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.

ROBERT INGERSOLL and CURT FREED

Respondents,

v.

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

Appellants.

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF REVERSAL

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INTRODUCTION

When the Supreme Court recognized same-sex couples' right to marry in *Obergefell*, it held that marriage is a deeply important and "transcendent" issue about which individuals should remain free to make their own decisions, without government coercion. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593-94, 2599-2604 (2015). In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court addressed the other side of the coin: the same liberty interests that prevent the government from forbidding same-sex couples to marry also forbid governments from making people like Stutzman "outcasts" for pursuing a less popular view of marriage. 138 S. Ct. 1719, 1727 (2018). The Free Exercise Clause of the First Amendment requires government officials to treat dissenters with "neutral and respectful consideration" rather than "hostility." 138 S. Ct. at 1729.

This case is easier than *Masterpiece* for at least three reasons. First, at every turn in this case, the Attorney General has shown hostility to Stutzman's beliefs. As in *Masterpiece*, there is a stark contrast between the way the Attorney General has treated Stutzman and others who have refused service. In the course of prosecuting this case, Attorney General has also asserted that Stutzman lost her Free Exercise rights when she entered the commercial sphere, and has questioned even *entertaining* religious freedom and free speech claims in the context of anti-discrimination laws. These zero-

sum arguments are deeply troubling coming from the government official responsible for enforcing the constitutional guarantees of religious liberty.

Second, even without a hostility analysis, the State's efforts to require Stutzman to violate her faith or lose her profession fail under the Free Exercise Clause. While in *Masterpiece* there was some dispute over the "extent of the baker's refusal to provide service," 138 S. Ct. at 1723, here, there is no dispute: the State has sought to require her to provide "full wedding support"—including attending the wedding herself to assist the couple. This kind of forced participation in a religiously-significant ceremony is flatly inconsistent with the Religion Clauses of the First Amendment.

This case is easier than *Masterpiece* in a third way as well. There, the Court observed that "[t]he free speech aspect of [*Masterpiece*] is difficult." *Masterpiece*, 138 S. Ct. at 1723. Here, however, it is not. The Attorney General concedes that when Stutzman helps her clients "say it with flowers," she is "attempting to speak" and would be treated the same if she were a poet. These concessions are dispositive. They also require the State to meet strict scrutiny, which it cannot do.

Neither side of this debate is well-served by continuing to treat wedding services as a winner-take-all fight, sending case after case to the Supreme Court to resolve, because the government is always trying to punish someone for having the wrong view. The better path is to follow *Obergefell*,

Masterpiece, and the First Amendment. Here, that means allowing Stutzman to practice her faith and run her business without Washington punishing her for her religious beliefs.

STATEMENT OF THE CASE

Amicus incorporates by reference Appellants' Statement of the Case.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. Becket does not take a position on same-sex marriage as such, but focuses instead on same-sex marriage only as it relates to religious liberty. Becket files this brief to urge the Court to ensure that the Constitution's promise of religious neutrality is honored when it comes to divergent views about same-sex wedding ceremonies.

ARGUMENT

I. The Religion Clause violations in this case are worse than *Masterpiece.*

A. The Attorney General's hostility in this case is worse than the Colorado Human Rights Commissioners' hostility in *Masterpiece.*

In *Masterpiece*, the Supreme Court found that the Colorado Human Rights Commission departed from its duty of neutrality in at least three

ways. First, Commissioners "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain[.]" 138 S. Ct. at 1729. Here, the Attorney General has asserted that Stutzman lost her free exercise rights when she opened her business 40 years ago.[1] But that is not the law. *See Burwell v. Hobby Lobby*, 573 U.S. 682, 708 (2014); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (government should not force citizens to "choose between their religious beliefs and receiving a government benefit"). And to argue that Stutzman lost the right to exercise her religion when she opened her business is to imply, like the Colorado Commissioners, that religious believers like Stutzman are not welcome in the "commercial domain." *Masterpiece*, 138 S. Ct. at 1729.

