NO. 19-333

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 Writ of Certiorari to the Supreme Court of Washington

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

This Court should grant review because so much is at stake for so many. For Barronelle, the ruling below will force her to make permanent her "interim policy," Pet.App.391a, of abandoning weddings—which have deep religious significance to her, are her most cherished design work, and are integral to showcasing her art and generating referrals. Pet. 10. And individual Respondents' attorney-fee award against Barronelle personally will drive her into bankruptcy, taking her business and nearly everything she owns.

Many are in similar positions. Pet. 5–6. Some even face threats of jail. *Ibid.* And lower courts are irreconcilably split. *Id.* at 5–6, 20, 23–24, 27–28, 30–35. Moreover, litigation is only the tip of the iceberg; with devastating attorney-fee awards and jail time at stake, many Jews, Christians, and Muslims shutter their wedding businesses to avoid trouble.

This case is the ideal vehicle for resolving these conflicts. It involves compelled participation, custom art, and government hostility—key issues that arise in many cases but not often all in one. Review would allow this Court to provide lower courts with guidance on all these issues and set straight a state court that simply reissued most of its prior ruling verbatim in response to this Court's remand. Also, Barronelle's long-time friendship with Robert, practice of designing arrangements to celebrate countless events for gay customers, and willingness to sell unarranged or prearranged flowers for same-sex weddings all show that First Amendment freedoms and public-accommodation laws can coexist. First Amendment Scholars Amici Br. 21–25. Certiorari is warranted.

ARGUMENT

I. Washington compels Barronelle's participation in same-sex weddings, raising an important free-exercise question.

When Barronelle provides her paid "full wedding support" service, her participation includes designing custom floral art, delivering it to the wedding, decorating the venue with her art, "pinn[ing]" her designs on "the bridesmaids and groomsmen," "attending the ceremony," and "ensur[ing] that all flowers are beautiful throughout" the event. Pet.App.382a–83a, 410a. Her hourly rate for full wedding support, Resp.App.38a–39a, puts her "at the [couple's] disposal," doing "whatever it takes" to make the event successful, including "help[ing] the wedding party" and "greet[ing] guests," among other things. Pet.App.383a–84a. But Washington says that if she won't do all this for same-sex weddings, she can't do it for any. The injunctions say the same.

1. The injunctions require all "services offered or sold to opposite sex couples" for "weddings" to be afforded "on the same terms to same-sex couples." Pet.App.135a, 140a. Thus, Barronelle must provide her full wedding support—and all it entails—for same-sex marriages.

Respondents say the state courts disclaimed any requirement to "personally attend and participate in same-sex weddings." State BIO 11–13 (quoting Pet.App.4a). But what the trial court actually indicated—when commenting on the injunctions it had yet to issue—was that Barronelle's "presence" at the ceremony, "delivering the flowers," and "set[ting]"

them up, *would all be covered*. Pet.App.197a–98a n.23. The Washington Supreme Court did not alter this scope. Pet.App.4a, 12a. So while the court said it wasn't compelling Barronelle to sing and clap at same-sex weddings, there is no reasonable dispute that the injunctions cover Barronelle's full-wedding-support services.

In addition, the injunctions are not limited to paid services; they cover all "services offered" for weddings. Pet.App.135a, 140a. And because Barronelle's full wedding support includes being "at the disposal" of the couple, all she does there "to make the entire ceremony" successful is included. Pet.App.383a–84a; Ethics and Religious Liberty Comm'n ("ERLC") Amici Br. 19–25 (explaining that the injunctions compel participation).

2. Respondents suggest that participation is irrelevant because the individual Respondents did not request full wedding support. I&F BIO 12. But Respondents admit the injunctions apply to other customers, *id.* at 28, and they undeniably cover the full range of Barronelle's wedding services. What's more, the Attorney General challenged Barronelle's same-sex wedding policies, *not* just her response to Robert. CP370-71, 375. And the trial court granted summary judgment against Barronelle, so her understanding that Robert was seeking full wedding support must be accepted. Pet.App.386a–87a.

Respondents suggest that Barronelle's participation is limited to "transporting flowers," I&F BIO 14, and "setting [them] up," State BIO 13. But as explained, Barronelle does far more: imagining and designing floral art, adorning the bridal party with

her designs, and attending the ceremony, among other things. Her participation is not like the examples Respondents offer. *E.g.*, I&F BIO 14.

As a last resort, Respondents imply that Barronelle is not even *at* the weddings. I&F BIO 5–6, 13. That ignores the record. While trucks transport her art to the venue, Barronelle is there to incorporate it into the event and provide full wedding support. Resp.App.37a–39a; Pet.App.410a ("[Barronelle] had come to the church with the delivery trucks").

3. Respondents do not try to justify compelling Barronelle's presence at and participation in same-sex weddings. For good reason: it is an affront to any historical understanding of the First Amendment. See ERLC Amici Br. 5–10. Such compelled participation is so egregious that this case presents an excellent opportunity to reconsider *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and its shortcomings. Pet. 25–26. The Court should do so.

II. The free-speech question is a pressing issue of national importance that is dividing lower courts.

The free-speech issue will decide the fate of many who create speech for a living, and appellate courts are irreconcilably split over it. After years of percolation, see *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013), the time has come for this Court to provide guidance before more people like Barronelle are punished for following their conscience.

A. Washington unconstitutionally compels speech.

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), establishes that government cannot apply public-accommodation laws to force professionals to create speech expressing messages to which they object. The Washington Supreme Court violated this rule.

