June 21, 2021

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: *Arlene's Flowers, Inc., et al. v. State of Washington* and *Arlene's Flowers, Inc., et al. v. Ingersoll, et al.*, No. 19-333 – Letter Brief of Respondents Robert Ingersoll and Curt Freed in Response to Supplemental Brief of Petitioners

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Dear Mr. Harris:

Respondents Robert Ingersoll and Curt Freed respectfully submit this letter to the Court in response to the Supplemental Brief of Petitioners filed June 18, 2021.

Petitioners' supplemental brief, ostensibly triggered by this Court's decision in *Fulton v. City of Philadelphia,* No. 19-123 (U.S. June 17, 2021), offers no additional reason for granting certiorari, and instead largely retreads the ground—and cases—addressed in earlier briefing. The Court should deny certiorari.

Nothing in this Court's recent decision in *Fulton* altered the settled free exercise principles the Washington Supreme Court applied below or requires any reconsideration by that court. *Fulton* announced no new law. Rather, it applied *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), and concluded that the city contract at issue was not generally applicable because it provided "a mechanism for individualized exemptions." *Fulton*, slip op. at 5-6 (internal quotation marks omitted). Washington's Law Against Discrimination, by contrast, contains no such mechanism for individualized exemptions—even the Flower Shop does not contend otherwise—and is generally applicable, as the Washington Supreme Court concluded after thorough review. Pet. App. 50a-56a. Accordingly, *Fulton* offers no occasion for a GVR, let alone a grant of certiorari.

Nor does this case present an opportunity to consider whether to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990). Because application of the Washington Law Against Discrimination to a public-facing business, such as a flower store, would survive

even the most searching form of judicial review, Opp. 30, this case does not present the question whether to overrule *Smith* and, even if it did so, presents a poor vehicle for choosing among the many possible standards the Court might adopt in place of the analysis in *Smith*. *See Fulton*, slip op. at 1-2 (Barrett, J., concurring).

Tellingly, even the Flower Shop does not contend that *Fulton* provides a new basis for review. Instead, it devotes virtually all of its brief to rehashing arguments and appellate decisions already raised and briefed in 2019. That is not a proper basis for a supplemental brief under Rule 15.8. Sup. Ct. R. 15.8 (providing that any party may file a supplemental brief while a petition for a writ of certiorari is pending "calling attention to new cases, new legislation, or other intervening matter *not available at the time of the party's last filing*" (emphasis added)).

Just as there was no basis for certiorari in 2019, there is no reason to grant the writ now. Respondents Robert Ingersoll and Curt Freed filed this action in 2013 after the Flower Shop refused to sell them flowers for their wedding. Opp. 3-5, 7. They intended to pick up the flowers themselves. Opp. 4. No one from the Flower Shop would have been required to participate in their wedding, and the injunction Mr. Ingersoll and Mr. Freed eventually obtained does not require Flower Shop staff to do so for any other customers, either. Opp. 8-9, 12-15.

Two years after it filed its reply, the Flower Shop remains unable to point to any conflict among the circuits. Instead, it points to a handful of lower court decisions, many of them not even from courts of appeals or state supreme courts, all faithfully applying this Court's precedents to different factual scenarios.

I. The Flower Shop has not identified any intervening appellate decisions concerning free speech, and the Washington Supreme Court's decision does not conflict with the previously decided compelled speech cases.

None of the court of appeals or state supreme court decisions the Flower Shop discusses in its Supplemental Brief is an "intervening" case, *see* Sup. Ct. R. 15.8; all were available when the Flower Shop filed its reply brief in December 2019. Supp. Br. 4-8 (citing *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Craig v. Masterpiece Cakeshop*, 370 P.3d 272 (Colo. App. 2015);

Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019)).[1] They are therefore not an appropriate basis for a supplemental brief.

In any event, the Flower Shop's attempt to manufacture a conflict between the decision below and decisions in *Telescope Media* and *Brush & Nib* fares no better this time than in its prior briefing, because both cases are distinguishable on their facts. In *Telescope Media*—which was addressed extensively in the Flower Shop's opening brief, Pet. 6, 20, 28, 30, 31, 32, 33, 39, and reply, Reply Br. 7, 9, 10, 11—the Eighth Circuit placed particular weight on the fact that the video company that objected to making videos of weddings celebrated by same-sex couples "retain[ed] ultimate editorial judgment and control" over any videos it might produce. 936 F.3d at 751. In this case, by contrast, the Flower Shop's owner testified at her deposition that "the customer," not the Flower Shop, "gets the last say" as to the product supplied. App. 43a.[2] The customers are free to arrange, rearrange, or use the flowers however they choose. Any message conveyed by the flower arrangements thus belongs to the customer, not the Flower Shop. Opp. 18-19. The decision in *Brush & Nib*—also previously briefed by the Flower Shop, Reply Br. 7, 8, 9, 11—is similarly distinguishable, as the Arizona Supreme Court expressly recognized in its opinion. 448 P.3d at 917. That court, too, focused on the complete artistic control exercised by the company, *id.* at 911, as well as the specific custom products in the record, *id.* at 895. Opp. 19-20.

The absence of any new appellate authority belies the Flower Shop's claim of a split, much less one that is mature enough to warrant this Court's intervention. In fact, the *only* new authority cited by the Flower Shop is a Colorado trial court decision, which this Court can of course consider after the ordinary appellate process takes its course. Supp. Br. 8 (citing *Scardina v. Masterpiece Cakeshop Inc.*, No. 19CV32214 (Dist. Ct., Denver City & Cty., Colo. June 15, 2021). If the Colorado Supreme Court reaches a decision that conflicts with decisions of other state supreme courts or federal courts of appeals, this Court can consider at that time whether any conflict warrants review.

