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

SUPPLEMENTAL BRIEF OF RESPONDENTS ROBERT INGERSOLL AND CURT FREED

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SUPPLEMENTAL BRIEF

Respondents Robert Ingersoll and Curt Freed submit this supplemental brief in response to Petitioners' Supplemental Brief, which requests that the Court at a minimum grant, vacate, and remand this case in light of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Petitioners now claim this case, like *Masterpiece Cakeshop*, was tainted by religious hostility in the adjudication of the complaint. Both because Petitioners never raised this claim in their petition for certiorari, and because there is no evidence in the record to support the assertion in any event, the Court should deny certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

Respondents Robert Ingersoll and Curt Freed are gay men who have been in a committed relationship since 2004. Pet. App. 3a. The two became engaged in 2012, and they originally planned a wedding for September 2013, on their nine-year anniversary. *Id.* The wedding was to be at a well-known outdoor wedding venue near their home, with over 100 friends and family members. *Id.* They also planned to buy flowers for the wedding from Petitioner Arlene's Flowers, Inc. (the "Florist"), where they had purchased flowers on many occasions and which they viewed as "their florist." *Id.* at 4a.

On February 28, 2013, Mr. Ingersoll drove to the Florist to talk to someone about ordering flowers for his wedding. Pet. App. 4a. He was informed by one of the Florist's employees that he would have to speak to the owner, Petitioner Barronelle Stutzman, about the request. *Id.* The next day, March 1, 2013,

Mr. Ingersoll returned to the Florist during his lunch hour to speak with Ms. Stutzman. *Id.* 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. *Id.*

Mr. Ingersoll and Mr. Freed were deeply hurt by the Florist's refusal to provide services for their wedding. Pet. App. 4a-5a. They stopped their wedding planning, and instead they married on July 21, 2013 at their home, with only 11 people in attendance. *Id.* at 5a.

On April 9, 2013, after the incident received substantial attention in the press, 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. On April 18, 2013, Mr. Ingersoll and Mr. Freed filed their own action against the Florist and Ms. Stutzman based on the CPA and the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code § 49.60, which prohibits discrimination in places of public accommodation because of race, creed, color, sex, sexual orientation, or disability. Pet. App. 265a-272a. Both lawsuits sought injunctive relief, and the cases were consolidated for all purposes except trial. *Id.*; Pet. App. 258a-264a.

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. The court granted the motion on the grounds of both the CPA and the WLAD, because a violation of the WLAD is a per se violation of the CPA. *Id.* at 88a, 151a-152a. Petitioners appealed directly to the Washington Supreme Court, which accepted review and affirmed on February 16, 2017. Pet. App. 2. Like the trial court, the Washington Supreme Court concluded that Petitioners had violated the WLAD, and therefore the CPA, and did not have a constitutional defense, under either the federal or state constitutions. *Id.* at 56a-57a. In analyzing Petitioners' free exercise claim under the state constitution, the court chose to assess whether the WLAD meets strict scrutiny, and concluded that it does:

> 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.

Id. at 51a.

On July 14, 2017, Petitioners filed their petition for writ of certiorari, which with respect to the Free Exercise Clause, presented only the following question: whether the compelled creation and sale of custom floral arrangement to celebrate a wedding and attendance of that wedding against one's religious beliefs violates the Free Exercise Clause. Pet. i. Petitioners have now filed a supplemental brief asking the Court to grant, vacate

and remand this case in light of the Court's decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111.

I. THE PETITION FOR CERTIORARI DID NOT PRESENT THE QUESTION OF ALLEGED HOSTILITY TO RELIGION IN THE ADJUDICATION OF THIS CASE AND PETITIONERS CANNOT RAISE NEW CLAIMS NOW.

The petition for certiorari does not claim that the State of Washington denied them neutral and respectful consideration of their claims. *See* Pet. 1-38. Because this claim was not presented in the petition for certiorari, it is not a proper ground for granting, vacating, and remanding. The only free exercise claim Petitioners raised in their petition asserted that because Petitioners' refusal to serve Mr. Ingersoll and Mr. Freed was based on the owner's Christian faith, she should be exempted from having to abide by Washington's generally applicable and neutrally applied public accommodations law. Thus, this case simply does not present the claim on which this Court decided *Masterpiece Cakeshop*—namely that the adjudicative body exhibited religious hostility in its processing of a public accommodation claim.