1. Respondents argue that this rule is unworkable because courts will need "to adjudicate" whether particular "products" express messages. I&F BIO 24. Yet that is a feature—not a fault—of the First Amendment. "While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it, and the line is long familiar to the bar." *NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2373 (2018) (cleaned up). A previously unrecognized form of speech qualifies if it (1) "communicate[s] ideas" and (2) is analogous to other protected speech. *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

Barronelle's wedding arrangements are speech because both factors are satisfied. Pet. 8–9, 27–30; Cato Amici Br. 12–15. As the individual Respondents admit, the unique art Barronelle creates for weddings conveys celebratory messages about the event. CP1752, 1858. And her wedding designs are akin to sculptures and "painting[s]" that are constitutionally protected despite lacking a "particularized message." *Hurley*, 515 U.S. at 569. This explains why the Attorney General conceded below that Barronelle's wedding art is speech. Pet. 26.

2. Washington insists it does not "dictate the content" of Barronelle's speech. State BIO 15–16. Not true. The messages Barronelle's art communicates depend on its context. *Spence* v. *Washington*, 418 U.S. 405, 410 (1974) (per curiam) (speech's "context" affects its "meaning"). By forcing her to design for same-sex marriages, Washington is compelling her to create custom art expressing celebration for those unions.

Respondents also suggest that Barronelle's designs do not convey celebratory messages because she testified that "sell[ing] flowers" for atheists' weddings does not "endors[e] atheism" and doing likewise for Muslims' weddings does not endorse Islam. Resp.App.95a. That comparison is inapt. Merely "sell[ing] flowers"—which Barronelle will do for any and all weddings including same-sex unions, Pet.App.390a—is a far cry from designing custom floral art for weddings. Also, Barronelle's conflict is with creating wedding art that celebrates unions her faith teaches are not marriages. CP606–07. Opposite-sex weddings between atheists or Muslims celebrate unions her faith regards as marriages; same-sex weddings do not.

3. Respondents' discussion of makeup artists, hairstylists, tailors, chefs, and architects ignores key analytical principles. I&F BIO 2, 23–24.

First, the First Amendment does not protect nonspeech. Many of these professionals will be unable to satisfy the two speech factors discussed above. A side of broccoli does not speak a message. Nor do alterations to a suit for a Catholic confirmation. In contrast, companies like Microsoft recognize that

people often use flowers to create art and express messages. See https://bit.ly/2M3ow2c.

Second, the Free Speech Clause applies in public-accommodation cases only if the speaker objects to the *message* that the created item expresses, not the *status* of the requesting person. *Hurley*, 515 U.S. at 572 (distinguishing "intent to exclude homosexuals" from "disagreement" with message); *Brush & Nib Studio* v. *City of Phoenix*, 448 P.3d 890, 910 (Ariz. 2019) (recognizing this message/status distinction). Even if a professional creates speech, the First Amendment does not apply if the creator objects to who the requesting person is. Painting beautiful landscapes on cakes is expression, but that does not allow pastry chefs to refuse service based on a person's protected status.

Respondents emphasize the need to ensure lower courts, professionals, and consumers know the lines surrounding compelled-speech protection. I&F BIO 24. Exactly. If the distinctions are "elusive," as Respondents insist, *ibid.*, this Court's guidance is urgently needed. And a holding reaffirming *Hurley*'s message/status distinction would bring much needed clarity.

B. The Washington ruling conflicts with decisions from this Court and others.

The decision below conflicts directly with *Hurley*, *Brush & Nib*, and *Telescope Media Group* v. *Lucero*, 936 F.3d 740 (8th Cir. 2019). Pet. 30–34; Ctr. For Religious Expression Amicus Br. 4–25.

Respondents deny any *Hurley* conflict, calling that case a "peculiar application" of a public-accommodation law "to a privately organized non-profit parade" rather than "a business that serves the general public." I&F BIO 17. But as the Arizona Supreme Court recently explained, "*Hurley* made no such distinction." *Brush & Nib*, 448 P.3d at 915. What *Hurley* "considered 'peculiar' was not the application . . . to a privately organized parade, but *application of the law to compel speech*." *Ibid.* (emphasis added) Because Barronelle's wedding art is speech, Washington's ruling conflicts with *Hurley*.

Respondents also say there is no conflict with *Telescope* or *Brush & Nib*. That argument is unpersuasive. Washington filed a brief in *Telescope* raising *the same theories* accepted in the decision below. Massachusetts Amici Br., *Telescope* (8th Cir.) (joined by Washington) ("States *Telescope* Amici Br."). And counsel for the individual Respondents did likewise in both cases. ACLU Amici Br., *Telescope* (8th Cir.); ACLU Amici Br., *Brush & Nib* (Ariz.). Yet both decisions categorically rejected Respondents' views.

Respondents offer three distinguishing factors that miss the mark.

First, Washington says that Minnesota "regulated the content of the plaintiffs' speech" while Washington does not. State BIO 17. But that conflicts with what Washington told the Eighth Circuit—that Minnesota "does not regulate [plaintiffs'] speech at all," States *Telescope* Amici Br. 13—a position that court rejected. And Washington *does* regulate the content of Barronelle's speech—by forcing her to celebrate same-sex weddings.

Second, Respondents insist it was "critical" that Minnesota required "a 'positive' message about [the] customers' weddings." I&F BIO 18. But *Telescope* treated that as an extra (not essential) consideration, holding that compelled speech "is always demeaning" and that the "'positive' message" mandate simply adds weight. 936 F.3d at 753. Moreover, Washington equally requires a positive message of Barronelle. It mandates her wedding services to same-sex couples "on the same terms" as others. Pet.App.135a, 140a. Since she expresses only positive celebratory messages about other weddings, she must do the same for same-sex ceremonies.

