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

SUPPLEMENTAL BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE

The Corporate Disclosure Statement in the petition remains unchanged.

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SUPPLEMENTAL BRIEF FOR PETITIONERS UNDER RULE 15.8

On June 17, 2021, this Court issued its decision in *Fulton* v. *City of Philadelphia*, No. 19-123. While the Court held Philadelphia's discrimination against faith-based adoption agencies unconstitutional, it left lower courts without guidance on the first question presented here: whether the government can compel an individual to communicate celebratory messages in violation of their faith. Pet.i.

This case is a uniquely good vehicle for addressing that question. It cleanly presents an issue this Court deemed cert-worthy in *Masterpiece Cakeshop*, *Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)—a question on which the lower courts are intractably split. And it provides the Court with the option of answering a second question on which lower courts are also deeply divided—whether "the Free Exercise Clause's prohibition on religious hostility applies to the executive branch." Pet.i.

Until this Court resolves the questions presented here, "[i]ndividuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties." *Fulton* SlipOp.8 (Gorsuch, J., concurring). Just three days ago, a Colorado court ruled that the law compels cake artist Jake Phillips to create a gender-transition cake, relying extensively on the Washington Supreme Court's decision here. *Scardina* v. *Masterpiece Cakeshop Inc.*, No. 19CV32214 (Denver Dist. Ct. June 17, 2021), Supp.App.1a. Others have used the decision to rule against people of faith too, including *Woods* v. *Seattle's Union Gospel Mission*, 481 P.3d

1060, 1079–84 (Wash. 2021) (Stephens, J., dissenting in part); and *Klein* v. *Oregon Bureau of Labor & Industries*, 410 P.3d 1051, 1064 n.6 (Or. Ct. App. 2017), cert. granted, judgment vacated, 139 S. Ct. 2713 (2019). Certiorari is warranted.

Barronelle Stutzman is a Christian artist who imagines, designs, and creates floral art. Her multimedia works incorporate plants, fabrics, pictures, and other objects to convey expressive messages. Pet.8. Unrebutted experts describe her work as art. Pet.9. Barronelle personally attends wedding celebrations to maintain her floral art and does "whatever it takes" to make the wedding a success. Pet.10. She regularly serves and hires everyone, including individuals who identify as LGBT. Barronelle also sells pre-arranged flowers for any event. But because of her sincere religious beliefs, she politely referred a long-term client to three other florists for custom arrangements designed to celebrate his same-sex ceremony.

That resulted in the State of Washington's unprecedented attack on Barronelle, in both her personal and professional capacities, and a ruling that labeled her a discriminator and threatens to bankrupt her and her business. After this Court vacated and remanded in light of *Masterpiece Cakeshop*, the Washington Supreme Court doubled down, reissuing most of its prior decision verbatim.

Barronelle filed the instant petition, arguing that Washington violated her First Amendment rights in three ways. First, the State required her to take part in sacred ceremonies that contravene her faith, violating the Free Exercise Clause's compelled-participation bar. Pet.21–26. Second, the State forced

her to create custom floral art celebrating same-sex marriage through a content-based application of its public-accommodation law.[1] *Id.* at 26–33. Finally, the State acted with impermissible hostility by targeting Barronelle's religious beliefs. *Id.* at 34–36.

In the 21 months since Barronelle filed her petition, the already-strong case for certiorari has become more compelling for three reasons:

1. Appellate courts have split 4–2 over whether a public-accommodation law violates the Free Speech Clause when it compels individuals to communicate celebratory messages in violation of their faith.

2. The lower courts have squarely split 4–2 over whether *Masterpiece*'s prohibition on religious animosity applies only to "adjudicatory bodies."

3. And the Washington Supreme Court has reaffirmed its hostility to religious liberty.

Unless this Court holds that governments may not use public-accommodation laws to compel individuals of faith to participate in and create expressive art for ceremonies that violate their sincere beliefs, the state will continue to vilify people like Barronelle. If *Employment Division* v. *Smith* allows this unconscionable result, it should be overruled. Pet.25–26; *Fulton*, SlipOp.73 (Alito, J. concurring).

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[1] Barronelle's petition also raises a hybrid-rights claim, Pet.39, a doctrine that has "divided" the "lower courts," *Fulton* SlipOp.62–64 (Alito, J., concurring).

I. The lower courts are split 4–2 over whether the government can compel individuals to communicate celebratory messages in violation of their faith.

A. Four jurisdictions hold that governments may compel individuals to communicate celebratory messages in violation of their faith.

