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NO. 91615-2

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

ARLENE'S FLOWERS, INC., dba ARLENE'S FLOWERS AND GIFTS,  
and BARRONELLE STUTZMAN,

Appellants.

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ROBERT INGERSOLL and CURT FREED,

Respondents,

v.

ARLENE'S FLOWERS, INC., dba ARLENE'S FLOWERS AND GIFTS,  
and BARRONELLE STUTZMAN,

Appellants.

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**STATE OF WASHINGTON'S ANSWER TO AMICUS BRIEFS**

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## I. INTRODUCTION

None of the amicus briefs supporting Appellants raise any new or compelling reasons for this Court to reverse the superior court in this case. Rather, as the amicus briefs supporting Appellees point out, they either argue issues not presented on remand, or they distort the facts and law to argue discriminatory hostility where none is present. This Court should again affirm the superior court.

## II. ARGUMENT

### A. **The Supreme Court Remanded for Further Consideration in Light of What *Masterpiece* Decided, Not What It Did Not Decide**

The United States Supreme Court remanded this case “for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*,” 138 S. Ct. 1719 (2018). *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). That order is not a mandate to this Court to start over. Rather, as explained in the amicus brief filed by the Washington State Association for Justice Foundation (WSAJF), at pages 5-6, this Court should confine its review to issues that are within the scope of the remand. The court in *Gonzalez v. Justices of Municipal Court of Boston*, 420 F.3d 5, 7 (1st Cir. 2005) (cited in Am. Br. WSAJF), explained that a “GVR” order “is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an

opportunity to reconsider that decision and, if warranted, to revise or correct it.” It is not “a thinly-veiled direction to alter . . . course”—it simply recognizes that the *Masterpiece* decision is pertinent and directs this Court to determine whether anything that the *Masterpiece* Court said demands a different result. *Gonzalez*, 420 F.3d at 7. *Accord Communities for Equity v. Michigan High Sch. Athletic Ass’n*, 459 F.3d 676, 680 (6th Cir. 2006); *Wright v. State*, 256 So. 3d 766, 769-70 (Fla. 2018) (citing cases).

The baker in *Masterpiece* made the same three federal constitutional arguments that Defendants now argue on remand: that the state anti-discrimination law is forcing their compelled speech in violation of the Free Speech Clause of the First Amendment,<sup>1</sup> that the state anti-discrimination law is not neutrally and generally applied to their religious objections,<sup>2</sup> and that their claims were entitled to strict scrutiny under a “hybrid rights” theory.<sup>3</sup> The Supreme Court in *Masterpiece* did not decide the compelled speech claim and made no mention of any hybrid right. As noted in the WSAJF amicus brief, at pages 3-5 and 6-13, the Court was presented with both issues and had adequate opportunity to address them. It did not, and

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<sup>1</sup> See Br. Pet’rs at 16-37, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), <http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-ts.pdf>. Compare Br. Appellants 32-44 (on remand, filed Nov. 13, 2018).

<sup>2</sup> See Br. Pet’rs at 38-46. Compare Br. Appellants at 18-31 (on remand, filed Nov. 13, 2018).

<sup>3</sup> See Br. Pet’rs at 46-48. Compare Br. Appellants at 31-32 (on remand, filed Nov. 13, 2018).

there is nothing in the *Masterpiece* decision that requires this Court to revisit its decision on those issues in this case.<sup>4</sup> Consequently, the amicus briefs seeking to support Defendants’ compelled speech and hybrid rights arguments are misplaced and this Court need not consider them further.<sup>5</sup>

The Court in *Masterpiece* held only that the hearing provided by the Colorado Civil Rights Commission was tainted by impermissible hostility towards the baker’s beliefs, in violation of the Free Exercise Clause. It found that the Colorado Civil Rights Commission “showed elements of a clear and impermissible hostility” towards the sincere religious beliefs

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<sup>4</sup> The WSAJF amicus brief also correctly notes, at page 6 note 3, that the Supreme Court did not direct this Court to examine its decision in light of *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018), or *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018), even though those decisions were issued one and two days, respectively, after the order remanding to this Court. The issuance of those decisions thus does not expand the scope of the remand in this case. *See* Br. Appellants at 33 (on remand, filed Nov. 13, 2018) (arguing for expansion).

<sup>5</sup> Two amicus briefs supporting Defendants focus entirely on compelled speech and are beyond the scope of the Supreme Court’s remand in their entirety:

- the amicus brief filed by the Cato Institute, and
- the amicus brief filed by the Center for Constitutional Jurisprudence.