Third, it was also "critical," Respondents say, that the filmmakers "retain[ed] ultimate editorial judgment and control." I&F BIO 18. But *Telescope* affirmed—based on this Court's precedent—that the First Amendment applies "whenever the government compels speech, regardless of who writes the script." 936 F.3d at 753 (discussing *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974)); accord *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 n.8 (1988) (fundraisers speaking for charities and under their control have "an independent First Amendment interest in the speech").

Nor did the Arizona Supreme Court focus on the artists' "control" in *Brush & Nib*. Contra I&F BIO 20. "More important[ ]" than whether the artists retained "substantial" artistic control is that the First Amendment protects multiple speakers when they jointly create the "item[s] featured in the communication." *Brush & Nib*, 448 P.3d at 911 (quoting *Hurley*, 515 U.S. at 570, and citing *Riley*, 487 U.S. at 794 n.8).

Regardless, Barronelle has ultimate control over the messages she communicates through her custom wedding work. Editorial control extends from big decisions, such as "what events to take on" and what messages to express, to small ones, like the details to include. Cf. *Telescope*, 936 F.3d at 747–48. While Barronelle makes final "corrections, additions, [and] changes" to her art as customers request, Resp.App.43a, she retains ultimate control over the events celebrated and the messages expressed, Pet.App.388a–91a (discussing what Barronelle will not celebrate). That is much like the *Telescope* filmmakers who gave their customers a "say over the finished product" while "retain[ing] ultimate editorial judgment and control." 936 F.3d at 751. Even in the details, customers respect Barronelle's "artistic judgment" on "how to convey" a "message." Pet.App.378a; see also *id.* at 382a, 398a, 405a.

Respondents also discard *NIFLA* because the law there "dictated [speech's] content." I&F BIO 20. But the constitutional violation in *NIFLA* did not hinge on that; as in *Hurley*—which did not dictate a script—the problem was the compelled speech. Nor is *Janus* v. *American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018), irrelevant because there is no speech subsidy here. State BIO 21. Forcing Barronelle to imagine and handcraft custom art is a graver violation of conscience than a speech subsidy. Cato Amici Br. 10–12.

Respondents' reliance on the logistical emails and flyers in *Rumsfeld* v. *FAIR*, 547 U.S. 47 (2006), is also misplaced. State BIO 21. Forcing schools to send those items was "plainly incidental" to non-expressive conduct—access to empty meeting rooms—that the

government could require. 547 U.S. at 62. Here, compelling Barronelle's art is not incidental to anything. It is the exact thing Washington demands. Pet. 32; see also *Brush & Nib*, 448 P.3d at 908–09 (distinguishing *FAIR*); *Telescope*, 936 F.3d at 758 (same). *FAIR* is inapposite.

III. The religious-hostility question warrants review.

A. Limiting *Masterpiece*'s ban on religious hostility to adjudicatory bodies is indefensible.

Confining *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), to adjudicatory bodies conflicts with *Masterpiece*'s own language and an entire body of constitutional law. Pet. 34–36; *Washington Supreme Court Limits Masterpiece Cakeshop to the Context of Adjudications*, 133 Harv. L. Rev. 731, 735–38 (2019); Samaritan's Purse Amicus Br. 17–25. In conflict with the Washington ruling, one federal court recently cited *Masterpiece* when relying on a state attorney general's statements and actions as evidence of impermissible "target[ing] based on [a] religious belief." *Buck* v. *Gordon*, No. 1:19-CV-286, 2019 WL 4686425, at *15 (W.D. Mich. Sept. 26, 2019).

Washington's defense of the ruling below falls flat. That decision did not ameliorate its flawed reading of *Masterpiece* simply by recognizing that the Attorney General is "subject to" other "constitutional restrictions." State BIO 3. And contrary to what Washington says, *Masterpiece* applied not a stricter

neutrality standard than *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993), but the same one, which bans "subtle departures from neutrality" and "even slight suspicion" of hostility. *Masterpiece*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534, 547).

B. Washington acted with hostility toward Barronelle's religion.

Barronelle filed a video, affidavits, and dozens of public records below showing Washington's disparate treatment of Bedlam. App.1a–16a. Respondents' attempts to downplay the disparity fail.

Washington responded very differently to both scenarios. Although the Attorney General received dozens of complaints about Bedlam, he did not demand an Assurance of Discontinuance. App.5a–6a, 20a. Sure, the Washington Human Rights Commission sent an information letter to Bedlam. State BIO 31–32. But that is nothing like what the Attorney General did to Barronelle: bypassing the Commission altogether and suing her in her personal and business capacities, despite receiving no complaint from the individual Respondents. Pet. 36–37; App.5a–6a, 10a–11a, 19a–22a.

Washington tries to justify the differential treatment by claiming that Bedlam "committed" to serve the Christian customers if they returned. State BIO 31. But Washington's own documents show no such commitment: "I *probably* would not throw them out," the owner said. State's Mot. to Supp., Ex. J at 4 (emphasis added). Accepting such a measly response

while demanding binding assurances from Barronelle, Pet. 14, confirms the disparity.

Respondents lastly argue that remedying the hostility will not make a difference because the individual Respondents have their own case and judgment. I&F BIO 27–29. Not true. The judgment awarded to Washington orders Barronelle to pay a $1,000 penalty. Pet.App.134a, 136a. If she prevails on her hostility arguments, that judgment will be vacated and bring clarity to courts and citizens alike.

