No. 91615-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

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

Appellants.

INGERSOLL and FREED,

Respondents,

v.

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

Appellants.

APPELLANTS' RESPONSE TO AMICI CURIAE

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I. INTRODUCTION

Arlene's Flowers, Inc. and Barronelle Stutzman (collectively, "Mrs. Stutzman") respond to the amicus briefs filed in support of Respondents. Those amici minimize the First Amendment's protections for free exercise and free speech, and they ignore the core lesson of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018)—that States violate the Free Exercise Clause when their enforcement of public-accommodation laws treat people of faith worse than others. Because that is what the State has done here, this Court should reverse.

II. ARGUMENT

A. All Mrs. Stutzman's arguments are properly before this Court.

Mrs. Stutzman's petition for a writ of certiorari raised and preserved her free-exercise and free-speech claims. Pet. for a Writ of Cert. at i & 15-37, *Arlene's Flowers, Inc. v. Washington* (No. 17-108). *Masterpiece* discussed both First Amendment claims, as did several concurrences. 138 S. Ct. at 1729-32, 1734-48. The U.S. Supreme Court's GVR order directs this Court to reevaluate all Mrs. Stutzman's federal claims (i.e., her entire case) in light of *Masterpiece*'s "intervening clarification in the law" and gives this Court "the first opportunity to adjust or correct its earlier decision." *Pratt v. Philbrook*, 109 F.3d 18, 19-20 (1st Cir. 1997).

Because Respondents' amici have no answer to Mrs. Stutzman's claims that the State cannot force her to (1) attend and participate in same-sex wedding ceremonies under the Free Exercise Clause or (2) create artistic expression celebrating them under the Free Speech Clause, one amicus asks this Court to ignore them entirely. Wash. State Ass'n for Justice Found. ("WSAJF") Br. 6-13. But heeding that call would violate the U.S. Supreme Court's GVR order, which vacated this Court's entire judgment. Because the GVR order is not limited to one federal issue but applies to *all* of them, this Court must reexamine all Mrs. Stutzman's claims.

B. State law allows closely held for-profit corporations to pursue their owners' religious values, and stripping Arlene's Flowers of that right would show hostility toward Mrs. Stutzman's faith.

Seeking an end-run around Mrs. Stutzman's First Amendment rights, one amicus contends that Arlene's Flowers is incapable of asserting her free-exercise and free-speech claims. Greenfield Br. 5-20. Amicus admits that he presented the same argument in *Masterpiece*. *Id.* at 1. The U.S. Supreme Court rejected those very arguments by ruling on First Amendment grounds not only for Jack Phillips, but also for his business, Masterpiece Cakeshop. Undeterred, amicus presents the same points again.

Amicus is still wrong. Corporate law generally allows closely held for-profit corporations to pursue "profit in conformity with the owners' religious principles." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682,

713, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014). Washington law is no different. It allows for-profit entities to pursue "any lawful business," RCW 23B.03.010(1), and grants them "the same powers as an individual to do all things necessary or convenient" to conduct their affairs, RCW 23B.03.020(2), including "any . . . act . . . that furthers the business and affairs of the corporation," RCW 23B.03.020(2)(q). This broad language authorizes Arlene's Flowers to conduct business consistent with Mrs. Stutzman's religious beliefs.

Amicus cites no court that has adopted his novel theory, and this Court should not be the first. The Ninth Circuit has concluded that a closely held Washington corporation may raise the First Amendment rights of its owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120-21 (9th Cir. 2009). This Court reached the same conclusion in this case. *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 848 n.20, 389 P.3d 543 (2017). There is no reason to depart from what the U.S. Supreme Court, the Ninth Circuit, and this Court have uniformly held.

C. Free-exercise violations do not turn on an intent to discriminate, and nothing in *Masterpiece* adopts such an equal-protection-like standard for demonstrating religious hostility.

