Supreme Court No. 91615-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff–Respondent,
v.

ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, *et al.*,
Defendants–Appellants.

ROBERT INGERSOLL, *et al.*,
Plaintiffs–Respondents,
v.

ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, *et al.*,
Defendants–Appellants.

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions but share a commitment to religious freedom and to ensuring that LGBTQ people, and all Americans, remain free from officially sanctioned discrimination.

Amici have a strong interest in ensuring that our Nation's fundamental commitment to equal treatment, equal dignity, and equal respect is never eroded or tainted by misusing the language of religious freedom to afford official imprimatur to the maltreatment of people based on their religion, race, sex, sexual orientation, or other protected characteristics. *Amici* write to explain why the fundamental protections for religious freedom do not and should not override Washington's prohibitions against discrimination in places of public accommodation. *Amici* are:

- Americans United for Separation of Church and State.
- Anti-Defamation League.
- Bend the Arc: A Jewish Partnership for Justice.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Hadassah, The Women's Zionist Organization of America, Inc.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.

- National Council of Jewish Women.
- People For the American Way Foundation.
- Reconstructionist Rabbinical Association.

Individual descriptions of the *amici* appear in the Appendix.

STATEMENT OF THE CASE

Amici adopt and incorporate the Statements of the Case in Respondents' briefs.

SUMMARY OF ARGUMENT

Religious freedom is a constitutionally protected value of the highest order. The Free Exercise and Establishment Clauses work in tandem to secure the rights to believe, or not, and to worship, or not, according to the dictates of individual conscience. But the guarantee of religious freedom is not, and never has been, a license to discriminate against others.

Yet Arlene's Flowers asks this Court to grant it just such a license. Ostensibly to avoid discrimination against it, the shop asserts entitlement to a constitutionally mandated exemption from neutral, generally applicable laws that are intended to protect minority and marginalized groups, so that it may legally discriminate against customers who do not conform to its religious views.

The Establishment Clause, however, bars the granting of religious exemptions when their effect would be to impose undue costs, burdens, or harms on innocent third parties. The flower shop's sought-after exemption would do just that: It would confer on all commercial establishments official

license to deny statutorily mandated equal service to anyone who does not live according to the business's religious views. Such exemptions cannot be required by the Free Exercise Clause (or by any statute) because granting them would violate the Establishment Clause.

Nothing in the Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018), alters that analysis. In fact, *Masterpiece* reinforces the long-standing principle that religious objections to neutral, generally applicable laws are not a constitutional license to discriminate. *Masterpiece* held only that government must not selectively enforce generally applicable laws to give effect to religious animus—which did not occur here.

What is more, the flower shop's asserted free-exercise right to violate antidiscrimination laws would undermine the protections that those very laws afford to religious liberty. Far from interfering with, impeding, or frustrating the enjoyment of free exercise, antidiscrimination laws extend essential protections to religious groups—just as to others who may face discrimination—thus advancing the aims of the Religion Clauses.

The predictable consequence of granting the flower shop an exemption here would be to erode these protections for all, and most especially for minority faiths, LGBTQ people, and other historically marginalized groups. That result is no more warranted today than it was before *Masterpiece* was decided.

ARGUMENT

A. The Religion Clauses Neither Authorize Nor Allow The Exemption That The Flower Shop Seeks.

1. The Free Exercise Clause does not authorize the requested religious exemption from public-accommodations laws.

In *Employment Division v. Smith*, the U.S. Supreme Court flatly rejected the argument that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." 494 U.S. 872, 882, 110 S. Ct. 1595, 1602, 108 L. Ed. 2d 876, 888 (1990). The Court held that as long as a law is "not specifically directed at . . . religious practice" and is otherwise constitutionally permissible—which antidiscrimination laws certainly are—the law is fully enforceable regardless of any religion-based reasons that objectors may have for wishing not to comply. *Id.* at 878, 110 S. Ct. at 1599, 108 L. Ed. 2d at 885. In other words, proscribing conduct without regard to whether the conduct is motivated by religion does not, as a matter of law, impermissibly target religion for disfavor, "even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 2226, 124 L. Ed. 2d 472, 489 (1993).