More broadly, Washington's hostility in these simultaneous enforcement actions—manifest by the Attorney General and the Washington Supreme Court—taints both proceedings. Pet. 36–38. The Attorney General instigated these actions by suing first, calling the individual Respondents repeatedly to offer support, and jointly litigating with them. CP1476–77, 1886–88. And the individual Respondents' own hostility toward Barronelle's religion was given legal force by courts—state actors that enjoined Barronelle from exercising her rights. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964); *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). Constitutional rights do not diminish simply because state officials orchestrate and carry out a companion case.

CONCLUSION

For the foregoing reasons, and those stated in the petition, review should be granted.

Respectfully submitted,

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DECEMBER 2019

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APPENDIX

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No. 91615-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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

Appellants.

ROBERT INGERSOLL and CURT FREED,

Respondents,

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

Appellants.

Appellants' Motion to Supplement Record or for Judicial Notice

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I. IDENTITY OF MOVING PARTIES

Appellants Arlene's Flowers, Inc. and Barronelle Stutzman (collectively, "Appellants" or "Mrs. Stutzman") are the moving parties.

II. STATEMENT OF RELIEF SOUGHT

Appellants request that the Court allow them to supplement the record with the attached materials, which consist of (1) documents produced by the Washington Attorney General's office in response to a public-records request inquiring about the State's actions concerning Bedlam Coffee's decision to expel a group of Christian customers in October 2017 (attached as Ex. A); (2) a declaration authenticating those documents (attached as Ex. B); (3) a video of the Bedlam Coffee incident (attached as Ex. C); (4) a declaration authenticating that video (attached as Ex. D); and (5) a transcript of that video (attached as Ex. E). In the alternative, Appellants request that the Court take judicial notice of those materials.

The U.S. Supreme Court directed this Court to reconsider this case in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018). *See Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). The attached materials demonstrate facts that are directly relevant—indeed essential—to carrying out that task.

III. FACTS RELEVANT TO THE MOTION

On February 16, 2017, this Court held that requiring Mrs. Stutzman to design custom floral arrangements celebrating a same-sex wedding does not violate the Free Exercise Clause of the First

Amendment. *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 838-43, 389 P.3d 543 (2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018). As part of that decision, this Court concluded that the WLAD "is a neutral, generally applicable law that serves [the] state government's compelling interest in eradicating discrimination in public accommodations." *Id*. at 856.

Following that ruling, while Ms. Stutzman waited for the U.S. Supreme Court to rule on her petition for a writ of certiorari, the owner of Bedlam Coffee in Seattle expelled a group of Christian customers visiting his shop. *Gay business owner in Seattle accused of discriminating against Christian customers*, Talk Radio 570 KVI (Oct. 12, 2017), https://bit.ly/2DnNqqy. After learning that those customers had distributed flyers advocating their religious beliefs outside his shop, the owner demanded that they leave. Catherine Davis Decl. ¶ 5 (Ex. D). He told them to "shut up," stated that he did "not want these people in [his shop]," and said to "tell all [their] f---ing friends, 'don't f---ing come here!'" Bedlam Coffee Video, Vimeo, https://vimeo.com/user 40726072/review/292380783/0c7f9182eb (last visited Nov. 13, 2018) (Ex. C); Tr. of Bedlam Coffee Video at 3-5 (Ex. E). While departing, one of the customers politely said something about Jesus Christ, and the owner responded: "I'd f--k Christ in the a--, okay? He's hot." Tr. of Bedlam Coffee Video at 5-6 (Ex. E). He then repeated his demand to "[g]et the f--k out!" *Id*. at 6.

The parties discussed this incident in supplemental briefing that they filed with the U.S. Supreme Court. *See* Pet'rs Suppl. Br. at 3, *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018)

(No. 17-108), 2018 WL 2735473 ("Arlene's Suppl. U.S. Sup. Ct. Br."); State Resp't Suppl. Br. at 2-4, *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (No. 17-108), 2018 WL 3019588 ("State Suppl. U.S. Sup. Ct. Br."). Although the Attorney General implied in his supplemental brief that there was "no indication that anyone filed a complaint about the incident with the State of Washington," State Suppl. U.S. Sup. Ct. Br. at 3, several complaints *were* indeed sent to the Attorney General about this incident. In fact, the attached documents show that dozens of individuals filed online complaints with the Attorney General asking him to investigate or sue Bedlam Coffee. Ex. A at Mot.Supp.0004, 0011, 0024, 0041, 0044-88. In response, the Attorney General did virtually nothing.

For example, one Washington resident asked the Attorney General if Bedlam Coffee's refusal to serve Christians was different than Mrs. Stutzman's actions and if the Attorney General would file suit against Bedlam Coffee's owner. Ex. A at Mot.Supp.0024. The Attorney General then sent Bedlam Coffee a standard form letter pursuant to its voluntary complaint-resolution process, advising the owner that a complaint had been filed and offering to act as a neutral party in resolving the issue. *Id.* at Mot.Supp.0025-28. When Bedlam Coffee did not respond, the Attorney General closed the file and sent a letter to the complainant informing her of that fact. *Id.* at Mot.Supp.0037-38.

In another instance, an out-of-state resident directed the Attorney General to an online article about the Bedlam Coffee incident, informed him about the video, and asked the Attorney General to do

equally to Bedlam Coffee what he had done to Mrs. Stutzman. Ex. A at Mot.Supp.0004. When Bedlam Coffee did not respond to the Attorney General's form letter, the Attorney General closed that file as well. *Id.* at Mot.Supp.0018-21. The egregious nature of the video itself seemingly was not enough to warrant further investigation.