Second, the Colorado Commissioners asserted that religion has been used to justify discrimination and atrocities like the Holocaust, while one Commissioner called religious justifications "despicable . . . rhetoric." *Masterpiece*, 138 S. Ct. at 1729. The Supreme Court found that violated religious neutrality in two ways: first, it disparaged religious views as somehow insincere and "insubstantial," and second, it compared the religious views

[1] Wash. Mot. For Summ. J. at 23; CP 389 ("Ms. Stutzman should not be permitted to claim a substantial burden where she freely chose to enter the Washington marketplace . . . .").

in that case with wholly different religious views advanced to justify historic atrocities. *Id.* The Supreme Court emphasized that comments like these were inconsistent with "the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation." *Id.*

Here, the Attorney General has repeatedly compared Stutzman's views about marriage—views which *Obergefell* was careful to point out are shared by many "decent and honorable" people—to support for Jim Crow laws. 135 S. Ct. at 2605.[2] He has similarly compared Stutzman's free speech and free exercise claims in this case to the claims made by people seeking to "evade" anti-discrimination laws—implying that her claims are mere pretext.[3]

Perhaps most troubling, the Attorney General has asserted four separate times that if Stutzman's religious and speech rights are respected, all of the "enormous progress" from decades of civil rights laws will be lost.[4] This is

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[2] Wash. Resp. Br. at 38 (Dec. 23, 2015) ("Ms. Stutzman's own Southern Baptist faith for decades offered a purportedly 'reasoned religious distinction' for race discrimination."); Wash. Br. Opposing Cert. at 20 n.6 (same).

[3] Wash. Mot. For Summ. J. at 1 (CP 367) ("For as long as there have been laws prohibiting discrimination, people have sought to evade them by claiming that their religious beliefs or free speech rights allowed them to discriminate.").

[4] *Id.* at 2 (CP 368) ("If religious beliefs or free speech rights justified ignoring anti-discrimination public accommodation laws, such laws would be left with little effect, and our state and country never would have made the enormous progress we have in eradicating such discrimination."); *id.* at 32 (CP 398) ("Free speech and free exercise rights do not prohibit states form outlawing discriminatory conduct in business. If they did, discrimination of all

a remarkable assertion, because it calls into question the legitimacy of even entertaining religious freedom and free speech claims in the context of anti-discrimination laws. It is a view which eschews balancing, and which would turn this case and every other like it into a zero-sum game. This argument is particularly troubling coming from the government official charged with enforcing both Washington's laws against religious discrimination and Article I, section 11 of the Washington State Constitution, which protects the free exercise of religion. Private citizens might be forgiven for thinking some rights are more important than others; but the Attorney General has a sworn obligation to uphold the laws—all of them.

Above all, the Attorney General's assertion is false. Civil rights protections for the freedoms of speech, association, and religion are hardly incompatible with anti-discrimination laws. Public accommodation laws, like all other state and federal laws, are subject to the Constitutional protections of the First Amendment. *See McDaniel v. Paty*, 435 U.S. 618 (1978). And these fundamental rights are "baked into" major federal civil rights laws.

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kinds would flourish, and our country never would have made the enormous progress that we have."); Wash. Resp. Br. at 2-3 (Dec. 23, 2015) ("If religious beliefs or free speech rights justified ignoring anti-discrimination public accommodation laws, such laws would be left with little effect, and our state and country never would have made the enormous progress we have in eradicating discrimination."); *id.* at 50 ("Free speech and free exercise rights do not prohibit states from outlawing discriminatory conduct in business. If they did, discrimination of all kinds would flourish, and our country never would have made the enormous progress that we have.").

See, e.g., 42 U.S.C. § 2000e-1 (Title VII); 42 U.S.C. § 3607(a) (Fair Housing Act); 42 U.S.C. § 12113(d) (Americans with Disabilities Act). These statutory exemptions do not exhaust the scope of these rights, but they do demonstrate that respecting Constitutional civil rights is entirely consistent with statutory civil rights. *Masterpiece* goes further and teaches what should have been obvious from the start: it is unconstitutional to apply anti-discrimination statutes in a way that disregards fundamental constitutional rights. And yet that is what the Attorney General urges this Court to do.