Below, the Washington Supreme Court broadly held that floral art "is not expressive conduct protected by the First Amendment." Pet.App.49a. It ruled that "[t]he decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding." *Id.* at 43a. Further, the for-profit nature of Arlene's Flowers was dispositive: "courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Id.* at 49a (cleaned up).

In *Elane Photography, LLC* v. *Willock*, the New Mexico Supreme Court similarly held that wedding photography was not protected speech. 309 P.3d 53 (N.M. 2013). It required wedding photographers who served opposite-sex couples to participate in same-sex ceremonies. *Id.* at 59. And the court denied that a compelled-speech violation ever arises "from the application of antidiscrimination laws to a for-profit public accommodation"—even ones that "involve speech or other expressive services." *Id.* at 65.

In *Klein*, the Oregon Court of Appeals held that custom wedding cakes are not protected expression. Despite acknowledging this Court has yet to "decide[ ] a free-speech challenge to the application of a public-

accommodations law to a retail establishment selling highly customized, creative goods and services that arguably are in the nature of art or other expression," the court held the forced creation of a custom cake celebrating a same-sex wedding was not "compelled speech." 410 P.3d at 1067, 1069. Further, though cakes "involve aesthetic judgments and have decorative elements," strict scrutiny did not apply because the cakes were not "experienced predominantly as expression." *Id.* at 1071.

Finally, in *Craig* v. *Masterpiece Cakeshop, Inc.*, the Colorado Court of Appeals held that wedding cakes "are not sufficiently expressive to warrant First Amendment protections." 370 P.3d 272, 283 (Colo. App. 2015), rev'd sub nom. *Masterpiece Cakeshop,* 138 S. Ct. 1719. Relying on *FAIR*, the court held the First Amendment irrelevant because a wedding cake does "not convey a celebratory message about same-sex weddings" likely to be understood by the public, warranting only rational-basis review. *Id*. at 286, 288.

This Court granted certiorari in *Masterpiece*, and while it did not decide whether Colorado's public-accommodation law violated the Free Speech Clause, several justices indicated it would: because the "creation of custom wedding cakes is expressive," Colorado's public-accommodation law must survive strict scrutiny. 138 S. Ct. at 1743, 1746 (Thomas, J., concurring). "Nor can anyone reasonably doubt that a wedding cake without words conveys a message." *Id*. at 1738 (Gorsuch, J., concurring). The issue has continued to percolate, resulting in a 4–2 split on the question deemed cert-worthy in *Masterpiece*.

B. Two jurisdictions have held that governments may not compel individuals to communicate celebratory messages in violation of their faith.

In *Telescope Media Group* v. *Lucero*, the Eighth Circuit held that Minnesota may not use a public-accommodation law to compel a for-profit film studio to create films telling stories of same-sex marriages just because they create films celebrating opposite-sex marriages. 936 F.3d 740, 758–60 (8th Cir. 2019). The government cannot compel a person "to talk about ... same-sex marriages" simply because she chooses "to talk about ... opposite-sex marriages." *Id.* at 753. To do so "is at odds with the cardinal constitutional command against compelled speech." *Id.* at 752 (quoting *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018)). It also affects a content-based regulation because it "[m]andat[es] speech that a speaker would not otherwise make." *Id.* at 753 (quoting *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

Applying strict scrutiny, the Eighth Circuit held that "regulating speech because it is discriminatory or offensive is *not* a compelling state interest, however hurtful the speech may be." *Id.* at 755 (emphasis added). "Even antidiscrimination laws, as critically important as they are," the court concluded, "must yield to the Constitution." *Ibid.*

Likewise, in *Brush & Nib Studio, LC* v. *City of Phoenix*, the Arizona Supreme Court applied federal law and held that custom wedding invitations are protected expression. 448 P.3d 890, 903, 905 (Ariz. 2019). It concluded that the city's public-

accommodation ordinance operated "as a content-based law" that, as applied, "coerce[d]" individuals into "abandoning their convictions, and compel[led] them to [communicate] celebratory messages" with which they disagree. *Id.* at 914. Because custom wedding invitations were "speech," requiring their creation for same-sex weddings would violate the "cardinal constitutional command" against compelled speech. *Id.* at 905 (quoting *Janus*, 138 S. Ct. at 2463).