The flower shop here makes precisely the argument that *Smith* rejected: It contends that Washington's neutral, generally applicable, and otherwise constitutionally permissible public-accommodations law is rendered unconstitutional and unenforceable because it "uniquely disadvantages religious wedding professionals who believe that marriage is an opposite-sex

union." Appellants Br. 31. In other words, the shop has a religious reason for wanting not to comply with the law and believes that this religious motivation puts it on a different constitutional footing from businesses that object to the law for nonreligious reasons. But while the flower shop has the undeniable religious-freedom right to believe as it does about same-sex couples and the unions of those couples, that right of *belief* does not confer a constitutional permission slip to *act* in derogation of neutral, generally applicable laws that it disfavors. That is not how law works. And "[a]ny society adopting . . . a system" allowing individuals to override neutral and generally applicable laws on the basis of their religious beliefs "would be courting anarchy." *Smith*, 494 U.S. at 888, 110 S. Ct. at 1605, 108 L. Ed. 2d at 892.

2. The Establishment Clause forbids the requested religious exemption because the exemption would unduly harm third parties.

Even if *Smith* did not foreclose the flower shop's argument—which it does—the argument fails for another reason: The Free Exercise Clause cannot require what the Establishment Clause forbids. *Lee v. Weisman*, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467, 480 (1992). And the Establishment Clause forbids religious exemptions, like the one sought here, that would impose costs, burdens, or harms on the rights and dignity of innocent third parties, because such exemptions would impermissibly favor certain religious beliefs over the burdened rights and differing beliefs of other people.

Hence, in *Estate of Thornton v. Caldor, Inc.*, the U.S. Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. 703, 709, 105 S. Ct. 2914, 2917, 86 L. Ed. 2d 557, 563 (1985). And in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because the exemption shifted the tax burden onto other taxpayers, "burden[ing] nonbeneficiaries markedly" by "provid[ing] unjustifiable awards of assistance to religious organizations" and thus "convey[ing] a message of endorsement to slighted members of the community." 489 U.S. 1, 15, 109 S. Ct. 890, 899, 103 L. Ed. 2d 1, 13 (1989) (internal quotation marks and brackets by Court omitted) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348, 107 S. Ct. 2862, 2875, 97 L. Ed. 2d 273, 290 (1987) (O'Connor, J., concurring in the judgment)).[1]

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[1] Similarly, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for accommodations under the Religious Freedom Restoration Act, 42 USC §§ 2000bb *et seq*. *See* 573 U.S. at 693, 134 S. Ct. at 2760, 189 L. Ed. 2d at 687 ("Nor do we hold . . . that . . . corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public to pick up the tab.'" (brackets omitted)); *id.* at 729 n.37, 134 S. Ct. at 2781 n.37, 189 L. Ed. 2d at 709 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S. Ct. 2113, 2121, 161 L. Ed. 2d 1020, 1033 (2005))); *id.* at 739, 134 S. Ct. at 2787, 189 L. Ed. 2d at 715–16 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons . . . in protecting their own interests"); *id.* at 745, 134 S. Ct. at 2790, 189 L. Ed. 2d at 719 (Ginsburg, J., joined by Breyer, Kagan,

The rule against exemptions that harm third parties is also reflected in the U.S. Supreme Court's free-exercise jurisprudence. The Court rejected an Amish employer's requested exemption from paying social-security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." *United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 1057, 71 L. Ed. 2d 127, 135 (1982). And the Court refused an exemption from Sunday-closing laws because it would have provided Jewish-owned businesses "with an economic advantage over their competitors who must remain closed on that day." *Braunfeld v. Brown*, 366 U.S. 599, 608–609, 81 S. Ct. 1144, 1149, 6 L. Ed. 2d 563, 569 (1961). In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption that would not "serve to abridge any other person's religious liberties." *Sherbert v. Verner*, 374 U.S. 398, 409, 83 S. Ct. 1790, 1797, 10 L. Ed. 2d 965, 974 (1963). And the Court granted Amish parents an exemption from state truancy laws because the adequacy of their alternative education ensured that their children would not be harmed. *Wisconsin v. Yoder*, 406 U.S. 205, 235–36, 92 S. Ct. 1526, 1543, 32 L. Ed. 2d 15, 36–37 (1972).