[1] *Klein* is also not a final decision; the case is currently pending in the Oregon Court of Appeals. *See Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (granting, vacating, and remanding for further consideration in light of *Masterpiece Cakeshop*).
[2] "App." refers to the Appendix to Respondent State of Washington's Brief in Opposition.

The Flower Shop's focus on whether particular businesses are expressive misses the broader point: even assuming the conduct of arranging flowers is expressive, as the Flower Shop asks this Court to hold, that does not trigger strict scrutiny unless the law in question targets the conduct because of what it communicates. No one disputes that Mr. O'Brien's burning of a draft card to protest the Vietnam War was expressive, but only intermediate scrutiny applied because the law in question prohibited destruction of draft cards whether or not the destruction was communicative. *United States v. O'Brien*, 391 U.S. 367 (1968). The Washington Law Against Discrimination prohibits discriminatory conduct regardless of whether the product sold is communicative or not. Opp. 21.

II. There is no split as to how the Free Exercise Clause applies to actions of executive branch agencies and, in any event, resolution of that question would not alter the result in this case.

This case is an exceptionally poor vehicle for addressing how the Free Exercise Clause restricts the actions of state executive agencies for several reasons.

First, and dispositively, nullifying the actions of a state executive agency—here, Washington's Attorney General—would not change the injunction against the Flower Shop. That is because there were two, separate but identical injunctions entered below, one in a case brought by the Washington Attorney General and another in an independent civil action brought by private plaintiffs, Mr. Ingersoll and Mr. Freed, Respondents here. Opp. 8-9. The latter would stand even if this Court were to conclude that the Attorney General's action should be invalidated for any reason, such as anti-religious animus. Opp. 27-29. The Court should not grant review to address an issue that would not alter the outcome.[3]

Moreover, there is no evidence of anti-religious animus by the Attorney General. The Attorney General initiated an enforcement action against the Flower Shop and not the coffee shop, not because of religion, but because the two businesses responded in radically

[3] The Flower Shop failed to raise its claim that the Attorney General selectively enforced the Washington Law Against Discrimination based on hostility to religion on appeal to the Washington Supreme Court. The Washington Supreme Court held that the Flower Shop could not revive that claim, once it was abandoned. Pet. App. 23a-24a. That holding, on a separate question of state procedure, bars this Court from reaching the Flower Shop's religious bias claim. Opp. 26 n.5.

different ways to notice that their conduct was discriminatory. Opp. 25-27. Most importantly, the coffee shop readily agreed to follow the law; the Flower Shop refused.

Finally, the Flower Shop identifies no split of authority as to whether executive branch agencies, or only adjudicative bodies, are subject to the Free Exercise Clause. All of the courts below, including the Washington Supreme Court here, recognized that executive branch agencies are subject to constitutional restrictions, including those contained in the Free Exercise Clause, on governmental power.

Far from suggesting the Attorney General could act in an anti-religious manner, the Washington Supreme Court expressly recognized that "the Washington attorney general" is not "free to enforce the [Washington Law Against Discrimination] in a manner that offends the state or federal constitution," including the Free Exercise Clause. Pet. App. 26a. The Court held that the Flower Shop had abandoned its selective enforcement claim based on religious hostility and that nothing in this Court's *Masterpiece Cakeshop* decision allowed the Flower Shop to revive that claim, once it was abandoned. Pet. App. 26a.

Finally, none of the other cases the Flower Shop cites shows a split in authority among the lower courts or holds that executive agencies are free to engage in anti-religious hostility. *Shavers v. Almont Township, Mich.*, 832 F. App'x 933 (6th Cir. 2020), for example, did not involve religion at all; in that case, the Sixth Circuit fully evaluated evidence of discrimination based on race by a municipal planning commission. *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020), also does not hold that an executive agency can engage in anti-religious hostility with impunity. The plaintiff argued that statements by legislators (not executive branch actors) in connection with a state law concerning education funds evidenced religious hostility in violation of the Free Exercise Clause, citing *Masterpiece Cakeshop*. The First Circuit held only that *Masterpiece Cakeshop* did not provide a basis to overrule prior First Circuit precedent that had already carefully evaluated evidence of anti-religious hostility in connection with the school funding law and concluded that there was none. *Id.* at 45-46. Accordingly, there is no split of authority for this Court to resolve.

III. The Washington Supreme Court's decision in an unrelated case does not establish hostility to religion or warrant review in this case.

Finally, the Flower Shop seeks review of the Washington Supreme Court's decision in this case by pointing to language two members of that Court used in concurring and dissenting opinions in an entirely unrelated case. Supp. Br. 11-12 (citing *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021)). *Woods* involved application of a state statutory religious exemption from the employment provisions of the Washington Law Against Discrimination. The Flower Shop's theory that comments in the concurring and dissenting opinions evince hostility to religion on the part of the court ignores the fact that the *Woods* Court actually *upheld* the exemption for religious employers. 481 P.3d at 1070. The *Woods* Court then remanded the case for factual development to determine whether the plaintiff, a staff attorney, was a "minister" within the meaning of this Court's decisions in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020). 481 P.3d at 1070. Far from establishing hostility to religion, the *Woods* decision reflects careful consideration of First Amendment protections as this Court has interpreted them. Should this Court disagree, it can consider whether review of *Woods* is appropriate, once the state courts have rendered a final decision in that matter. But that case surely offers no ground for granting review here.

In short, the Flower Shop's supplemental brief does little more than rehash its prior arguments and almost exclusively discusses cases already extensively discussed in its prior briefing. And it proffers no reason to grant certiorari, whether as a GVR or for full consideration.

Respectfully submitted,

s/Ria Tabacco Mar
Ria Tabacco Mar
Counsel for Respondents
Robert Ingersoll and Curt Freed

cc: All Counsel of Record