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June 21, 2021

The Honorable Scott Harris
Clerk of Court
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

Re: *Arlene's Flowers, Inc. v. Washington*
U.S. Supreme Court Docket No. 19-333

Dear Mr. Harris:

The State of Washington respectfully submits this letter in response to the Supplemental Brief of Petitioners filed June 18, 2021.

I. Introduction

Petitioners' "supplemental brief" abuses the purpose of supplemental briefing, ignores the import of this Court's recent decisions, and continues to misrepresent the facts of this case and the holding below. There is still no basis to grant certiorari.

This Court's rules are clear: "A supplemental brief shall be restricted to new matter[.]" Rule 15(8). But there is little new in Petitioners' supplemental brief. Every case they cite as creating a circuit split as to their first question presented was addressed in their prior briefing, and the State's Brief In Opposition explained why the alleged split was illusory. The limited new material Petitioners do offer, meanwhile, is misrepresented. They cite a recent Washington Supreme Court opinion as supposedly evincing hostility to religion, but they distort that holding and ignore other recent cases where the same court has ruled in favor of religious claims.

Petitioners' ostensible justification for filing the supplemental brief was this Court's decision in *Fulton v. City of Philadelphia*, No. 19-123, slip op. (U.S. June 17, 2021), but they cite *Fulton* only in passing and ignore the import of *Fulton* and other recent rulings. *Fulton* reiterated that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." Slip. op. 14 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018)). And this Court has made clear, in language quoted by the Washington Supreme Court below, that cases like this one

"must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." Pet. App. 2a-3a (quoting *Masterpiece*, 138 S. Ct. at 1732).

Petitioners' approach ignores these principles. Their policy is that they will not prepare *any* flower arrangement for the wedding of a gay or lesbian couple, even an arrangement copied from a picture book identical to one they would prepare for a heterosexual couple. It is thus clear that their objection is not to any "message" sent by the flowers themselves, but rather to the message they perceive would be sent by serving a gay couple. Their proposed rule would mean that any "expressive" business—a category Petitioners cannot coherently define[1]—could refuse service to LGBTQ individuals even if it would provide the exact same service to heterosexual customers. This rule would unquestionably "subject[] gay persons to indignities when they seek goods and services" and treat "gay persons and gay couples . . . as social outcasts or as inferior in dignity and worth."

Petitioners' dangerous theory is not limited to allowing discrimination against LGBTQ individuals. Their own expert acknowledged that the rule they advocate would allow businesses to refuse service "in the case of [an] interracial marriage[.]" State's BIO App. 102a. And their counsel argued to this Court that it would allow discrimination *based on religion* that is currently prohibited: a baker, florist, printer, or even jeweler could refuse to serve an interfaith couple for their wedding.[2]

In sum, Petitioners' supplemental brief relies on old material and misrepresentations to continue advocating for exactly the sort of rigid, unworkable rule this Court has repeatedly rejected. The Court should deny certiorari.

II. Petitioners' Alleged Circuit Split as to Their First Question Presented Offers Nothing New, Remains Illusory, and Continues to Rely on Misrepresenting the Record

A supplemental brief "shall be restricted to new matter[,]" Rule 15.8, but Petitioners' brief offers almost nothing new. In their primary argument—alleging a 4-2 "jurisdictional split" as to their compelled speech claim—every one of the six cases allegedly creating the split was addressed in their prior briefing. Their argument simply repeats the same arguments they have already made and offers nothing new for the Court's consideration.

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[1] Oral Argument Tr. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, at 11-18 https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf) (Petitioners' counsel arguing that bakeries, florists, jewelers, and printers are sufficiently "expressive" to merit protection, but chefs, architects, hair stylists, and makeup artists are not).

[2] *Id.* at 22.

They also continue to misrepresent the record in this case. This case does not present their first question. The injunctions issued by the trial court and upheld on appeal by the Washington Supreme Court do not require Ms. Stutzman or Arlene's Flowers to communicate any particular message, celebratory or otherwise. The injunctions do not require them to sell any particular goods or services—including wedding flowers. State's BIO at 7 (citing Pet. App. 140a). They do not require Ms. Stutzman to personally attend or participate in any way in any kind of "celebration." State's BIO at 7 (citing Pet. App. 4a, 12a). The omission of these requirements from the injunctions was emphasized by both the trial court and the Washington Supreme Court. State's BIO at 12-13 (citing Pet. App. 12a, 197a-98a n.23; Pet. App. 4a).