The attached documents show that approximately *two dozen others* sent complaints to the Attorney General regarding the Bedlam Coffee incident. Ex. A at Mot.Supp.0041, 0044-88. Apparently, none of those were forwarded to Bedlam Coffee, nor did the Attorney General do anything else with them. Contrast that with the Attorney General's handling of this case, where he sent a letter threatening to sue Mrs. Stutzman if she did not agree with his view of the law, CP 1325-29, contacted the individual Respondents to say that his office was "research[ing] . . . options" to sue Mrs. Stutzman, CP 1886-87, and ultimately devised a novel way to bring claims against her, CP 1503.

Months after the Attorney General decided not to act against Bedlam Coffee, the U.S. Supreme Court on June 5, 2018, issued its ruling in *Masterpiece*. The Court there held that the state of Colorado violated the free-exercise rights of cake artist Jack Phillips and his business when it punished them for declining—based on their sincere religious beliefs—to create a custom wedding cake celebrating a same-sex marriage. *Masterpiece*, 138 S. Ct. at 1731-32. Colorado acted "inconsistent with [its] obligation of religious neutrality," the Court concluded, by exhibiting "elements of a clear and impermissible hostility" toward Mr. Phillips's faith. *Id.* at 1723, 1729. And the

Court found an "indication of hostility [in] the difference in treatment" between Phillips—who was punished by the government—and three other cake artists "who objected . . . on the basis of conscience" to requests for "cakes with images that conveyed disapproval of same-sex marriage" and were not punished. *Id.* at 1730. The situations involving the three other cake artists did not arise until after Colorado punished Mr. Phillips and his case was on appeal.

About a week after the *Masterpiece* ruling, Appellants filed their supplemental brief with the U.S. Supreme Court arguing that remand of this case was appropriate so that Washington courts could "consider the evidence of government hostility toward" Mrs. Stutzman's faith. Arlene's Suppl. U.S. Sup. Ct. Br. at 2. In particular, Appellants cited the incident at Bedlam Coffee and argued that the State's "treatment of that situation stands in marked contrast to its swift and unprecedented efforts to punish [Mrs. Stutzman] in her personal capacity." *Id.* at 3.

Despite the Attorney General's attempts to characterize this disparate treatment as "entirely different" than what occurred in *Masterpiece*, *see* State Suppl. U.S. Sup. Ct. Br. at 3, the U.S. Supreme Court on June 25, 2018, granted Mrs. Stutzman's petition for a writ of certiorari, vacated this Court's judgment, and remanded the case to this Court for reconsideration in light of *Masterpiece*. *See Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). That order requires this Court to "reconsider the entire case" in light of *Masterpiece*. Stephen M. Shapiro et al., *Supreme Court Practice* 350 (10th ed.

2013).

Soon thereafter, on July 20, 2018, Respondents filed with this Court a Motion to Recall the Mandate and Set a Briefing Schedule. Appellants responded by asking this Court to remand the case to the Superior Court, which would have allowed that court to determine if summary judgment is still appropriate, if the record should be supplemented, or if additional discovery is needed. On September 12, 2018, this Court issued an order setting a briefing schedule and stating that Appellants' request to "remand this case to the superior court is denied at this time." Order Setting Briefing Schedule at 2. Appellants now request that this Court supplement the record or take judicial notice of the attached materials demonstrating the State's disparate treatment of and hostility toward Mrs. Stutzman's beliefs—issues that are directly relevant given the U.S. Supreme Court's directive to reconsider this case in light of *Masterpiece*.

IV. GROUNDS FOR THE RELIEF SOUGHT AND ARGUMENT

A. The Court should supplement the record under RAP 9.11.

Under Rule 9.11 of the Rules of Appellate Procedure ("RAP 9.11"), this Court may direct that additional evidence be added to the record if six criteria are met:

> (1) additional proof of facts is needed to fairly resolve the issues on review;

> (2) the additional evidence would probably change the decision being reviewed;
>
> (3) it is equitable to excuse a party's failure to present the evidence to the trial court;
>
> (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive;
>
> (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive; and
>
> (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11. Each of these six factors is satisfied here.

First, the U.S. Supreme Court ordered this Court to reconsider this case in light of *Masterpiece*. *See Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). The *Masterpiece* Court found a free-exercise violation because Colorado acted with "clear and impermissible hostility" toward Mr. Phillips's faith—evidenced in part by the government's "difference in treatment" between Mr. Phillips and other business owners who refused service to a Christian customer while Mr. Phillips's case was on appeal. 138 S. Ct. at 1729-31. Similarly here, the Attorney General has treated Mrs. Stutzman differently than the owner of Bedlam Coffee, who refused service to Christian customers while Mrs. Stutzman's case was on appeal. The only way that

this Court can "fairly resolve" the question posed by the U.S. Supreme Court—whether this Court's prior judgment can stand in light of *Masterpiece*—is by considering the materials attached to this motion.

Moreover, the Attorney General's supplemental brief with the U.S. Supreme Court made assertions that put the attached materials at issue. For example, the Attorney General wrote that there is "no indication that anyone filed a complaint about the [Bedlam Coffee] incident with the State of Washington." State Suppl. U.S. Sup. Ct. Br. at 3. But the attached documents show that the Attorney General did receive many complaints. *See, e.g.*, Ex. A at Mot.Supp.0004, 0011, 0024, 0041, 0044-88. Also, the State mentioned that "the Chair of the Washington Human Rights Commission publicly announced that she would send a letter" to Bedlam Coffee. State Suppl. U.S. Sup. Ct. Br. at 3. And a draft of that letter is included in the attached materials. *See* Ex. A at Mot.Supp.0089-90.