In addition, two amicus briefs devote substantial portions of their arguments to compelled speech; those portions of those briefs are beyond the scope of the remand:

- the amicus brief filed by the Becket Fund for Religious Liberty (pages 15-17), and
- the multistate amicus brief filed by Arkansas and Texas (pages 3-17).

Finally, two amicus briefs attempt to resurrect a hybrid rights argument, even though *Masterpiece* said nothing at all about that argument; those portions of those briefs also are beyond the scope of the remand:

- the multistate amicus brief filed by Arkansas and Texas (pages 18-19); and
- the amicus brief filed by Religious Liberty Attorneys (pages 9-12).

motivating the baker’s refusal to bake a cake for a same-sex marriage, which “cast doubt on the fairness and impartiality of the Commission’s adjudication of [the] case.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*,” 138 S. Ct. 1719, 1729-30 (2018).

The U.S. Supreme Court remanded this case for further consideration in light of the decision in *Masterpiece*. This Court has no need to revisit issues never addressed in *Masterpiece*. See Br. Resp’t State at 13-18 (on remand, filed Jan. 14, 2019) (summarizing *Masterpiece* decision), 24-25 (setting out issues on remand).

**B. There Is No Merit to Any Claim of Hostility Towards Religion**

**1. The record in this case does not support such a claim**

Several amicus briefs supporting Defendants summarily assert hostility, but the Becket Fund dwells on it at some length. Am. Br. Becket Fund at 1-7. Unfortunately, it does so by repeatedly misrepresenting statements made in previous briefs filed by the State as purported evidence of the Attorney General’s anti-religious hostility.<sup>6</sup> Three examples illustrate the tactic.

On page 4 of its brief, the Becket Fund claims that a brief filed in the trial court “asserted that Stutzman lost her free exercise rights when she

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<sup>6</sup> That amicus brief attributes each statement to the Attorney General personally, even though the Attorney General did not write the cited briefs and even though each brief was filed for the State of Washington, not the Attorney General.

opened her business 40 years ago.” The sentence cited in the footnote is the final sentence in a paragraph citing decisions of this Court and the U.S. Supreme Court for the premise that persons choosing to operate businesses in Washington “‘necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity,’ even where they claim a religious objection.” CP at 389 (quoting *Backlund v. Bd. of Comm’rs of King Cty. Hosp. Dist. 2*, 106 Wn.2d 632, 648, 724 P.2d 981 (1986); citing *United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (holding that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity”)). Accurate reliance on decisions of this Court and the U.S. Supreme Court cannot be characterized as evidence of hostility.

The Becket Fund also finds hostility in the State’s argument that allowing businesses to assert personal religious beliefs as exemptions to anti-discrimination laws would leave those laws with little effect. Am. Br. Becket Fund 5-6. But both the *Masterpiece* Court and this Court recognized the potential harm to civil rights protections of a broad religious exemption from anti-discrimination laws. See *Masterpiece*, 138 S. Ct. at 1727 (summarizing the potential harm in light of “the history and dynamics of

civil rights laws that ensure equal access to goods, services, and public accommodations”); *State v. Arlene’s Flowers, Inc.*, 187 Wn.2d 804, 851-52, 389 P.3d 543 (2017) (“As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined.” (Footnote omitted.)).

On page 5 of the Becket Fund amicus brief, it asserts that the State has treated Ms. Stutzman’s religious claims as “mere pretext,” claimed only to evade anti-discrimination laws. The State did no such thing. To the contrary, the State specifically did not (and does not) doubt “that Ms. Stutzman has a sincerely held religious belief that prompts her to oppose marriage between people of the same sex.” *See* CP at 387. Both Defendants and the trial court acknowledged that the State was not contesting the sincerity of Ms. Stutzman’s religious belief. *See* CP at 2355, 2380-81.

The State did point out—accurately—that discrimination in our country’s history has sometimes been justified on religious grounds.<sup>7</sup> *See*,

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<sup>7</sup> Becket Fund criticizes the State for observing—accurately—that “Ms. Stutzman’s own Southern Baptist faith for decades offered a purportedly ‘reasoned religious distinction’ for race discrimination.” Am. Br. Becket Fund at 5 n.2 (quoting Wash. Resp. Br. at 38 (Dec. 23, 2015)). But even the Defendants’ own expert opined that

*e.g.*, CP at 2127 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (religion-based policy prohibiting interracial dating and marriage)). But that is simply the factual background for the U.S. Supreme Court’s consistent rejection of that basis for discrimination. As the Court explained in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), the constitutional right to exercise one’s religion “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” (Internal quotation marks omitted.) “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.” *Smith*, 494 U.S. at 878-79. ““Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.”” *Id.* at 879

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a merchant currently should be allowed to refuse to serve an interracial couple if the merchant has a religious objection to such a relationship. CP at 2101. At no time has the State suggested or implied that Ms. Stutzman believes in or engages in any racial discrimination.

(quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940)).

Our nation’s history of discrimination is also the factual background for the U.S. Supreme Court’s consistent refusal to create personal religion-based exemptions from neutral and generally applicable antidiscrimination laws governing public accommodations. *See Masterpiece*, 138 S. Ct. at 1727 (explaining that while religious and philosophical objections to civil rights protections are protected, “it is a general rule that such 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” (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) (*per curiam*); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995))).<sup>8</sup>

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<sup>8</sup> *See also* Am. Br. Church-State Scholars at 19-20:

[I]f *Masterpiece* can cite *Piggie Park* while noting limits on the scope of religious exemptions from civil rights laws, there is no reason why state officials cannot recognize the painful history that led to laws against denying service based on race or other characteristics. It is not unconstitutional for state officials to call discrimination by its name. They should not gratuitously demean those who discriminate based on religious objections, but they are free to explain and vindicate the historical purposes of civil rights laws—including the [Washington Law Against Discrimination].

At all times in this case, the State has been respectful toward Ms. Stutzman's religious beliefs and toward religious beliefs in general. But the State has not allowed those beliefs to justify violations of the Washington Law Against Discrimination. That is not evidence of hostility; it is a good-faith attempt to uphold the law as articulated in statute and by the courts. And accurately citing and applying the decisions of this Court and the U.S. Supreme Court in light of their historical and legal context are proper methods of legal argument, not evidence of hostility toward Ms. Stutzman's religious beliefs or toward religion generally.

**2. The Bedlam Coffee incident does not support a claim of hostility towards religion**

Like the Defendants, the multistate amicus brief led by Arkansas and Texas attempts to portray the Bedlam Coffee incident and Ms. Stutzman's refusal as directly comparable, and therefore as "proof" of selective enforcement. Am. Br. Arkansas et al. at 13-14, 17-18. Their attempt is amply refuted by other amicus briefs, especially the amicus brief filed by Church-State Scholars. As the Church-State Scholars note, the available evidence<sup>9</sup> indicates that the owner of Bedlam Coffee did not exclude the graphic fliers and the persons distributing them from his shop for any reason related to religion. Am. Br. Church-State Scholars at 23. And,

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<sup>9</sup> This evidence includes the owner's public statements that he did not ask the anti-abortion activists to leave because they were Christian, or for any reason related to religion. See Br. Resp't State at 22-23 (on remand, filed Jan. 14, 2019), and citations therein.

as the Scholars carefully explain, the argument made by Defendants (and by Arkansas et al.) erroneously assumes uniformity of religious belief—that any refusal to accommodate an anti-abortion message (even one that is graphic or shocking) *necessarily* is anti-Christian. Am. Br. Church-State Scholars at 15.<sup>10</sup> “Treating as anti-Christian any opposition to the means or ends of the Bedlam protestors is an effort to paint political disagreement as an attack upon Christians. This Court should emphatically reject such an effort.” Am. Br. Church-State Scholars at 16. Because the coffee shop owner’s decision to expel patrons was not based on religion, it is not the comparator Defendants and amici Arkansas et al. want it to be.

The religious exemption Defendants seek could claim one other set of victims—people of different faiths—which is not acknowledged by Defendants or their amici. But the amicus brief of Religious and Civil Rights Organizations explains how anti-discrimination public accommodation laws protect against discrimination based on the victim’s religious faith or belief, and how the type of religiously motivated exemption Defendants seek would undermine those protections for religious freedom. Am. Br. Religious & Civil Rights Organizations at 12-20.

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<sup>10</sup> See also Am. Br. Episcopal Bishops et al. at 10-11 (noting the diversity of religious views in America).

### III. CONCLUSION

Some of the amici supporting Defendants simply echo Defendants' arguments and offer their agreement. Others attempt to raise issues not properly before this Court on remand. None of the amici supporting Defendants offers a new or compelling reason to find that this case is similar to or controlled by *Masterpiece*. This Court should again affirm the superior court.

RESPECTFULLY SUBMITTED this 22nd day of March 2019.

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DATED this 22nd day of March 2019, at Olympia, Washington.

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March 22, 2019 - 4:09 PM

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