By contrast, Masterpiece Cakeshop, represented by the same counsel as Petitioners here, expressly pointed to both statements by the adjudicative bodies and differential treatment of Masterpiece Cakeshop and other bakers in arguing that the law in Colorado was not "neutrally applied,"

and therefore violated the Free Exercise Clause. They maintained that the Colorado Civil Rights Commission "hardly conceal[ed] its disdain for [his] religious views," and applied "different rules to all expressive professionals depending on their views about same-sex marriage," under which "supporters get a pass, but opponents get punished." *Masterpiece Cakeshop*, No. 16-111, Br. for Pet'rs 38-46.

Petitioners' attempt to reframe their petition at this late stage should be rejected. Moreover, Petitioners provide no cite to any fact in the record for the belated assertion that the State of Washington has treated Ms. Stutzman with "neither tolerance nor respect," Supp. Br. of Pet'rs 2, despite having previously explained that the record in this case is "well developed and comprehensive" and already contains "exhaustive evidence." Pet. 37.

Petitioners have not properly presented a claim of religious hostility to this Court. The Court should not entertain such a claim now. *See, e.g.*, Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (Court will not consider grounds of attack that were not raised and decided by the state court).

II. PETITIONERS' SUPPLEMENTAL BRIEF MISSTATES THE RECORD.

Even if the Court were inclined to consider Petitioners' belated effort to reframe their case, the record offers no support for the unfounded claim that the State of Washington denied the Florist or

Ms. Stutzman "neutral and respectful consideration" of their claims. *Masterpiece*, No. 16-111, slip op. 12.

Petitioners point to a single case discussed in the trial court's decision—*Lewis v. Doll*, 765 P.2d 1341 (Wash. Ct. App. 1989), involving a 7-Eleven store that refused to serve any Black customers—and claim that the court's application of the legal standard described in that case to Petitioners' case is by itself evidence of the court's failure to treat the Florist with tolerance and respect. Supp. Br. of Pet'rs 2. But citing a legal precedent involving racial discrimination in such a case is no evidence whatsoever of religious hostility. Indeed, this Court did precisely that in *Masterpiece Cakeshop*, No. 16-111, slip op. 9 (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 US. 400 (1968)).

The only other "evidence" Petitioners identify in their supplemental brief is the fact that the Washington Attorney General filed a discrimination case against them a week before Mr. Ingersoll and Mr. Freed filed their case. Supp. Br. of Pet'rs 2. But the mere filing of a discrimination complaint, without more, is no evidence of animus or hostility. And unlike the Colorado Civil Rights Commission in *Masterpiece Cakeshop*, the Washington Attorney General, an adverse party, played no adjudicatory role in the process.

Petitioners aver that the Washington Attorney General filed his case against Petitioners "[w]ithout receiving a complaint from Robert [Ingersoll]." Supp. Br. of Pet'rs 2. Yet the incident received substantial press attention, and Mr. Ingersoll and Mr. Freed independently filed their separate lawsuit against Petitioners at essentially the same time that the

Attorney General was filing his own lawsuit. Pet. App. 265a-272a. While the lawsuits in the trial court were consolidated for all purposes except trial and the Washington Supreme Court heard the cases together, the State of Washington and Mr. Ingersoll and Mr. Freed have different claims against Petitioners and submitted separate briefing and argued separately at every stage of the proceedings. The result in the state courts cannot therefore be characterized as solely a product of Washington state officials' enforcement decisions.[1]

[1] Petitioners previously raised as an affirmative defense in the trial court selective enforcement by the Washington Attorney General, arguing that his filing of the lawsuit against them violated their rights under the Fourteenth Amendment. Pet. App. 234a. Based on the facts in the record, the trial court rejected this defense, *id.* at 145a, and Petitioners did not appeal the denial. Pet. App. 210a-226a. Nor did they include it in their petition. Pet. 1-38.

CONCLUSION

Petitioners have offered the Court no basis on which to grant, vacate, and remand this case in light of *Masterpiece Cakeshop*. The petition should be denied.

Respectfully Submitted,

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