to examine its opinion in *Arlene’s I* in light of either of these opinions, despite the fact that they were issued one and two days, respectively, after the Court issued the GVR Order. In any case, neither opinion speaks to the particular free speech question before the Court -- whether floral arrangements in public accommodations constitute protected expression.

<sup>4</sup> The free speech question was a central issue at oral argument. See Transcript of Oral Argument, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n* (No. 16-111), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-111\\_f314.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf). Justice Breyer attempted to bring the free speech questioning into focus:

straint, and urged a holding that would extend free speech protection to expressive businesses in this context. *See Masterpiece Cakeshop*, 138 S.Ct. at 1742 (Thomas, J., concurring) (concluding “[t]he conduct that the Colorado Court of Appeals ascribed to Phillips — creating and designing custom wedding cakes — is expressive” (brackets added)). Justice Ginsburg also recognized the majority did not rule on free speech. *See id.*, 138 S.Ct. at 1748 n.1 (Ginsburg, J., dissenting) (noting “the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. . . Nor could it, consistent with our First Amendment precedents”).

In an effort to place the issue before the Court, Arlene’s references statements by the majority as to the “difficult” free speech issue, *see Arlene’s Op. Br.* at 17, but these statements only offer context for the Free Exercise issue, reaching no conclusion on free speech:

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an example of protected speech. . . . Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.

138 S.Ct. at 1723-24 (brackets added).

Arlene’s other referenced passages offer no greater support. It cites the majority opinion for the proposition that the Court “recognized the important distinction between ‘customers’ rights to goods and services’ and

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[W]hat is the line? That's what everybody is trying to get at ... the reason we're asking these questions is because obviously we would want some kind of distinction that will not undermine every civil rights law ... including the African Americans, including the Hispanic Americans, including everybody who has been discriminated against in very basic things of life, food, design of furniture, homes, and buildings. Transcript at 18-19 (brackets added).

customers’ demands that creators of custom art ‘exercise the right of [their] own personal expression for . . . a message [they cannot] express in a way consistent with [their] religious beliefs.’” Arlene’s Op. Br. at 17 (quoting *Masterpiece Cakeshop*, 138 S.Ct at 1728 (brackets added)). Reading the full text of the quoted passage in context, however, reveals the Court did not itself endorse free speech rights for asserted creative businesses, like bakers or florists, but merely focused the Free Exercise inquiry by underscoring the free speech interests *the baker personally perceived*:

*[Phillips] argues* that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. *As Phillips would see the case*, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context *the baker likely found it difficult* to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

138 S.Ct. at 1728 (brackets and emphasis added). The Court concludes:

Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case. The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

138 S.Ct. at 1729.

Arlene’s also contends that *Masterpiece Cakeshop* clarified that the free speech inquiry should focus on the expressiveness of the product. It insists this Court’s free speech analysis improperly focused on the “conduct of selling those arrangements,” rather than the “expressiveness of her wedding floral arrangements.” *See* Arlene’s Op. Br. at 16. In fact, *Masterpiece*

*Cakeshop* acknowledges the issue, but declines to resolve whether cakes constitute expression for First Amendment purposes:

The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

*Masterpiece Cakeshop*, 138 S.Ct. at 1723.

Even were the Court inclined to reach the issue, the argument rests on a misreading of this Court’s opinion. It is true the Court initially described the issue as whether “the conduct at issue here — her commercial sale of floral wedding arrangements—amounts to ‘expression’ protected by the First Amendment.” 187 Wn.2d at 831. However, this statement begins a careful study of the free speech arguments, including examination of the asserted expressive elements of Arlene’s floral designs. The Court acknowledges Arlene’s claim that her floral arrangements are expressive:

Stutzman contends that her floral arrangements are “speech” for purposes of First Amendment protections because they involve her artistic decisions. . . . [S]he argues for a broad reading of protected speech that encompasses her “unique expression,” crafted in “petal, leaf, and loam.” Ingersoll and the State counter that Stutzman’s arrangements are simply one facet of conduct—selling goods and services for weddings in the commercial marketplace—that does not implicate First Amendment protections at all.