The exemption that the flower shop seeks here would violate this long-standing rule against religious exemptions that harm third parties. The shop seeks the right to refuse to serve same-sex couples in situations when

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and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."). RFRA itself, of course, does not apply in this case. *See City of Boerne v. Flores*, 521 U.S. 507, 532–34, 117 S. Ct. 2157, 2170–71, 138 L. Ed. 2d 624, 646–48 (1997) (holding that extending RFRA to states exceeds Congress's authority).

it would serve all other couples and individuals. That is discrimination, both in fact and as defined by Washington law. If it were permitted, people like Robert Ingersoll and Curt Freed would wake up each day knowing that, wherever they go, they may be turned away from public accommodations that deem them unfit to be served, and they would have no legal recourse as long as the denials were explained in religious terms. They "might be forced to pick their merchants carefully, like black families driving across the South half a century ago." Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, ENGAGE, FEDERALIST SOC'Y PRAC. GRPS., Sept. 2011, at 12, 16–17, https://tinyurl.com/y76yg4zr. Recognizing the unequal treatment is not a slight to the flower shop's religious beliefs; it is a reality that must be part and parcel of the Court's analysis here. For while the right to hold religious beliefs and to worship according to those beliefs, whatever they are, is secured absolutely, no individual or business "may use the power of the State [or the courts] to enforce [its] views on the whole society." *See Lawrence v. Texas*, 539 U.S. 558, 571, 123 S. Ct. 2472, 2480, 156 L. Ed. 2d 508, 521 (2003).

B. The *Masterpiece* Decision Does Not Alter The Outcome Here.

The U.S. Supreme Court's decision in *Masterpiece* changes none of that. It neither diminishes *Smith*'s protections against the anarchy of boundless exemptions from general law, nor reverses the long-standing prohibition against religious exemptions that unduly harm third parties. Rather, it reinforces the "general rule" that "religious and philosophical objections"

"do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece*, 138 S. Ct. at 1727, 201 L. Ed. 2d at 44. *Masterpiece* thus underscored that the Constitution does not license "a long list of persons who provide goods and services for marriages and weddings [to] refuse to do so for gay persons" on religious grounds, as that would "result[ ] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id.* at 1727, 201 L. Ed. 2d at 44. Instead, "these disputes must be resolved . . . without subjecting gay persons to indignities when they seek goods and services in an open market." *See id.* at 1732, 201 L. Ed. 2d at 50. For "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Id.* at 1727, 201 L. Ed. 2d at 44–45.

Masterpiece thus held only that it is impermissible for government to act based on religious animus by selectively enforcing laws against religious objectors. The Court concluded that the Colorado Civil Rights Commission violated the free-exercise rights of the accused business because the adjudicative process itself was impermissibly infected with religiously based bias. *Id.* at 1729–31, 201 L. Ed. 2d at 47–48. The Court reached that conclusion principally because, in its view, (1) a commissioner during the adjudicative hearing "describe[d the baker's] faith as 'one of the most despicable pieces of rhetoric that people can use'" and compared it to "defenses

of slavery and the Holocaust" (*id.* at 1729, 201 L. Ed. 2d at 47 (quoting commissioner's statement)), and (2) the commission did not enforce Colorado's antidiscrimination law against similarly situated secular objectors (*id.* at 1730–31, 201 L. Ed. 2d at 47–48).