Finally, like in *Masterpiece*, there is a stark contrast between the way the Attorney General has treated Stutzman and the owner of Bedlam Coffee, who admitted to refusing to serve customers because of their religiously-motivated pro-life activism. Stutzman Br. at 20-21. The Attorney General treated media reports of the shop owner's statements as exonerating, saying that there was "no clear evidence that the business owner was discriminating based on religion in violation of the WLAD" because the owner asserted he simply objected to the activists' flyers and had served them on later occasions. Wash. Br. at 32. But the Attorney General disregarded Stutzman's uncontested record of serving Ingersoll for nine years and her insistence that her objection is to the content of their request, not them as customers.[5] But

[5] The Attorney General spends considerable space describing the nature of the activists' speech, even including a full-page, full color reproduction of one of their flyers, Wash. Br.

religious neutrality requires the Attorney General to treat like situations alike, and to accept the same defense when advanced by Stutzman and Bedlam Coffee.

Washington's chief defense against *Masterpiece* is to assert that the only "religious hostility" relevant to the Free Exercise analysis in that case is hostility on the part of the adjudicator. Wash. Remand Br. at 27-29 (Jan. 14, 2019). But *Masterpiece* itself did not make that distinction. 138 S. Ct. at 1731 ("*all officials* must pause to remember their own high duty to the Constitution and to the rights it secures.") (emphasis added) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)). The Free Exercise Clause protects individuals from all kinds of state-sponsored religious hostility, whether it comes from the federal or state governments, or from judicial, legislative, or executive officers.[6] The Due Process Clause requires the same.[7] Indeed, "the Free Exercise Clause is not confined to actions based on animus," and "has been applied numerous times when government officials interfered with religious exercise not out of hostility

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at 21. But "[a] principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness." *Masterpiece*, 138 S. Ct. at 1731.

[6] *See, e.g.*, *Lukumi*, 508 U.S. at 548 (municipal ordinance), *Masterpiece*, 138 S. Ct. at 1724 (Human Rights Commission); *McDaniel*, 435 U.S. at 620 (state statute).

[7] *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that "the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of protected statutory and constitutional rights," such as freedom of speech). (internal citations omitted).

or prejudice, but for secular reasons." *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006); *cf. Dawson v. Steager*, No. 17-419, 2019 WL 691579, at *4 (U.S. Feb. 20, 2019) ("what matters isn't the intent lurking behind the law" but that similarly situated groups are treated equally).

The Attorney General, like the Colorado Civil Rights Commissioners, must make an oath or affirmation to support the Constitution, U.S. Const. Art. VI, which is why *Masterpiece* emphasizes that "*all* officials" must remain neutral and avoid hostility. Thus, the Attorney General cannot escape the Free Exercise Clause by arguing that he is not an adjudicator or that he is not personally hostile to religion. Indeed, he cannot justify his differential treatment of Stutzman as non-hostile when that factual question has not been resolved by a trier of fact. At the very least, the question should be sent back to the trial court for factual findings.

B. The Attorney General's "religious hostility" towards Stutzman violates the Free Exercise Clause.

The Free Exercise Clause requires the Attorney General, like all government officials, to treat Stutzman's religious identity with respect and her Free Exercise claims with neutrality. He has failed to do either. In *Employment Division v. Smith*, the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid

and neutral law of general applicability.'" 494 U.S. 872, 879 (1990) (internal citation omitted) (emphasis added). But neutrality is an important condition that is not met here.

Smith recognized that prior Supreme Court precedent carves out areas of free exercise with which the state may not interfere. 494 U.S. at 877 ("the government may not compel affirmation of religious belief" or "impose special disabilities on the basis of religious views or religious status") (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961); *McDaniel*, 435 U.S. 618); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) ("*Smith* involved government regulation of only outward physical acts").

This case fits within those areas. *Smith* dealt with a law prohibiting conduct, not coercing it. Indeed, it distinguished *Barnette* for just that reason. 494 U.S. at 882. *Smith* also specifically anticipated the problem of applying public accommodation laws to Religion Clause claims. *See Smith*, 494 U.S. at 882 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)) (noting that "it is easy to envision a case in which a challenge" dealing with public accommodation laws "would likewise be reinforced by Free Exercise Clause concerns").