Another group of amici insists that the First Amendment bars only intentional religious discrimination. Church-State Scholars ("CSS") Br. 2, 6-8. But the Free Exercise Clause applies when the State—regardless of its

intent—treats people of faith worse than others. The Equal Protection Clause already forbids purposeful discrimination based on religion. *E.g.*, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (per curiam). Thus, to ensure that the Free Exercise Clause retains its independent significance, federal courts have regularly rejected amici's exact theory. *E.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 n.30 (3d Cir. 2002); *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1292 n.3 (7th Cir. 1996).

Amici are wrong when they argue that a free-exercise violation hinges on the Attorney General's subjective motivations. *Masterpiece* makes this clear. Equal-protection plaintiffs must show that adverse government action was "designed to accord disparate treatment on" a protected ground, i.e., discriminatory intent. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982). But *Masterpiece* forbids "subtle departures from neutrality" and clarifies that "even [a] slight suspicion" of religious hostility violates the Free Exercise Clause. 138 S. Ct. at 1731. *Accord, e.g.*, *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (listing cases in which the Free

Exercise Clause foreclosed the application of laws enacted "not out of hostility or prejudice, but for secular reasons").

In fact, *Masterpiece* identified a First Amendment violation based on the State's disparate treatment of Mr. Phillips *without requiring him to make an affirmative showing of discriminatory purpose*. 138 S. Ct. at 1730 (relying on the State's disparate "consideration of Phillips' religious objection" without any discussion of the State's motives); *id.* at 1732 (grounding the free-exercise violation on "disparate" treatment that merely "suggests" a lack of neutrality). Because "religious neutrality . . . must be strictly observed," *id.* at 1732, the U.S. Supreme Court has made it easier to establish a free-exercise violation than an equal-protection violation.

In short, nothing in *Masterpiece*—the controlling precedent here—requires Mrs. Stutzman to show that the Attorney General "intentionally target[ed]" her religious objections for prosecution, *contra* CSS Br. 8, although Mrs. Stutzman has presented ample evidence showing that is exactly what the Attorney General did, *see* Appellants Br. 13-14, 18-25; Appellants Reply Br. 6-13.

D. Mrs. Stutzman's religious-hostility claim is governed by *Masterpiece*, not selective-prosecution cases that *Masterpiece* did not even mention, let alone apply.

One group of amici maintains that selective-prosecution principles govern Mrs. Stutzman's religious-hostility claim. CSS Br. 8-11. But this

ploy to short-circuit *Masterpiece* fares no better than their other efforts to import equal-protection standards into the Free Exercise Clause.

Criminal defendants bring selective-prosecution defenses under the Fifth or Fourteenth Amendments, not the First Amendment. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). Like all equal-protection claims, a selective-prosecution defense requires defendants to prove that the government's actions had a discriminatory purpose, not just a discriminatory effect. *Id.* at 465.

Amici cite no case that applies this equal-protection rule in the free-exercise context. That is unsurprising because federal courts often find that selective enforcement proves religious hostility without a showing of discriminatory intent. *E.g.*, *Tenafly*, 309 F.3d at 165-69 (selective enforcement necessarily showed religious hostility because it devalued religious beliefs by judging them to be of lesser importance and singled out religiously motivated conduct for discriminatory treatment).

Courts traditionally look to *Lukumi*—and now *Masterpiece*—to identify religious hostility that violates the Free Exercise Clause. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-40, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); *Tenafly*, 309 F.3d at 165-69. Nothing in either *Lukumi* or *Masterpiece* suggests that the U.S. Supreme Court has adopted an equal-protection-like standard for free-

exercise claims. As already explained, the standard for showing religious hostility in free-exercise cases is lower than the bar for demonstrating intentional discrimination under the Equal Protection Clause. *See* Section II.C, above.

That is true regardless of which branch of government displays religious hostility through unequal treatment. Many free-exercise cases have involved executive-branch discretionary decisions, and none have imposed amici's stringent standard. *E.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981).

In sum, *Masterpiece* held that free-exercise plaintiffs like Mrs. Stutzman may establish religious hostility by showing that the State (1) subjected her religious objection to disparate treatment, (2) presumed the illegitimacy or adopted a negative view of her religious beliefs, or (3) denigrated her faith. 138 S. Ct. at 1729-32. It is *Masterpiece*, not amici's theories, that controls this case.