No post-*Masterpiece* decision of which *amici* are aware even hints that the decision requires granting religious exemptions from neutral, generally applicable antidiscrimination laws. On the contrary, cases interpreting *Masterpiece* have roundly rejected the arguments for such exemptions.

In *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 64–65, 418 P.3d 426, 431–32 (Ariz. Ct. App. 2018), *review granted*, No. CV-18-0176-PR (Ariz. Nov. 20, 2018), for example, the Arizona Court of Appeals upheld enforcement of a Phoenix antidiscrimination ordinance against a calligraphy business that refused on religious grounds to sell products for weddings of same-sex couples. The court rejected the business's assertion that the Arizona Free Exercise of Religion Act, ARIZ. REV. STAT. § 41-1493.01, conferred a right to refuse service. *Brush & Nib*, 244 Ariz. at 77–78. *Masterpiece*, the Arizona court explained, did not alter this outcome. *Id.* at 76 n.13.

Similarly, in *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 668, 671 (E.D. Pa. 2018), *appeal docketed*, No. 18-2574 (3d Cir. July 16, 2018), a federal district court denied a preliminary injunction that would have permitted a religiously affiliated foster-care-placement agency to discriminate against same-sex couples in violation of a city nondiscrimination policy. The court explained that *Masterpiece* "ha[d] little bearing on this

case in view of [its] narrow holding . . . that disputes . . . 'must be resolved with tolerance,'" because the foster-care-placement agency had provided no persuasive evidence of biased enforcement. *Id.* at 686–87 (quoting *Masterpiece*, 138 S. Ct. at 1732, 201 L. Ed. 2d at 50). Finding that the antidiscrimination policy was a neutral one, the court held that the agency was unlikely to prevail on the merits of its claims. *Id.* at 682–90.

Arlene's Flowers has no free-exercise right to violate Washington's antidiscrimination law because, as recognized in *Brush & Nib* and *Fulton*, *Masterpiece* does not alter the controlling rule that antidiscrimination laws are fully enforceable to protect against denials of service—even when a business asserts a religious basis for a denial. Yet the flower shop asserts that Washington's antidiscrimination law should be subjected to strict scrutiny—and contends that the law fails that heightened review.

This Court should not hesitate to dispense with the shop's argument. In its previous ruling in this case, the Court already addressed and upheld the statute's validity, even under strict scrutiny. While noting that it was "not aware of any case invalidating an antidiscrimination law under a free exercise strict scrutiny analysis," this Court nonetheless "emphatically reject[ed]" the flower shop's argument that Washington lacks a compelling interest in preventing discrimination by the shop. *State v. Arlene's Flowers, Inc.*, 187 Wash. 2d 804, 851, 389 F.3d 543, 566 (2017). As the Court explained, "public accommodations laws do not simply guarantee access to goods or services"; "they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace."

Id. Narrow tailoring is likewise satisfied because there is no less restrictive way to eradicate unequal treatment than to bar it. Hence, even if strict scrutiny applied here, it would be fully satisfied. *See id*. at 852.

And there is not a whiff of bias similar to what the U.S. Supreme Court identified in *Masterpiece*—not in the record below, and not in anything put forward by Arlene's Flowers in its supplemental briefing—nothing, in short, to cause this the Court to deviate from its earlier holding. *See* Br. Resp't State of Wash. 25–39. In the absence of hostility or bias tainting the enforcement of Washington's neutral antidiscrimination law, the flower shop must be held to the same standard as would any place of public accommodation that categorically turns away members of a protected class.

C. Antidiscrimination Laws Protect Religious Freedom.

Far from offending religious freedom, public-accommodations laws like Washington's embody and advance the State's strong interests in preventing discrimination of all kinds, including discrimination on the basis of religion. To guard against these practices, Title II of the Civil Rights Act, the public-accommodations laws of forty-five states (including Washington (*see* RCW § 49.60.030)), and countless local ordinances prohibit discrimination in the provision of goods or services on the basis of religion. *See, e.g.*, *State Public Accommodation Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 13, 2016), https://tinyurl.com/ycy9eugt. The religious freedom of all is therefore threatened, not served, by efforts to use the Free Exercise Clause to license discrimination in the name of religion.