Nor, in any event, is the selling of flowers to a same-sex couple an endorsement of their marriage. Ms. Stutzman herself admitted as much when she testified that "providing flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." State's BIO at 18 (quoting Pet. App. 43a, 95a). She specifically testified that her goal in providing wedding flowers is *not* to express her own message, but to convey the customer's message. State's BIO at 19 (citing Pet. App. 26a, 43a).

In short, there is no cognizable jurisdictional split, and even if there were a split as to the compelled communication of a "celebratory message," that issue is not presented in this case.

III. Petitioners' Alleged Circuit Split as to *Masterpiece*'s Reach Is Illusory and Not Implicated Here

Petitioners' secondary argument is an alleged circuit split about whether *Masterpiece* allows executive officials to act with hostility towards religion, but they misrepresent the cases cited (including this one), and in any event this case presents no opportunity to address that issue because there is no evidence of executive hostility.

Petitioners claim that the court below and two others have held that "no religious-neutrality requirement applies to [executive] officials[.]" Suppl. Br. 9. That is false.

On remand in this case, the Washington Supreme Court fully embraced this Court's holding in *Masterpiece*, recognizing that "[d]isputes like those presented in *Masterpiece* and *Arlene's Flowers* 'must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.'" State's BIO at 9 (quoting Pet. App. 2a-3a, 17a (alteration added by State's BIO) (quoting *Masterpiece*, 138 S. Ct. at 1732)). While the court did reject Petitioners' attempt to revive a

selective enforcement claim that they had earlier abandoned, State's BIO at 11 (citing Pet. App. 23a-24a), the court also explicitly rejected any suggestion that "the Washington attorney general is free to enforce the WLAD [Washington Law Against Discrimination] in a manner that offends the state or federal constitution." State's BIO at 26 (quoting Pet. App. 26a).

The other cases cited by Petitioners are no more supportive of their claim. The first, *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020), *pet. for cert. filed*, No. 20-1088 (Feb. 4, 2021), addressed a state requirement that parents choose a nonsectarian private school to be approved for public funds to pay for tuition. The case turned on how to apply *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). Almost parenthetically, appellants suggested that statements by Maine legislators in 1997 were analogous to those of the Colorado Civil Rights Commission in *Masterpiece*. *Carson*, 979 F.3d at 45-46. The First Circuit made no holding as to the scope of *Masterpiece*; in a single short paragraph, it stated only that *Masterpiece* provided no reason to depart from two earlier First Circuit decisions that already had rejected animus claims against the 1997 legislators. *Id.* (citing *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999)). *Masterpiece* played no consequential role in the First Circuit's analysis or the appellants' arguments—it is not even mentioned in the petition for certiorari (Docket No. 20-1088).

Petitioners' second citation is to dictum in a footnote in an unpublished Sixth Circuit decision, *Shavers v. Almont Township, Mich.*, 832 F. App'x 933, 939 n.3 (6th Cir. 2020). Mr. Shavers alleged that racial animus motivated a delay in approval of his land use site plan. The court held there was no evidence of animus in the record. *Id.* at 939. In the footnote, the court also rejected Mr. Shavers' attempt to invoke *Masterpiece* in his reply brief. It described the circumstances and holding in *Masterpiece* as "a far cry from Shavers' allegations of discriminatory conduct, which involves neither a First Amendment religion claim nor an act 'by an adjudicatory body.'" *Id.* at 939 n.3 (quoting *Masterpiece*, 138 S. Ct. at 1730).

Even if there were a circuit split as to this question, it would not be implicated here. This is not a case in which the Washington Supreme Court excused or overlooked some hostility toward religion by the Washington Attorney General. There simply has been no hostility toward religion. Period. As summarized in the State's Brief in Opposition, the Attorney General has, from the very beginning of this case, treated Ms. Stutzman's religious beliefs with respect and neutrality. State's BIO at 29-31. The Attorney General proposed an early resolution under which Petitioners would have faced no costs and admitted no violation. State's BIO at 29 (citing Pet. App. 365a-70a). The Attorney General followed normal procedures and in no way

singled out Petitioners. State's BIO at 29-30. During litigation, the Attorney General offered multiple ways in which Ms. Stutzman could continue her business, including providing wedding flowers, without compromising her religious principles or violating the law, all of which Petitioners rejected. State's BIO at 30. When the State ultimately prevailed in the trial court, the Attorney General sought and received only a minimal penalty ($1,000) and asked for only one dollar in attorney fees and costs. State's BIO at 31 (citing Pet. App. 136a).