Second, the additional evidence would likely affect the outcome of this case. As explained above, the new evidence demonstrates the same sort of disparate treatment that the U.S. Supreme Court found outcome-determinative in *Masterpiece*. The additional evidence, when juxtaposed against the Attorney General's treatment of Mrs. Stutzman, demonstrates the State's hostility toward Mrs. Stutzman's religious beliefs and practices. Appellants Br. at 19-23 (filed Nov. 13, 2018). Unlike the swift decision to prosecute Mrs. Stutzman for exercising her religious beliefs, the Attorney General appears to have done nothing to investigate or prosecute Bedlam Coffee or its owner after the media broke the story

about their actions in expelling Christians. *Id.* Instead, even after receiving dozens of complaints, the Attorney General merely sent a few form letters to Bedlam Coffee and promptly closed the files after the business ignored them. *See* Ex. A at Mot.Supp.0018-19, 0035-36.

The Bedlam Coffee video alone, which was referenced in many of the complaints, *see, e.g.*, Ex. A at Mot.Supp.0004, 0046, 0048, 0055, 0065, 0069, should have prompted the Attorney General to act, but it did not. Bedlam Coffee's shockingly discriminatory actions were acceptable to the Attorney General, but Mrs. Stutzman's respectfully conveyed religious conflict was not. The attached materials showing this disparity in treatment should have a direct impact on the outcome of this case.

Third, Mrs. Stutzman did not present the attached materials to the Superior Court because that evidence did not exist until after she filed her petition for a writ of certiorari with the U.S. Supreme Court. *See Wash. Fed'n of State Emps., Council 28 v. State*, 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983) (granting motion for receipt of evidence that was created after trial court ruling). It is thus equitable to allow her to file it now.

Fourth, Mrs. Stutzman could not have previously obtained a remedy through post-judgment motions with the Superior Court because the case was pending before the U.S. Supreme Court when the additional evidence was created. Nor would a post-judgment motion with the Superior Court following this Court's eventual ruling suffice. The Superior Court's judgment holds Mrs. Stutzman responsible, in

her personal capacity, for the individual Respondents' attorney fees. Forcing her to litigate the remaining legal issues on an incomplete record—increasing her attorney-fee liability all the while—based on the prospect that she might be able to supplement the record later is an inadequate and prejudicial option that needlessly wastes judicial resources.

Fifth, this Court has already determined that the appellate remedy of granting a new trial is inadequate. It did so by denying Appellants' request to "remand this case to the superior court"—a request that Appellants raised so that the Superior Court could determine whether summary judgment is still appropriate, whether the record should be supplemented, and whether additional discovery is needed. *See* September 12, 2018 Order Setting Briefing Schedule at 2. Given this prior order, the appellate remedy of granting a new trial cannot justify denying Mrs. Stutzman's request to supplement the record.

Sixth, it would be inequitable to decide this case without the additional materials. The U.S. Supreme Court ordered this Court to reconsider the case in light of *Masterpiece*, and the evidence submitted here is akin to the evidence of disparate treatment that developed while the *Masterpiece* case was on appeal. Mrs. Stutzman would be prejudiced by allowing this case to be resolved without the attached materials. This is particularly true because, as explained above, those materials belie at least one of the statements about the Bedlam Coffee incident that the Attorney General included in his supplemental brief. In short, it would not only be inequitable to decide this case solely on the evidence already taken by the Superior Court; it would be contrary to the U.S.

Supreme Court's direction.

B. The Court should supplement the record, notwithstanding the requirements of RAP 9.11, because doing so would serve the ends of justice.

This Court may consider new evidence, notwithstanding the requirements of RAP 9.11, if that evidence would "serve the ends of justice." *Wash. Fed'n of State Emps.*, 99 Wn.2d at 884-85 (citing RAP 1.2 and RAP 18.8). This provides an additional reason why this Court should supplement the record with the attached materials.

Masterpiece held that state officials cannot target people who hold disfavored religious beliefs for punishment—that the State must not treat those people worse than others. *Masterpiece*, 138 S. Ct. at 1730-31. As the Court there explained, "[t]he Free Exercise Clause bars even '*subtle departures* from neutrality' on matters of religion," and its protection applies "upon even *slight suspicion* that proposals for state intervention stem from animosity to religion or distrust of its practices." *Id.* at 1731 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)) (emphasis added). Review of the attached materials, regardless of whether the requirements of RAP 9.11 are met, would serve the ends of justice by enabling this Court to adequately evaluate the State's actions in light of *Masterpiece*.

C. In the alternative, this Court should take judicial notice of the additional evidence.

Washington evidentiary rules require courts to take judicial notice if a party requests it and supplies the necessary information. ER 201(d). Judicial notice is appropriate "at any stage" if the information is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b), (f). The attached documents produced by the Attorney General's office in response to a public-records request and the videotape of the Bedlam Coffee incident (along with the accompanying transcript) are appropriate for judicial notice under ER 201.

First, a court may take judicial notice of public records like those attached to this motion. *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 726, 189 P.3d 168 (2008) (taking judicial notice of a certificate of incorporation because that document was capable of accurate and ready determination). Public records obviously include all materials obtained through a public-records request. *See*, *e.g., In re American Apparel, Inc. Shareholder Litigation*, 855 F. Supp. 2d 1043, 1064 (C.D. Cal. Jan. 13, 2012) (taking judicial notice of documents obtained by submitting a public-records request because those are matters of public record). The documents produced by the Attorney General are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," ER 201(b), and should therefore be considered by this Court.