187 Wn.2d at 832. After reviewing federal free speech precedent, the Court finds no sufficiently expressive component to Arlene’s conduct to warrant constitutional protection, *whether the focus is on the conduct of selling or the asserted expressiveness of the arrangements themselves*:

Stutzman’s conduct—whether it is characterized as creating floral arrangements, providing floral arrangement services for opposite-sex weddings, or denying those services for same-sex weddings—is

not like the inherently expressive activities at issue in these cases. Instead, it is like the unprotected conduct in FAIR....

187 Wn.2d at 836.

In sum, while *Masterpiece Cakeshop* recognized that “religious and philosophical” views about marriage are “in some instances protected forms of expression,” *see* Arlene’s Op. Br. at 32 (quoting *Masterpiece Cakeshop*, 138 S.Ct. 1727), it ultimately declined to determine whether those circumstances were present on the facts before it. Instead, the Court’s carefully circumscribed opinion leaves resolution of the “difficult” free speech issue for a future case. This Court carefully considered the free speech question in *Arlene’s I*. *Masterpiece Cakeshop* did not alter the legal analysis this Court applied, and it provides no basis for revisiting the free speech ruling in *Arlene’s I*. This Court should decline Arlene’s invitation to read between the lines of *Masterpiece Cakeshop*, seeking the answer to a question the majority of the U.S. Supreme Court ultimately decided not to resolve.

**3. *Masterpiece Cakeshop* provides no basis for addressing Arlene’s compelled participation argument.**

Arlene’s also contends the summary judgment order and injunction requires her to participate in same-sex weddings in violation of her Free Exercise rights. Arlene’s previously made this argument in *Arlene’s I*. *See* Arlene’s I Op. Br. at 3, 35-36. The bulk of Arlene’s legal argument here recites the same arguments and authorities it presented in *Arlene’s I*. Indeed, Arlene’s cites just two statements in *Masterpiece Cakeshop* that it maintains put this issue before the Court. Neither of these references provide sufficient clarity or guidance on this question to warrant addressing the issue.

First, Arlene’s cites *Masterpiece Cakeshop* for the proposition that “*Masterpiece* itself identified personal attendance at a wedding as a factor impacting a free-exercise claim like Mrs. Stutzman’s.” Arlene’s Op. Br. at 26. It appears to be referencing the following passage, which recognized the “possibility” of concerns arising from compelled participation:

[D]ifficulties arise in determining whether a baker has a valid free exercise claim. *A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.* Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality.

*Masterpiece Cakeshop*, 138 S.Ct. at 1723. Far from offering guidance, the Court acknowledged the issue but shed no light on its resolution.

The only clarity the Court offers is in a later passage, when it states *religious officials* are entitled to exemptions from compelled participation:

[I]t can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.

*Masterpiece Cakeshop*, 138 S.Ct. at 1727 (brackets added). Significantly, the Court immediately follows this statement by recognizing the right must be constrained:

Yet if that exception were not confined, 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.

*Id.*, 138 S.Ct. at 1727.

The recognition in *Masterpiece Cakeshop* of the special role occupied by clergy and religious institutions finds substantial support in statutory and constitutional law. Legislative enactments recognize the solemn role of religious institutions and clergy, frequently excusing clergy and churches from obligations that implicate religious freedom. *See, e.g.*, RCW 26.04.010(4)-(6) (permitting religious officials and organizations to refuse participation in weddings); RCW 49.60.040(11) (excluding nonprofit religious and sectarian organizations from WLAD definition of employer); *see also* VT Stat. Ann. tit. 18, § 5144(c); Conn. Gen. Stat. Ann. § 46b-22b(b); D.C. Code Ann. § 46-406(c); N.Y. Dom. Rel. Law § 10-b(1); Raymond C. O'Brien, *Family Law's Challenge to Religious Liberty*, 35 U. Ark. Little Rock L. Rev. 3, 52 (2012) (surveying statutes and noting “[a]most all of the states permitting same-sex marriage provide an exemption for clergy who object to performing the solemnizations based on religious beliefs” (brackets added)). This Court’s jurisprudence has similarly reflected solicitude for clergy and religious institutions. *See e.g. State v. Motherwell*, 114 Wn.2d 353, 788 P.2d 1066 (1990) (counselors functioning in capacity as clergy exempted from child abuse reporting statute); *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 644-45, 211 P.3d 406 (2009) (granting church exemption from permit requirement); *Munns v. Martin*, 131 Wn.2d 192, 930 P.2d 318 (1997) (similar). This deference has been far less common in cases addressing the free exercise rights of individuals. *See, e.g., Backlund v. Bd. of Comm'rs of King Cty. Hosp. Dist. 2*,

106 Wn.2d 632, 642-44, 724 P.2d 981 (1986) (regarding mandatory professional liability insurance); *State v. Meacham*, 93 Wn.2d 735, 740-41, 612 P.2d 795 (1980) (regarding paternity test for putative fathers).