In claiming anti-religious hostility, Petitioners' "evidence" is a selectively edited online video of an unrelated event that occurred years after the facts in this case. The State has explained the many ways in which Petitioners' account is inaccurate. State's BIO at 31-32. And addressing this issue would have no bearing on the outcome of this case, because even if the Court somehow concluded that the State acted with religious hostility, it would have no effect on the action by Respondents Ingersoll and Freed. Pet. App. 25a.

In sum, neither the Washington Supreme Court decision at issue here nor any other case cited by Petitioners has understood *Masterpiece* to exempt the executive branch from the requirement to treat religious objections neutrally and with respect. Petitioners still have not identified any relevant split in lower courts' application of *Masterpiece.*

IV. Petitioners' Allegation of Religious Hostility by the Washington Supreme Court Is Baseless

Petitioners similarly fail to show any reason for this Court's review based on alleged hostility to religion by the Washington Supreme Court. In both their original petition and their supplemental brief, Petitioners fail to show any of the signs of religious hostility akin to those described in *Masterpiece*. Instead, they appear to find religious hostility in any legal opinion that does not rule in favor of a religious claim. As already explained in the State's Brief in Opposition, the Washington Supreme Court on remand from this Court showed no signs of religious hostility, but simply applied *Masterpiece.* State's BIO 33. Petitioners' new authority similarly shows no reason for this Court's review.

Petitioners attempt to bolster their meritless claims of religious hostility in their own case by reference to a subsequent Washington Supreme Court case. Suppl. Br. at 1-2 (citing *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060, 1079-84 (Wash. 2021)). Petitioners thus seek to extend this Court's religious-hostility test beyond an examination of any individual case to an apparently boundless review of a court's body of work. Even if the Court were inclined to adopt this unworkable and unprecedented approach, neither the case Petitioners cite nor others of the Washington Supreme Court show any hostility to religion.

Petitioners claim that the Washington Supreme Court in *Woods* used the decision in *Arlene's Flowers* "to rule against people of faith[.]" Suppl. Br. at 1. That statement is wrong in almost every respect. The majority and concurring opinions in *Woods* did not even cite *Arlene's Flowers*, let alone use it to rule against anyone. *Woods*, 481 P.3d at 1062-73. And describing *Woods* as ruling against people of faith is incorrect and overly simplistic. *Woods* involved a state constitutional challenge to an exemption from the WLAD for religious organizations in an employment discrimination case. *Id.* at 1062. The court upheld the religious exemption but determined under the state constitution that it could be applied unconstitutionally if a person's fundamental right were impacted. *Id.* In seeking to balance the rights of employees to be free from discrimination and a religious organization's right to exercise its religious beliefs and determine its messengers, the court looked to this Court's opinions for guidance. *Id.* at 1070 (citing *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)). Ultimately, the court did not rule against the religious organization, but remanded to the trial court to determine if the ministerial exception as described by this Court applied. *Woods*, 481 P.3d at 1063. Just as this Court did not demonstrate religious hostility in preserving the right of religious organizations to determine the messengers of their faith, neither did the Washington Supreme Court.

Petitioners also take statements in the concurring opinion in *Woods* out of context in an effort to show hostility. Suppl. Br. at 11-12. The concurring opinion's reference to a "license to discriminate" in the context of an employment discrimination claim in which the religious organization conceded that it was discriminating but alleged that it was exempt from anti-discrimination laws, does not suggest that religious non-profits are "simply looking to discriminate," as Petitioners claim. Suppl. Br. at 11-12. Similarly, the concurrence's concern about a potential conflict if a person sought to act both as a lawyer for a client and a minister for an organization shows no hostility, especially as the concurrence explicitly recognized the propriety of religious considerations in rendering advice. *See Woods*, 481 P.3d at 1073 (Yu, J., concurring).

Finally, as one would expect from any neutral tribunal, the Washington Supreme Court sometimes rules in favor of parties raising religious claims, and sometimes against. In recent years the Washington Supreme Court has overruled precedent in order to require employers to reasonably accommodate religious practices under the WLAD and held unreasonable a fire department's policy disallowing religious fellowship messages on a message board. *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193 (Wash. 2014); *Sprague v. Spokane Valley Fire Dep't*, 409 P.3d 160 (Wash. 2018). Petitioners' tendentious and selective discussion of

Washington Supreme Court opinions fails to show any evidence of hostility and provides no basis for this Court's review.

In sum, the petition offered no good reason to grant certiorari, and the supplemental brief does not either. The Court should deny review.

Sincerely,

Noah Guzzo Purcell

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cc: Counsel of Record via the Court's E-filing Portal