The Supreme Court has since expanded on the exceptions to *Smith*, clarifying that "[t]he Free Exercise Clause bars even 'subtle departures from

neutrality' on matters of religion." *Masterpiece*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534). Thus, even a law that is neutral and generally applicable on its face can violate the Free Exercise Clause if it has "been enforced in a discriminatory manner." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208 (3d Cir. 2004). This is because "selective . . . application" of a facially neutral and generally applicable law "devalues" religious reasons for engaging in conduct just as much as a law that facially exempts analogous secular conduct. *Tenafly Eruv Ass'n, Inc. v. The Borough of Tenafly*, 309 F.3d 144, 151, 168 (3d Cir. 2002). Enforcing religious neutrality is essential to keeping the Constitution's promise of religious liberty for all, and it particularly benefits followers of minority religions who are the most frequent targets of religious discrimination by government officials. *See, e.g.*, *Blackhawk*, 381 F.3d 202 (Native American religion); *Lukumi*, 508 U.S. 520 (Santería); *Tenafly*, 309 F.3d 144 (Orthodox Judaism).

C. Even without a showing of hostility, forcing Stutzman to participate in a wedding ceremony violates the Religion Clauses.

In *Masterpiece*, the state required the baker to prepare a cake and go no further. Here, however, the Attorney General sought and received an order that requires Stutzman to provide "full wedding support" to same-sex couples—which includes personally attending the wedding. CP 2419-20; Stutzman Br. at 15. This case is thus easier than *Masterpiece*, because the Free

Exercise Clause and the Establishment Clause have long stood for the basic proposition that government may not force individuals, under threat of penalties, to participate in ceremonies to which they religiously object. Government efforts to do so are not neutral, and therefore face strict scrutiny.

For example, in *Barnette*, the Court protected the right of Jehovah's Witnesses not to participate in the Pledge of Allegiance. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).[8] The Court did not undervalue the importance of the patriotic ceremony in question; if anything the Pledge ceremony was even more weighty because it was made in time of war. *Id.* ("The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own."). Instead, it recognized that "freedom to differ is not limited to things that do not matter much." *Id.* at 642. If forcing a pledge of allegiance to the United States flag "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," *id.*, then requiring religious objectors to participate in a wedding ceremony against

[8] Although *Barnette* is typically thought of as a Free Speech Clause case, the Jehovah's Witness plaintiffs brought the lawsuit primarily under the Free Exercise Clause. See First Amended Complaint, *Barnette v. W. Va. Bd. of Educ.*, No. 242, (S.D. W. Va. filed Sep. 15, 1942) at 12 (pledge requirement "unreasonably abridge[s] the rights of said parents and children freely to worship Almighty God according to His written law and the dictates of conscience" and "unlawfully force[s] and coerce[s] said children to engage in a religious 'rite' or ceremony contrary to their conscientious objection thereto").

their religious beliefs *a fortiori* contradicts the Religion Clauses. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (the First Amendment provides "absolute" protection of the freedom to believe); *Torcaso*, 367 U.S. at 496 (noting that religious test "invade[d] the appellant's freedom of belief and religion").

The Establishment Clause likewise protects citizens from being forced to participate in ceremonies. In *Lee v. Weisman*, the Supreme Court found a violation of the Establishment Clause because government officials had required participation in a religious exercise: "Even for those students who object to the religious exercise, their attendance and *participation* in the state-sponsored religious activity are in a fair and real sense *obligatory*." 505 U.S. 577, 586 (1992) (emphasis added). And even though the ceremony in question lasted for only "two minutes or so," the state had nevertheless "in effect required participation in a religious exercise" that could not be characterized as "*de minimis*." *Id.* at 594.

This logic applies with greater force to religious wedding vendor objections to participating in a wedding ceremony. In *Lee*, the objector plaintiff did not have to do anything but attend. But in this case, it is undisputed that Stutzman has been ordered to provide her "full wedding support"—which

includes custom floral design and personal attendance at the wedding ceremony—to any same-sex couples who approach her. CP 2401, CP 2419-20; Stutzman Br. at 15.