The Arizona Supreme Court held that Brush & Nib's case bore "no resemblance to *FAIR*"—instead of the empty interview rooms at issue there, the city's ordinance declared "speech itself to be the public accommodation." *Id.* at 909, 914 (quoting *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995)). And because the ordinance "necessarily alters the content" of expression by forcing Brush & Nib to engage in speech it "would not otherwise make," the ordinance failed strict scrutiny. *Id.* at 914–916 (quotation omitted). Accord, *e.g.*, *Chelsey Nelson Photography LLC* v. *Louisville/ Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 559 (W.D. Ky. 2020) (J., Walker) (wedding photography is protected speech; no compelling interest requires speakers "to modify the content of their expression").

The Washington Supreme Court's ruling is on all fours with three other jurisdictions that force creative professionals to celebrate same-sex marriage and squarely conflicts with the Eighth Circuit and the Arizona Supreme Court. It separately conflicts with decisions of seven Courts of Appeal that have held that the Free Speech Clause extends beyond spoken words, Pet.27–28, and this Court's decisions in *Hurley*, *Janus*, and *NIFLA*.

State officials have become emboldened in their efforts to compel speech in violation of a speaker's sincere religious beliefs. *E.g.*, *Emilee Carpenter Photography* v. *James*, No. 6:21-cv-06303 (W.D.N.Y. filed Apr. 6, 2021) (applying public-accommodation law to wedding photographer); *303 Creative LLC* v. *Elenis*, 385 F. Supp. 3d 1147, 1150 (D. Colo. 2019) (custom websites); *Scardina*, Supp.App.1a (gender-transition cakes). This Court's review is needed urgently.

II. The lower courts are split 4–2 over whether *Masterpiece*'s prohibition of religious hostility applies beyond adjudicatory bodies.

In *Masterpiece*, this Court held that "the government" may not demonstrate "impermissible hostility toward … sincere religious beliefs." 138 S. Ct. at 1729, 1731. And yet a mature split has developed over whether *Masterpiece*'s religious-neutrality requirement applies beyond adjudicatory bodies. *Fulton* suggests the answer is "yes." *Fulton* SlipOp.8 (executive may not "discriminate against religion"); *id.* at 21–22 n.27 (Alito, J., concurring) (Free Exercise Clause applies to "those responsible for enforcing the law"). And the Second, Third, and Sixth Circuits, and New Mexico Supreme Court have held that *Masterpiece*'s anti-religious hostility holding applies to other branches of government, too. Accord Pet.35–36 (describing four courts of appeals' decisions applying the religious-hostility test to executive officials and two more suggesting that the test applies to law enforcement). In contrast, the Washington Supreme Court, First Circuit, and an unpublished Sixth Circuit decision limited *Masterpiece* to adjudicatory bodies.

A. The Minority View: *Masterpiece's* anti-religious hostility holding applies only to adjudicatory bodies.

On remand in this case, the Washington Supreme Court held that evidence of religious hostility by the Attorney General was "irrelevant" to Barronelle's Free Exercise challenge because *Masterpiece* addressed *only* the religious hostility of "adjudicatory bodies." Pet.App.19a–26a. In Washington State, no religious-neutrality requirement applies to officials like "the attorney general of the State of Washington." Pet.App.23a. Rather, because evidence of the Attorney General's anti-religious bias "has nothing to do with the neutrality of either our court or the Benton County Superior Court, it [was] irrelevant." Pet.App.26a.

Early this year, the First Circuit likewise held that *Masterpiece*'s anti-religious bias prohibition applies only to adjudicatory bodies. In *Carson* v. *Makin*, plaintiffs argued that statements made by Maine legislators were evidence of religious hostility under *Masterpiece*. *Carson as next friend of O.C.* v. *Makin*, 979 F.3d 21, 45–46 (1st Cir. 2020), pet. for cert. filed, No. 20-1088 (U.S. Feb 9, 2021). The First Circuit disagreed, concluding that the discriminatory statements were irrelevant because they were not made "in the specific context of an adjudicatory body deciding a particular case." *Id.* at 46 (quotation omitted). And in *Shavers* v. *Almont Township*, the Sixth Circuit limited *Masterpiece*'s anti-religious bias holding to adjudicatory bodies in an unpublished decision, holding that *Masterpiece* did not apply to a town planning commission. 832 F. App'x 933, 939 n.3 (6th Cir. 2020).

B. The Majority View: *Masterpiece*'s anti-religious hostility holding applies beyond adjudicatory bodies.

In contrast, in *New Hope Family Services, Inc.* v. *Poole*, the Second Circuit applied *Masterpiece*'s anti-religious bias holding to an executive agency. 966 F.3d 145, 165–66 (2d Cir. 2020). The court held that New Hope's pleadings—which alleged religious bias on the part of the New York State Office of Children and Family Services—"easily g[a]ve rise to the 'slight suspicion' of religious animosity." *Id.* at 165.