E. Regardless of whether the WLAD and CPA are facially neutral and generally applicable, *Masterpiece* held that the State cannot apply its laws in a discriminatory way.

Several amici contend that *Masterpiece* has no impact on Mrs. Stutzman's case because the WLAD and CPA are facially neutral and

generally applicable. CSS Br. 1-5; Episcopal Bishops ("EP") Br. 2; Americans United ("AU") Br. 4-8. That argument ignores *Masterpiece*'s holding and the as-applied nature of Mrs. Stutzman's free-exercise claim.

Masterpiece never once questioned the facial neutrality and general applicability of Colorado's public-accommodation law. 138 S. Ct. at 1727-28. But the U.S. Supreme Court still ruled for Mr. Phillips and Masterpiece Cakeshop. *Id.* at 1729-32. So whether the WLAD and CPA are facially neutral and generally applicable does not resolve Mrs. Stutzman's free-exercise claim. The First Amendment demands more than a law that does not obviously discriminate against religion; government acts must be neutral and generally applicable in their "real operation" and effect. *Lukumi,* 508 U.S. at 535. Mere "facial neutrality" is not enough. *Id.* at 534.

Masterpiece's free-exercise ruling is based not on how Colorado's public-accommodation law was written but on how the State enforced it. The government's "consideration of Phillips' religious objection did not accord with its treatment of . . . other objections." 138 S. Ct. at 1730. It was this "difference in treatment" that demonstrated religious hostility, not what the statute said. *Id.* at 1731; *see also id.* at 1732 (citing the "disparate consideration of Phillips' case compared to the cases of . . . other bakers").

Likewise here, Mrs. Stutzman does not challenge the WLAD and CPA on their face. Mrs. Stutzman's free-exercise argument on remand is

that the State cannot (1) apply its laws to force her to attend and participate in a same-sex wedding ceremony, (2) exhibit hostility toward her religious beliefs by—among other things—enforcing its public-accommodation law against her while exempting business owners with secular objections the State favors, or (3) overcome her combined free-exercise and free-speech interests. Appellants Br. 18-32; Appellants Reply Br. 1-14. Amici's facial arguments fail to address these points.

F. The State's decision to prosecute Mrs. Stutzman while letting Bedlam Coffee off the hook is evidence of religious animus.

Some amici argue that the State's decision to sue Mrs. Stutzman while ignoring Bedlam Coffee's discrimination is not unconstitutional because (1) Bedlam would have expelled *any* customer who distributed offensive flyers, even while continuing to serve Christian patrons, CSS Br. 12-14, (2) the evidence of the Attorney General's non-enforcement was limited and did not reflect an extended pattern, *id.* at 16-18, and (3) disapproval of same-sex marriage is inextricably linked to animus against same-sex orientation and LGBT persons, *id.* at 14-16; WSAJF Br. 14-16; EP Br. 5-11. None of these arguments withstands scrutiny.

The first point supports Mrs. Stutzman. She, too, would have declined to participate in a same-sex marriage celebration requested by *any* customer, while continuing to hire LGBT employees and serve LGBT

patrons, including Robert Ingersoll. CP 663-64, 537-38, 543-44, 1735-36. The situations are therefore indistinguishable.

The second point conflicts with *Masterpiece*. There, the Court held that an "indication of [government] hostility" was the State's difference in treatment between Mr. Phillips and other cake shops that declined a request to create cakes with religious messages criticizing same-sex marriage. 138 S. Ct. at 1730. Nowhere did the Court suggest that a religious proprietor had to establish the type of longtime pattern sufficient to prove selective enforcement. *See* Sections II.C & II.D, above. The limited evidence of disparate government treatment in *Masterpiece* was more than adequate to send "a signal of official disapproval of Phillips' religious beliefs." 138 S. Ct. at 1731.

The third point makes no sense. Consistent with her Christian beliefs that everyone is made in the image of God, Mrs. Stutzman has always served LGBT customers and treated them with dignity. CP 46-47, 537-38, 543-44, 1735-36. Her objection was never to Mr. Ingersoll's sexual orientation but to celebrating and participating in a ceremony that violated her faith. Her decision was not orientation-based animus.