The *Lee* Court also did not credit the government's argument that the plaintiff's participation was "voluntary"—even though she would still receive her diploma if she missed the ceremony. "Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions." *Lee*, 505 U.S. at 595. In the Court's view, the idea that one could avoid government compulsion by remaining absent from one's own high school graduation was "formalistic in the extreme." *Id.* Here, of course, the consequences are even more grave—Stutzman is not merely missing a ceremony, she is losing her livelihood as a penalty of refraining from attending a ceremony she disagrees with.[9] This kind of forced participation in a religiously-significant ritual—present here even more so than in *Lee*, but wholly absent in *Masterpiece*—violates the Establishment Clause and makes this an easier case.

[9] Refusing to create religious exemptions to state anti-discrimination laws has the effect of ensuring ideological conformity among wedding vendors by suppressing the views of religious dissenters who would be forced to attend or help celebrate religious rituals. *See, e.g.*, *McDaniel*, 435 U.S. at 626 (the State may not "punish[ ] a religious profession with the privation of a civil right" by forcing ministers to choose between their religious exercise and their profession) (citing 5 Writings of James Madison 288 (G. Hunt ed. 1904)).

II. The Free Speech Clause prohibits the State from forcing Stutzman to participate in same-sex weddings with her expressive activities.

Stutzman's case is easier than *Masterpiece* in another way: here, there is no dispute that when she creates a custom floral arrangement to celebrate a couple's wedding, she is "engaged in "a form of expression" and is "attempting to speak."[10] Oral Argument Video at 40:05-42:13, *available at* https://bit.ly/2SP3aaj. Yet the State would compel her to speak in support of same-sex weddings as a condition of speaking in support of any marriages. CP 2401, CP 2419-20. When asked from the bench whether this case would be different if Stutzman were a poet instead of a florist, the Attorney General answered that, so long as the context were a public accommodation, Stutzman the poet would still lose. Oral Argument Video at 40:05-42:13, *available at* https://bit.ly/2SP3aaj.

This plainly violates Stutzman's right to free speech. The Supreme Court has held "time and again that freedom of speech 'includes both the

[10] On remand, Washington attempts to walk back its concession by restating this Court's holding that, regardless of Stutzman's *intent* to speak, her work is not "inherently expressive." Wash. Remand Br. at 43 (quoting *Arlene's I* at 832). But even if that were true, weddings themselves are undeniably expressive events. *Kaahumanu v. Hawaii*, 682 F.3d 789, 798-99 (9th Cir. 2012) ("Wedding ceremonies convey important messages[.]"); *accord State v. Immelt*, 267 P.3d 305, 308 (Wash. Oct. 27, 2011) (wedding-related horn-honking is constitutionally-protected expressive conduct). And the State's order would force Stutzman to provide her "full wedding support"—including personal design work, personal attendance, and personal participation at same-sex weddings. If the small financial contribution that Janus was compelled to make qualified as a burden on his speech, then the far more extensive and personal support required of Stutzman here more than meets the standard. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2461, 2486 (2018) ($44.58 per month).

right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command[.]" *Id*. Washington's efforts to compel Stutzman to speak in support of same-sex marriage are particularly harmful. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," and requires "'even more immediate and urgent grounds' than a law demanding silence." *Id*. at 2464 (quoting *Barnette*, 319 U.S. at 633).

This prohibition cannot be avoided merely by using conditional phrasing for the coercion. Washington attempts this by claiming that Stutzman is only being required to participate in and facilitate same-sex weddings because she participates in and facilitates opposite-sex weddings. Wash. Resp. Br. at 30 (December 23, 2015). But that is just the wedding version of the equal space rule rejected by the Supreme Court in *Tornillo*. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."). Just as surely as a state could not pass a law forbidding florists from arranging flowers to celebrate same-sex weddings, no state can force them to do so "only at the price of evident hypocrisy,"—as a condition of helping celebrate other weddings. *See*

Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 119 (2013).

Of course, nothing stops Washington from seeking to send its *own* messages in support of same-sex weddings. But the First Amendment forbids the government from choosing a particular path—here, forced participation in a wedding ceremony or support from unwilling citizens—to foster that message. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 418 (1989) ("It is not the State's ends, but its means, to which we object.").