Second, courts may also take judicial notice of videos. *Creative Dream Productions, LLC v. Houston*, No. CV 14-7714, 2015 WL 12731915, at *1 n. 3 (C.D. Cal. April 2, 2015) (taking judicial notice of a YouTube video); *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1235 (N.D. Cal. 2014) (taking judicial notice of videotape and accompanying transcript). Here, the video of the Bedlam Coffee incident is well known within the State and has been viewed thousands of times. *See* Curtis M. Wong, *Gay Coffee Shop Owner Blasts Anti-Abortion Activists in Viral Video*, Huffington Post (Oct. 10, 2017), https://bit.ly/2DsGU1J (stating that the video had been "viewed over 660,000 times since it was uploaded"). Also, its accuracy cannot reasonably be questioned. The Court should thus take judicial notice of the video and accompanying transcript.

V. CONCLUSION

Appellants respectfully request that this Court supplement the record or take judicial notice of the materials attached to this motion.

Respectfully submitted this the 13th day of November, 2018.

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Excerpts from Brief of Appellants filed in Washington Supreme Court, Case No. 91615-2, on November 13, 2018

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V. ARGUMENT

A. Targeting Mrs. Stutzman because of the State's hostility toward her religious beliefs and requiring her to physically attend and participate in same-sex weddings violate her free exercise of religion.

The State violates Mrs. Stutzman's free-exercise rights in two ways.[3] First, the Attorney General has targeted her because of, and shown hostility toward, her religious beliefs about marriage—beliefs that the U.S. Supreme Court has described as "decent and honorable" and held "in good faith by reasonable and sincere people." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2602, 192 L. Ed. 2d 609 (2015). Second, the Superior Court's order requires Mrs. Stutzman to physically attend and participate in wedding ceremonies—events she considers sacred—that violate her faith.

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[3] Arlene's free-exercise rights are synonymous with Mrs. Stutzman's. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768, 189 L. Ed. 2d 675 (2014) ("[P]rotecting the free-exercise rights of [closely held] corporations . . . protects the religious liberty of the humans who own and control those companies."); *Masterpiece*, 138 S. Ct. at 1732 (ruling in favor of a free-exercise claim brought by a small business and its owner).

1. The State's targeting of and hostility toward Mrs. Stutzman's religious beliefs and practices violate her free exercise of religion.

Masterpiece held that the government violates the Free Exercise Clause when it exhibits "hostility toward the sincere religious beliefs" of people who cannot in good conscience celebrate same-sex marriages. 138 S. Ct. at 1729. Where such hostility exists, the State fails in its obligation to act "in a manner that is neutral toward religion." *Id.* at 1732. Given the importance of free-exercise rights, the threshold for establishing such a violation is low. "The Free Exercise Clause bars even '*subtle* departures from neutrality' on matters of religion," and its protection applies "upon even *slight* suspicion that . . . state [actions] stem from animosity to religion or distrust of its practices." *Id.* at 1731 (citation omitted) (emphasis added).

One of the easiest ways to demonstrate an absence of neutrality—and the presence of anti-religious hostility—is by showing a "difference in treatment" that disfavors people with certain religious beliefs. *Id.* at 1730. It has long been true that "[o]fficial action that targets religious conduct for distinctive treatment" violates the neutrality requirement. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Likewise, selectively burdening conduct motivated by a specific religious belief demonstrates a failure to generally apply the law. *Id.* at 543.

In *Masterpiece*, the Court found an "indication of hostility [in] the difference in treatment between Phillips'[s] case"—in which he declined to create a custom wedding cake celebrating a same-sex marriage—and three other cake artists "who objected . . . on the basis of conscience" to requests for "cakes with images that conveyed disapproval of same-sex marriage." 138 S. Ct. at 1730. The government punished Mr. Phillips, but declined to act against the other cake artists. That unequal treatment violated the Free Exercise Clause.

The Attorney General has exhibited the same unequal treatment here. After learning about Mrs. Stutzman's religious conflict through media reports, but without any complaint from the individual Respondents, the Attorney General contacted Mr. Freed to express his concern, sent a letter threatening to sue Mrs. Stutzman, had his office devise a novel way to bring this lawsuit, employed an admittedly unprecedented use of the CPA to do so, and sued Mrs. Stutzman in her personal capacity.

In marked contrast, the Attorney General responded very differently when a media story went viral about the gay owner of Bedlam Coffee in Seattle profanely berating, ejecting, and discriminating against a group of Christian customers in October 2017.[4] After learning that the customers had distributed flyers advocating their religious beliefs in the streets outside his shop, Bedlam's owner (as shown in a widely disseminated video) told them that

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[4] *Gay business owner in Seattle accused of discriminating against Christian customers*, Talk Radio 570 KVI (Oct. 12, 2017), https://bit.ly/2DnNqqy.

he was denying them service, repeatedly ordered them to "shut up," and angrily yelled: "Leave, all of you! Tell all your f---ing friends, 'Don't f---ing come here!'"[5] While departing, one of the customers politely said something about Jesus Christ, and the owner responded: "I'd f--k Christ in the a--, okay. He's hot."[6]

The Attorney General received dozens of complaints about this outrageous behavior asking if he was planning to file suit against Bedlam like he did against Mrs. Stutzman. *See* Appellants Motion to Supplement Record, Ex. A at Mot.Supp.0004, 0011, 0024, 0041, 0044-88. But the Attorney General sent no letter threatening to sue Bedlam and filed no suit against the business, let alone against the owner in his personal capacity. The Attorney General's Office merely sent Bedlam a few standard form letters pursuant to its voluntary complaint-resolution process, advising the owner that people had filed complaints and offering to act as a neutral party in resolving the matter. *Id.* at Mot.Supp.0005-08, 0025-28. When Bedlam didn't respond, the Attorney General did nothing—he simply closed the files. *Id.* at Mot.Supp.0018-19, 0035-36.