Arlene's argument here relies on arguments and authorities it offered in *Arlene's I*. The limited references in *Masterpiece Cakeshop* provide no clarity regarding the application of constitutional principles to the context here. As with its free speech claim, Arlene's offers no basis for revisiting its compelled participation claim, and the Court should decline to do so.

**B. This Court Correctly Concluded In *Arlene's I* That Same-Sex Marriage Is Inextricably Linked To Sexual Orientation, And This Conclusion Does Not Require Recognition Of A Similar Link Between Religion And Religiously-Motivated Conduct.**

**1. Overview of the WLAD public accommodation provision and the substantial factor test.**

The WLAD prohibits discrimination in public accommodations on the basis of, among other things, "race, creed, color, national origin [and] sexual orientation." RCW 49.60.215 (brackets added). A business owner is liable for public accommodation discrimination upon proof that:

- (1) The customer is a member of an enumerated protected class;
- (2) The business owner purposefully refuses to provide the customer a public accommodation and the protected characteristic is a substantial factor in the refusal; and
- (3) The customer is denied full enjoyment of the accommodation, resulting in being treated as not welcome, accepted, desired, or solicited.

*See Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637-42, 911 P.2d 1319 (1996). A claim is established by proof that the conduct was purposeful, and that the protected characteristic was a substantial factor in the outcome. *See*

*E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 910, 726 P.2d 439 (1986) (purposeful); *Scrivener v. Clark College*, 181 Wn.2d 439, 444-47, 334 P.3d 541 (2014) (substantial factor; citing *Fell*).

**2. A substantial factor in Arlene’s denial of service was Ingersoll’s same-sex wedding, which this Court properly recognized is inextricably linked to sexual orientation.**

A substantial factor in Arlene’s refusal to accommodate Ingersoll was his request for same-sex wedding services, and by extension, his sexual orientation. In *Arlene’s I*, Arlene’s contended it discriminated on the basis of same-sex marriage, not sexual orientation. This Court rejected Arlene’s effort to disaggregate the status of sexual orientation from the conduct of same-sex marriage, relying on jurisprudence recognizing the fundamental liberty interests encompassed by private matters central to one’s identity:

[N]umerous courts—including our own—have rejected this kind of status/conduct distinction in cases involving statutory and constitutional claims of discrimination. . . . [L]ast year, the Supreme Court likened the denial of marriage equality to same-sex couples itself to discrimination, noting that such denial “works a grave and continuing harm,” and is a “disability on gays and lesbians [that] serves to disrespect and subordinate them.” *Obergefell v. Hodges*, —U.S. —, 135 S.Ct. 2584, 2604, 2607-08, 192 L.Ed.2d 609 (2015)... In accordance with this precedent, we reject Stutzman's proposed distinction between status and conduct fundamentally linked to that status.

*Arlene’s I*, 187 Wn.2d at 823-25 (brackets added; citations omitted).

Recognition of the inextricable link between sexual orientation and closely-linked conduct, like same-sex marriage, is grounded in well-established law that has grown up around the constitutional right to privacy. The Fourteenth Amendment provides the State shall not “deprive any person of life, liberty or property, without due process of law.” This clause has been interpreted to protect not just the rights enumerated in the Bill of Rights, but

also “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Obergefell*, 135 S.Ct. at 2597-98 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)). These “personal choices” have included, among other things, contraception, *see Griswold*, 381 U.S. at 485, abortion, *see Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and marriage, *see Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

These core fundamental rights have been extended to LGBT persons. In *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), the Court held that criminalizing same-sex conduct violated Due Process, emphasizing the constitutional dimensions of private matters like marriage and sex: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Lawrence*, 539 U.S. at 574 (citations omitted).