G. The State did not provide Mrs. Stutzman with equal treatment.

One group of amici says that all people are entitled to equal government treatment, regardless of faith. EP Br. 4. In support, they argue

that the government should never grant "exemptions" to particular religious perspectives. *Id.* at 10; *accord* AU Br. 4-8. But these positions misunderstand what this case is about and what Mrs. Stutzman requests.

Mrs. Stutzman agrees that all citizens deserve equal government treatment. She is not asking for an exemption from that. Rather, she is asking to exercise her First Amendment rights and to stop the disparate treatment that she is enduring at the hands of the State.

Consider *Lukumi*. In striking down the city's regulation of animal sacrifice, the U.S. Supreme Court did not grant the church an "exemption" from a generally applicable statute. The Court held that the city's decision to incorporate the state's animal-cruelty statute into its ordinances was religiously gerrymandered and therefore unconstitutional. 508 U.S. at 531-40. The question was and is not whether religious believers are exempt from the law but whether a court should invalidate government action because it functions to punish religion. If the Free Exercise Clause retains any meaning at all, the answer must be "yes," just as *Masterpiece* held.

H. Allowing Mrs. Stutzman to exercise her religious beliefs will not eviscerate civil-rights laws.

Some amici argue that a ruling for Mrs. Stutzman could not be limited and would thus eviscerate civil-rights laws. EP Br. 13-14; AU Br.

14-19. One brief says that the church-autonomy doctrine provides the only free-exercise protection required. EP Br. 15-16. These amici are wrong.

If this Court rules for Mrs. Stutzman on religious-hostility grounds, that is a substantial limitation on the holding and would not upend the WLAD, just as the U.S. Supreme Court did not void the Colorado public-accommodation law in *Masterpiece*. What's more, Mrs. Stutzman is not asking for an open-ended right to flaunt the WLAD. She serves everyone; what she declines to do is to personally participate in, or create custom art that celebrates, wedding ceremonies contrary to her faith. Recognizing that narrow protection hardly eviscerates the WLAD. Also, custom floral design—the type of service at issue—is a form of constitutionally protected artistic expression, whereas there are, as *Masterpiece* recognized, "innumerable goods and services that no one could argue implicate the First Amendment." 138 S. Ct. at 1728. That, too, is a significant limit.

Amici are also wrong to suggest that only churches need free-exercise protection. As the United States Conference of Catholic Bishops explained in *Masterpiece*, "American citizens should never be forced to choose between their religious faith and their right to participate in the public square." Br. of USCCB, et al. in Supp. of Pet'rs at 4, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* (No. 16-111). The "Free Exercise Clause guarantees every individual the right to seek the truth in religious

matters *and then adhere to that truth* through private and public action." *Id.* at 5. Perhaps amici believe that religious adherents should confine their beliefs to the inner sanctum of their homes and worship spaces. But such a vision is at odds with a constitutional provision that expressly protects the "exercise" of religion. Br. of Wash. State Catholic Conference, et al. in Supp. of Pet'rs at 9-23, *Arlene's Flowers v. State of Washington* (No. 17-108) (explaining the call to live out faith in one's work as taught in the Catholic, Jewish, Islamic, and Protestant traditions).

Relatedly, the business amici claim that ruling for Mrs. Stutzman will subject customers to discrimination based on race, creed, sex, and disability. Business Br. 20. Hardly. This case, like *Masterpiece*, does not involve a blanket refusal to serve members of a protected class or "to sell any goods . . . for gay weddings." 138 S. Ct. at 1728. Mrs. Stutzman serves LGBT customers and will sell various items for same-sex weddings. What she seeks is the freedom not to create custom art that celebrates, or to participate in, ceremonies contrary to her religious beliefs about marriage—beliefs that the U.S. Supreme Court has declared "decent and honorable," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 192 L. Ed. 2d 609 (2015), and that constitute "protected views and in some instances protected forms of expression," *Masterpiece*, 138 S. Ct. at 1727. The U.S. Supreme Court itself

has recognized that Mrs. Stutzman's beliefs are different than the invidious discrimination to which the amici aver.