In *Moses* v. *Ruszkowski*, the New Mexico Supreme Court similarly applied *Masterpiece*'s anti-religious bias holding beyond an adjudicatory body, 458 P.3d 406, 416 (N.M. 2018). The court defined the *Masterpiece* inquiry as whether "a challenged *government action* … was neutral or motivated by hostility toward religion." *Ibid.* (emphasis added). Applying *Masterpiece* to a state constitutional provision, the court held that the "factors relevant" to assess "governmental neutrality" include considerations that do not apply to adjudicative bodies, like legislative history. *Ibid.*

In *Meriwether* v. *Hartop*, the Sixth Circuit created an intra-circuit split, applying *Masterpiece*'s anti-religious bias holding to a university. 992 F.3d 492, 512–14 (6th Cir. 2021). The court concluded that the university's derision of Meriwether's religious beliefs and its equation of his good-faith convictions with racism warranted "an inference of religious hostility." *Id.* at 514. "State actors," the Sixth Circuit wrote, "must give 'neutral and respectful consideration' to a person's sincerely held religious beliefs." *Id.* at 512 (quoting *Masterpiece*, 138 S. Ct. at 1729).

And in *Fulton* v. *City of Philadelphia*, the Third Circuit applied *Masterpiece*'s anti-religious-bias holding to an executive department—the City of Philadelphia's Department of Human Services—because *Masterpiece* forbid hostility on the part of "*officials* charged with executing the law." 922 F.3d 140, 154 n.9, 157 (3d Cir. 2019), *rev'd* __ S. Ct. __, 2021 WL 2459253 (June 17, 2021).

The Washington Attorney General's statements and actions raise at least a "slight suspicion" of religious animosity. See Pet.36–38 (describing hostility). This Court should grant certiorari to resolve the 4–2 split of authority and clarify that antireligious bias is just as unconstitutional when it comes from the executive branch as when it comes from an adjudicatory body.

III. The Washington Supreme Court has again made clear its hostility to religion.

A GVR in this case would accomplish nothing. The Washington state courts have exhibited religious hostility at every turn. See Pet.34–39 (describing conduct). Despite this Court's remand, the Washington Supreme Court found "no reason to change [its] original decision in light of *Masterpiece*" and thus copied and pasted its original decision largely verbatim. Pet.App.3a–73a & n.1.

Recently, in another case, the court judicially abrogated a religious exemption in Washington's employment law, holding that it violated state privileges-and-immunities protection *unless* a particular job qualifies for the ministerial exception. *Woods*, 481 P.3d at 1063. Two concurring Justices

called the religious exemption a "license to discriminate" and stated bluntly that "it is simply not possible to simultaneously act as both an attorney and a minister while complying with" state ethical standards. *Id.* at 1071, 1073 (Yu, J., concurring). And two dissenting Justices believed the Court had not gone far *enough* by writing the co-religionist exemption out of the First Amendment. *Id.* at 1079 (Stephens, J., dissenting in part).

It demonstrates more than a "slight suspicion" of hostility, *Masterpiece*, 138 S. Ct. at 1731, to suggest that religious nonprofits are simply looking to discriminate. If the First Amendment "is to maintain its vitality," the Washington Supreme Court's reasoning "must be rejected." *Id.* at 1748 (Thomas, J., concurring in part). This Court should grant certiorari.

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Free speech and free exercise are crucial to preventing public-accommodation laws from being used to "stamp out every vestige of dissent" and "vilify Americans" who continue to believe that marriage is between one woman and one man. *Obergefell* v. *Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting). As "trendy" as "disdain for deep religious conviction" may be, *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2266–67 (2020) (Thomas, J., concurring), the Constitution protects *all* "religious exercises from the condemnation of civil authorities," *Masterpiece*, 138 S. Ct. at 1734 (Gorsuch, J., concurring). Yet Washington's harassment "strike[s] at the very heart of the First Amendment's guarantee of religious liberty." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020).

Barronelle (and *Masterpiece*'s Jack Phillips) have both been embroiled in state-court litigation for almost 9 years. The time has come for this Court to resolve the lower court confusion on the questions presented by this case and hold that (1) governments may not use public-accommodation laws to force people of faith to speak and participate in ceremonies in violation of sincerely held religious beliefs, and (2) religious hostility by the executive branch violates the First Amendment.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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