The Court faced the issue of same-sex marriage in *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) and *Obergefell*, 135 S.Ct. 2584. In *Windsor*, the Court struck down the federal Defense of Marriage Act (DOMA), finding that DOMA selected out LGBT persons for disfavor in violation of the Fifth Amendment. *See Windsor*, 570 U.S. at 769-70. In *Obergefell*, the Court recognized a constitutional *right* to same-sex marriage. Drawing from cases recognizing the rights of LGBT

persons, as well as constitutional jurisprudence concerning intimate choices that embody one’s identity, the Court reaffirmed such matters are protected from state intervention and extend to heterosexuals and homosexuals alike: “[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” *Obergefell*, 135 S.Ct. at 2604 (brackets added).

The link between sexual orientation and same-sex marriage is grounded in this circumscribed category of fundamental privacy rights. *See Obergefell*, 138 S.Ct. at 2602 (noting fundamental rights require “careful description” lest the category become too expansive, but “[t]he right to marry is fundamental as a matter of history and tradition”). With sexual orientation and closely-linked conduct, like sex and same-sex marriage, the nexus is so close that the conduct has been said to define the class. *See Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (noting same-sex conduct “defines the class” of gay persons); *see also Romer v. Evans*, 517 U.S. 620, 641, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (Scalia, J., dissenting) (same).

3. **While the Court properly recognized an inextricable link between sexual orientation and same-sex marriage, a claim of discrimination on the basis of creed under the WLAD’s public accommodation provision should require proof that a patron’s religion was itself a substantial factor motivating the denial of service.**

The U.S. Supreme Court remanded in light of *Masterpiece Cakeshop*, which found that the Colorado Civil Rights Commission’s inconsistent granting of exemptions constituted evidence of religious animus. Importantly, it did *not* hold that a refusal to serve same-sex couples

for religious reasons is legally equivalent to a refusal to serve customers seeking anti-gay, albeit religiously-motivated, messages. Rather, it held only that the Colorado Civil Rights Commission’s offering of conflicting rationales for its differential treatment offended Free Exercise:

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell “birthday cakes, shower cakes, [and] cookies and brownies”... to gay and lesbian customers as irrelevant.

*Masterpiece Cakeshop*, 138 S.Ct. at 1730. The Court found the inconsistent rationales there dispositive, but acknowledged there may be principled ways to explain differential treatment: “There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public.” *Id.*, 138 S.Ct. at 1728.

Arlene’s suggests the scenarios are legally equivalent, and that because the Court recognized a link between sexual orientation and same-sex marriage, it should also recognize a link between religion and religiously-motivated conduct in the context of public accommodations:<sup>5</sup>

According to the State, same-sex marriage is inextricably intertwined with sexual orientation, but Christians’ religiously motivated pro-life speech is not inexorably tied to creed . . . even though the link between religion and pro-life views is well known and was recognized by Bedlam Coffee’s owner. *If Mrs. Stutzman’s religious*

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<sup>5</sup> This argument also appears to animate Justice Gorsuch’s concurrence in *Masterpiece Cakeshop*. See 138 S.Ct. at 1735-36. This reasoning was not adopted by the majority.

*objection to celebrating same-sex marriage is inextricably linked to sexual orientation, then the coffee shop owner's secular objection to Christian's faith-based speech is inexorably tied to Christianity.*

Arlene's Reply Br. at 8-9 (emphasis added).

This Court has not had the opportunity to address whether religion and religiously-motivated conduct should be linked in the way that link has been recognized in the context of sexual orientation. There are reasons to decline to do so, however. Private matters like sex and marriage belong to a small subset of intimate choices recognized in constitutional jurisprudence as central to personal dignity. While the nexus between sexual orientation and marriage or sex is so close as to "define the class," religion can manifest in a wide range of conduct that cannot be reasonably circumscribed.

In a related context, the U.S. Supreme Court has recognized that religious faith and religiously-motivated practice are analytically distinct. *See Employment Div. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith*, the Court considered Free Exercise protections afforded to religious observers for religiously-motivated conduct. It held the fact that conduct is undertaken for religious reasons does not entitle one to protection from neutral and generally applicable laws:

Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and we decline to do so now.