Finally, one amicus brief says that protecting Mrs. Stutzman's religious exercise will result in the persecution of religious believers in other contexts. AU Br. 18-20. But religious business owners like Mrs. Stutzman do not refuse to serve customers because of who they are or the religious clothing they wear. *Contra id.* at 19 (citing hypothetical examples of a movie-theatre owner who refuses to sell a ticket to a boy in a yarmulke, a restaurant owner who will not serve people wearing a hijab, sari, or turban, and a grocer who chooses not to sell food to an unmarried woman and her child). Declining to create custom art or to participate in ceremonies that violate one's religious beliefs is not the same as status-based discrimination.

I. Allowing Mrs. Stutzman to exercise her faith will not expose businesses to liability.

The business amici urge this Court to reject Mrs. Stutzman's First Amendment claims because to recognize those rights would expose businesses to liability for the religious-based discrimination of their employees. Business Br. 16-20. "[B]usinesses could be subject to strict liability," the brief argues, "if employees decide . . . that their religious beliefs entitle them to discriminate against certain customers." *Id.* at 19. Not so.

This case does not involve a rogue employee who refuses to serve LGBT customers. It involves a woman of faith who befriended an LGBT customer while serving him for more than nine years. All she did was politely decline to create art for and participate in what she considers to be a religious ceremony in violation of her faith, as the law allows. *See Hobby Lobby*, 573 U.S. at 710 ("Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within [the] definition" of the "exercise of religion").

It may be that one of the amici businesses has an employee who, like Mrs. Stutzman, cannot participate in a ceremony because of religious reasons. Regardless of the outcome of this case, that business should not be allowed to discriminate against that employee because of her religion. Such discrimination would likely violate Title VII and the WLAD. 42 U.S.C. § 2000e-2; *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 500-01, 325 P.3d 193 (2014) (holding that "the WLAD creates a cause of action for failure to reasonably accommodate an employee's religious practices"). Respecting employees' beliefs promotes "the shared community values of inclusion and acceptance," Business Br. 19, just as *Masterpiece* intended.

J. To the extent that economic considerations are relevant, protecting Mrs. Stutzman's First Amendment rights will benefit—not harm—the economy.

The business amici assert that strong public-accommodation laws are an indispensable prerequisite for economic flourishing. Business Br. 4-9. It is doubtful that economic considerations are relevant to this Court's constitutional analysis, but even if they are, amici's argument falls flat because Mrs. Stutzman is not seeking to eviscerate public-accommodation laws. Rather, she is asking this Court to recognize constitutional rights that allow public-accommodation laws and religious freedom to flourish together—by enabling governments to forbid discrimination against people because of who they are but barring the State from compelling artistic expression or personal participation in sacred ceremonies.

Failing to provide the limited constitutional protection that Mrs. Stutzman seeks will have adverse economic effects, as scholars have explained elsewhere. Br. of Law & Econ. Scholars in Supp. of Pet'rs at 1-5, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* (No. 16-111). It will drive some people, particularly people of faith, out of certain sectors of the market or out of business entirely, reduce choices for consumers, and decrease competition—all hurting the economy and consumers. *Id.* at 19-20. Plus, business owners' desire for revenue—and to avoid the harassment, threats of violence, and boycotts that people like Mrs. Stutzman have

endured—ensures that conscientious objections will be sincere and limited, thus minimally affecting the market. *Id.* at 16-18.

Other evidence suggests that broad public-accommodation laws are not necessary for economic prosperity. For example, most of the top states for business and those with the best economic outlook lack nondiscrimination laws that include sexual orientation, while the worst 10 states for business have such laws. *See* PAFamily.org, https://bit.ly/2FsVFBm (last visited Mar. 21, 2019). Thus, the business amici's assumptions of what is necessary for the economy to thrive are simply unfounded.