The Free Speech Clause requires that we protect speech we find harsh and distasteful. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 448 (2011).[11] Here, where Stutzman seeks only to refrain from creating floral arrangements to celebrate an event with which she disagrees—where she is not even accused of the harsh speech of *Snyder* or the exaggeration, vilification, or false statement discussed in *Cantwell*—the First Amendment protects her from government coercion.

[11] As Justice Thomas commented in *Masterpiece*, "[c]oncerns about 'dignity' and 'stigma' did not carry the day when this Court affirmed the right of white supremacists to burn a 25–foot cross . . . conduct a rally on Martin Luther King Jr.'s birthday . . . or circulate a film featuring hooded Klan members . . . ." 138 S. Ct. at 1747 (internal citations omitted).

III. The State has no strict scrutiny defense to the religious hostility claim, and has not proved its defense with respect to the other claims.

Because the State acted with religious hostility when it violated Stutzman's Free Exercise rights, Washington's affirmative defense of strict scrutiny necessarily fails. The "judgmental dismissal of a sincerely held religious belief" is "antithetical to the First Amendment and cannot begin to satisfy strict scrutiny." *Masterpiece*, 138 S. Ct. at 1734 (Gorsuch, J., concurring). That is why, in *Masterpiece*, the Supreme Court reversed without remanding. *Id.* at 1732. Based on the evidence of hostility that Stutzman has submitted, this Court should do the same.

Even in the absence of hostility, the State has still failed to meet strict scrutiny. Strict scrutiny is an affirmative defense that the State must plead and prove. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). And, for all the reasons stated in Stutzman's briefs, and in Becket's prior amicus brief, the "broadly formulated interests" that the State has asserted in this case ("eradicating barriers to the equal treatment of all citizens in the commercial marketplace") do not justify WLAD's application to Stutzman in the narrow circumstances of this case. Wash. Br. at 46 (stating interest); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420, 430-31 (2006) (requiring the government to "look[] beyond broadly formulated interests" and "demonstrate that the compelling interest test is

satisfied through application of the challenged law" to "the particular claimant whose sincere exercise of religion is being substantially burdened."); *id.* at 430 (noting that strict scrutiny analysis is the same for speech cases).

None of this is to say that eliminating actual, pervasive barriers to equal citizenship and services could never qualify as a compelling interest. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, at 626 (1984); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964). But when a public accommodation law collides with other fundamental rights, the courts must balance those rights "on one side of the scale, and the State's interest on the other." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000). This balancing protects all viewpoints and ensures that broadly-worded public accommodations laws like WLAD do not end up violating the fundamental rights of the citizens they were enacted to protect. *See, e.g.*, *Apilado v. N. Am. Gay Amateur Athletic All.*, No. C10-0682-JCC, 2011 WL 5563206, at *3 (W.D. Wash. Nov. 10, 2011) (holding that "the First Amendment protects [the North American Gay Amateur Athletic Alliance's] membership policy from [WLAD]" and stating that, if WLAD "truly prohibited discrimination against all groups and in any form, then freedom of association would be toothless").

* * *

The Supreme Court's decisions in *Obergefell* and *Masterpiece* invoke diversity, tolerance, and respect for citizens' rights to form their own views about deeply important questions like sex, marriage, and religion without compulsion by the government. That is why *Masterpiece* requires the questions in this case to be treated "delicate[ly]," 138 S. Ct. at 1724, and why *Obergefell* emphasized that the constitutional problem arose not from the multiplicity of good faith views about marriage, but from the enshrining of a single view into law which was then used to "demean[ ]," "stigmatize[ ]," and exclude those who did not accept it, treating them as "outlaw[s]" and "outcast[s]." 135 S. Ct. at 2600, 2602. It is just as impermissible for a government to make Stutzman an outcast for living and expressing her understanding of marriage as it was to make Obergefell an outcast for living and expressing his. And it would represent a profound misunderstanding of the Supreme Court's rulings in *Obergefell* and *Masterpiece* to approve such a course. Neither the parties, nor our society, will benefit from continuing to send the Supreme Court cases pretending that this is a zero-sum game in which the government must subject one particular view of marriage to punishment.

CONCLUSION

For the reasons explained above, the decision below should be reversed.

Respectfully submitted,

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