*Smith*, 494 U.S. at 882. *See also Open Door Baptist Church v. Clark Cty.*, 140 Wn.2d 143, 162, 995 P.2d 33 (2000) (noting the Court should avoid "a system 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” (quoting *Smith*, 494 U.S. at 890)). In reaching its conclusion, *Smith* suggested religion and religious practice can be disaggregated:

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires....But the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts....It would be true, we think...that a State would be “prohibiting the free exercise [of religion]” if it sought to ban such act or abstentions only when they are engaged in for religious reasons or only because of the religious belief that they display....Respondents in the present case, however...contend that their religious motivation...places them beyond the reach of a criminal law that is not specifically directed at their religious practice.

*Smith*, 494 U.S. at 877-78 (brackets added).

While *Smith* was examining Free Exercise principles, its analysis is instructive. Courts are poorly situated to evaluate the centrality of one’s religious practice to their faith, so when a religious observer asserts a religious motivation for any wide range of conduct, the reasonableness or nexus to the particular religious faith cannot be questioned. *See Smith*, 494 U.S. at 906-07; *see also Backlund*, 106 Wn.2d at 639. The Court in *Smith* recognized that religious motivation cannot by that fact alone cloak regulatable conduct with protection. Instead, religious observers should be protected in the practice of their religion from being targeted on that basis.

Similarly, this Court should clarify that for a religious patron to seek protection under the public accommodation provision of the WLAD, a business owner’s denial of service should be on the basis of religion. A denial of service based on a belief that the patron’s message is offensive, without more, does not implicate a protected class.<sup>6</sup> In contrast, if a

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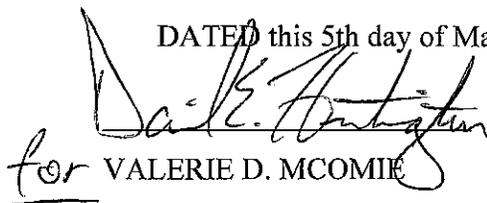
<sup>6</sup> Offensiveness as perceived by a business owner is distinguishable from offensiveness perceived by the State. Free speech protections prohibit the State from discriminating

substantial factor motivating discrimination is a patron's membership in a protected class, whether religion or sexual orientation, the WLAD may be violated.<sup>7</sup> The link recognized between sexual orientation and same-sex marriage is one of a small subset of privacy interests grounded in constitutional jurisprudence, and the nexus is so close as to "define the class." These qualities are not present in the context of religion, and the Court should decline to extend its reasoning to that context.<sup>8</sup>

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on remand.

DATED this 5th day of March, 2019.

  
for VALERIE D. MCOMIE

  
DANIEL E. HUNTINGTON

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against individuals based on *its* view of their message. No such constitutional concerns are implicated, however, when a business owner denies service based on his view of offensiveness. And because expression of political viewpoints is not itself a protected category under the WLAD, no statutory concerns should be implicated either.

<sup>7</sup> This is not to say that refusing service based on religiously-motivated conduct could never be actionable, just that the intent requirement cannot be met merely by proof of knowledge that conduct was religiously-motivated. In some cases, particularly where the conduct is understood to be engaged in by one particular religious group, discrimination on that basis may be evidence of animus. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 760, 122 L.Ed.2d 34 (1993), for instance, the U.S. Supreme Court stated "[a] tax on wearing yarmulkes is a tax on Jews." 506 U.S. at 270. This illustrated its larger point that when targeted conduct is associated solely with one group, intent to disfavor may be *presumed*: "Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Id.* *Bray* did *not* find an inextricable link as a matter of law between religious faith and practice.

<sup>8</sup> The Court's recognition of a duty on the part of employers to reasonably accommodate religious practice in *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014), does not alter the analysis here. That opinion rested in part on the disparate impact doctrine that has been recognized in the context of employment discrimination. Additionally, unlike the situation at issue here, the duty there was limited in scope: 1) it applied only in the context of an existing employment relationship, 2) after an employee has requested specific accommodations, and 3) the requested accommodation must be reasonable.

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I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 5th day of March, 2019, I served the foregoing document by email to the following persons:

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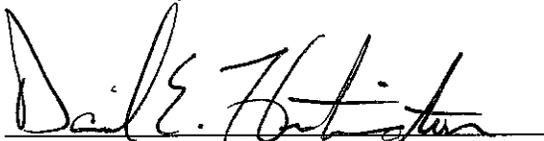
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