K. Affirming Mrs. Stutzman's First Amendment rights does not violate the Establishment Clause.

Some amici argue that upholding Mrs. Stutzman's First Amendment rights would violate the Establishment Clause. AU Br. 5-8. The primary cases they cite—*Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989)—found Establishment Clause violations because the laws at issue afforded religious people and groups "absolute and unqualified right[s]" without regard for the impact on others. *Caldor*, 472 U.S. at 709. Free-exercise and free-speech protections do no such thing because those kinds of First Amendment claims require strict-scrutiny analysis. That "'compelling governmental interest'" test, as the

U.S. Supreme Court has held, adequately accounts for "the burdens a requested accommodation may impose on nonbeneficiaries" and thus is "compatible with the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722-23, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005). Because Mrs. Stutzman's First Amendment claims require this Court to assess strict scrutiny, they pose no Establishment Clause concerns.

And contrary to what amici suggest, "it could not reasonably be maintained" that the First Amendment provides no protection whenever a law used to burden religious freedom "benefit[s] . . . third parties" or a religious accommodation has any adverse effect on a third party. *Hobby Lobby*, 573 U.S. at 729 n.37. Otherwise, the First Amendment would be practically "meaningless." *Id.* Only third-party harm that the government has a compelling interest in preventing will suffice. But as already explained, the State has not shown any such harm from affording the limited constitutional protection that Mrs. Stutzman seeks. Appellants Br. 44-50.

L. The Individual Respondents' lawsuit cannot remedy the State's palpable hostility to Mrs. Stutzman's religious beliefs, which taints every facet of this case.

One amicus brief contends that Mrs. Stutzman treats the Individual Respondents like "an arm of the state" when analyzing her constitutional rights. CSS Br. 20. But Mrs. Stutzman has never suggested that the Individual Respondents are state actors. She merely responded to their very

cursory argument that their separate lawsuit forecloses any conceivable *Masterpiece* claim. Ingersoll & Freed Br. 14; Appellants Reply Br. 13-14.

Nothing supports that argument. The U.S. Supreme Court was advised about the Individual Respondents' case. *See* Ingersoll & Freed Suppl. Br. at 6-7, *Arlene's Flowers, Inc. v. Washington* (No. 17-108). And it nonetheless fully vacated this Court's judgment for reconsideration in light of *Masterpiece*. Thus, the U.S. Supreme Court obviously did not think that the Individual Respondents' case rendered *Masterpiece* inapplicable.

Moreover, the Individual Respondents and their amici cannot explain how to isolate the State's religious hostility or its effects. Nor do they even try because it is undisputed that (1) the State and the Individual Respondents jointly strategized to prosecute Mrs. Stutzman, and (2) the courts considered and ruled on their lawsuits together at every stage. Appellants Reply Br. 13-14.

The Individual Respondents cannot just reap the benefits of having the State's voice in their favor; they must also bear the burdens of the State's religious hostility, which taints every facet of this case. *Masterpiece* supports this point. There, the U.S. Supreme Court identified a free-exercise violation despite the fact that Colorado and an independently represented same-sex couple jointly prosecuted Jack Phillips under the State's public-

accommodation law. 138 S. Ct. at 1722-23, 1725-27, 1729-32. What was true in *Masterpiece* is equally true here.

In addition, religious-freedom protections from nondiscrimination laws should not "change depending on whether [the laws are] enforced by the [government] or an aggrieved private party." *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006). This Court should not give private litigants greater power to coerce religious believers than the Attorney General exercises directly. Only court orders bring about that coercion, so there is state action either way, and thus the Free Exercise Clause applies with full force.

III. CONCLUSION

The State has acted with hostility toward Mrs. Stutzman's religious beliefs, treated her worse than others, required her to attend ceremonies that she regards as sacred and in conflict with her faith, and mandated that she create custom art celebrating a view of marriage that violates her beliefs. The First Amendment's protection for freedom of conscience, as established in cases like *Masterpiece*, forbids such religious hostility and such deep intrusions into the mind and soul. For this reason and all the others in Mrs. Stutzman's prior briefs, this Court should reverse the Superior Court's ruling and enter judgment for Mrs. Stutzman.

Respectfully submitted this 22nd day of March, 2019.

s/ Kristen K. Waggoner

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