Bedlam's actions are an extreme violation of the WLAD, which bans discrimination based on creed, RCW 49.60.215, and which the Attorney General has power to enforce through the CPA. Given the Attorney General's prior arguments and this Court's holding in this case, the State cannot legitimately claim that Bedlam's behavior was lawful:

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[5] Bedlam Coffee Video, Vimeo, https://vimeo.com/user40726072/review/292380783/ 0c7f9182eb (last visited Nov. 13, 2018).
[6] *Id.*

> [T]he language of the WLAD itself . . . states that it is to be construed liberally, RCW 49.60.020; that all people, regardless of [creed] are to have "*full enjoyment* of any of the accommodations, advantages, facilities, or privileges" of any place of public accommodation, RCW 49.60.030 (emphasis added); and that *all* discriminatory acts, including any act "which directly *or indirectly* results in any distinction, restriction, or discrimination" based on a person's [creed] is an unfair practice in violation of the WLAD, RCW 49.60.215 (emphasis added).

Arlene's, 187 Wn.2d at 825; *see also* RCW 49.60.040(14) (forbidding public accommodations from "directly or indirectly causing persons of any particular . . . creed . . . to be treated as not welcome"). To paraphrase the Attorney General's argument below, expelling Christian customers for expressing their religious beliefs "at the very least *indirectly* resulted in discrimination" based on creed, CP 377, and undeniably treated Christians as "unwelcome," RCW 49.60.040(14).

While Bedlam's shocking WLAD violation didn't prompt the Attorney General to action, Mrs. Stutzman's respectfully expressed and narrowly confined religious conflict unleashed the full power of the State. That disparate treatment demonstrates governmental animosity toward Mrs. Stutzman's religious exercise. The Attorney General's crusade against her has never been about neutrally enforcing the law; he has publicly decried the morality of her

decision not to celebrate same-sex marriages, labeling it as discrimination that is both "illegal—and wrong."[7] In other words, the Attorney General "passe[d] judgment upon" and "presuppose[d] the illegitimacy of" Mrs. Stutzman's "religious beliefs and practices." *Masterpiece*, 138 S. Ct. at 1731.

In addition to subjecting people of faith to disfavored treatment, *Masterpiece* highlighted other indicia of anti-religious animus. One is dismissing religious beliefs as a mere excuse for discrimination. 138 S. Ct. at 1729. A state official charged with enforcing the public-accommodation law in *Masterpiece* impugned "[f]reedom of religion and religion" as "despicable pieces of rhetoric" that people have used "to justify all kinds of discrimination." *Id.* Likewise here, the Attorney General has derided Mrs. Stutzman's religious beliefs as a mere "mechanism or a means to discriminate,"[8] thereby making "a negative normative evaluation" of her religious convictions. *Id.* at 1731 (quotation marks omitted). And his briefing has even dismissed her religious beliefs as irrelevant and equated them with bigotry, arguing that religion does not "excuse[ ]" discrimination because "[d]iscrimination is discrimination, whether motivated by religion . . . or simple bigotry." CP 2118.

Another indicator of impermissible animus is comparing a person's religious conflict with celebrating same-sex marriage to racism. *Masterpiece*, 138 S. Ct. at 1729. A state official in *Masterpiece*

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[7] Letter from Bob Ferguson to John Trumbo and Bob Hoffmann at 2 (Aug. 11, 2015), *available at* https://bit.ly/2Rw6mGu.

[8] *Dori at odds with AG's explanation of florist-gay wedding lawsuit*, Kiro Radio (Jan. 9, 2015), https://bit.ly/2AM3bVA.

"compare[d]" Mr. Phillips's "invocation of his sincerely held religious beliefs" to egregious historical examples of racism like "slavery and the Holocaust." *Id.* The Attorney General has drawn similar comparisons here. After oral argument before this Court, the Attorney General defended the State's position by saying that "[w]e can't go back to the 1960s and lunch counters."[9] And he gratuitously slammed Mrs. Stutzman's faith in past briefs, scoffing that some who share her "Southern Baptist faith for decades offered a purportedly 'reasoned religious distinction' for race discrimination." State's Br. in Opp'n at 20 n.6, *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (No. 17-108), 2017 WL 4805387. This obvious attempt to demean Mrs. Stutzman's faith is deeply offensive and highly inappropriate for a state official.

A final factor demonstrating a lack of religious neutrality takes the form of government statements "implying that religious beliefs and persons are less than fully welcome in [the] business community." *Masterpiece*, 138 S. Ct. at 1729. In *Masterpiece*, this appeared in comments declaring that Mr. Phillips "can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" *Id.* Here, the Attorney General has likewise stated that "Ms. Stutzman is free to hold her religious beliefs about marriage, but she is not entitled to invoke them" when running her business. CP 2069. And he explained that he sued Mrs. Stutzman in her personal capacity because she made decisions for her business based on "her *personal*

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[9] Nicole Fierro, *Arlene's Flowers owner speaks out after Supreme Court hearing*, KEPR (Nov. 16, 2016), https://bit.ly/2RDLc9H.

belief 'that marriage is a union of a man and a woman.'" CP 219. This sends a chilling message to business owners acting on their own religious beliefs: should they persist, they face the prospect of not only professional hardship but personal financial ruin.

All these facts show that the State has acted with hostility toward Mrs. Stutzman's religious exercise and that it has been "neither tolerant nor respectful" of her beliefs. *Masterpiece*, 138 S. Ct. at 1731. The record creates far more than a "slight suspicion" of governmental animosity to her faith. *Id.* The State has violated the Free Exercise Clause, and the Superior Court's decision must be reversed.

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