1. Antidiscrimination laws serve an important role in combatting biases, stereotypes, and unequal treatment.

When Congress enacted Title II to bar discrimination in public accommodations, it included religion as a protected category. *See* 42 U.S.C. § 2000a(a). It did so to remedy the systematic refusals of service that were occurring on the basis of religion as well as race. *See, e.g.*, 110 CONG. REC. 1615 (1964) (statement of Rep. Teague) (noting that Title II barred discrimination against Jews, who were "not allowed in certain hotels"); *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 735 (1963) (statement of Franklin D. Roosevelt Jr., Under Secretary of Commerce) (explaining that "it has been traditional, among some . . . resort places, to refuse to take members of the Jewish faith"). Senate committee hearings included references, for example, to a hotel that set aside specific weeks when it rented exclusively to Christians and other weeks when it rented only to Jews. *Id.* at 780 (statement of Sen. Cotton). In other words, the hotel engaged in time-sharing to provide "equal but separate facilities" (*id.* at 1045), which Congress recognized to be a serious harm and a substantial barrier to full participation in civil society—so much so that it warranted a substantial federal remedy.

Title II, however, is limited both in the classifications for which it affords protections (race, color, religion, and national origin) and in the entities that it covers (hotels, rooming houses, restaurants, gas stations, and entertainment venues whose "operations affect [interstate] commerce"). *See*

42 U.S.C. § 2000a(b). To varying degrees, state and local public-accommodations laws fill the gaps. Washington's antidiscrimination law, for example, bars discrimination on the basis of "race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or . . . disability," and it applies to all places of "public resort, accommodation, assemblage, or amusement." RCW § 49.60.030(1).

The "fundamental object of" such laws is "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 354, 13 L. Ed. 2d 258, 264 (1964) (quoting S. Comm. on Commerce); *see also, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855, 865 (1996) (antidiscrimination laws "protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"). If the Free Exercise Clause were construed to grant businesses a license to violate antidiscrimination laws whenever the businesses have a religious motivation, not only would LGBTQ people be deprived of their dignity, but the religiously based biases, predispositions, and stereotypes that some people harbor toward a wide array of other groups—including people of different faiths—would likewise receive legal sanction.

Indeed, people of minority faiths would be among the principal victims of the discrimination. The case law shows—and the experiences of *amici* and our members confirm—that disfavor toward, unequal treatment of, and denials of service to members of minority faiths and nonbelievers

are all too common. And religious discrimination, like other forms of discrimination, may be, and often is, premised on religious views or motivations.

In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014), for instance, a hotel owner in California closed a poolside event hosted by a Jewish group. After learning that the group was Jewish, the hotelier told an employee, "I don't want any [f—ing] Jews in the pool" (*id.* at *2 (alteration in original)); said that "her family members would cut off her financing if they learned of the gathering" (Michael Cieply, *Jews Awarded Damages in California Hotel Case*, N.Y. TIMES (Aug. 15, 2012), http://tinyurl.com/9myoenc); and directed hotel staff to remove the Jewish guests from the property (*Paletz*, 2014 WL 7402324, at *2).

In *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016), a restaurant in Connecticut refused service to a Muslim family because of their faith. The father recounted: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Id.* at 385. In front of the family's 12-year-old child, the IHOP manager told his staff "not to serve 'these people' any food." *Id.*

And in Arkansas, a shooting range declared itself a "Muslim-free zone." Abby Ohlheiser, *Justice Department Will 'Monitor' the 'Muslim-Free' Gun Range in Arkansas*, WASH. POST (Apr. 24, 2015), http://tinyurl.com/yc4fdjzu. It also refused to allow a Hindu father and son of

South Asian descent to use the range, erroneously assuming that they were Muslims. *See id.*[2]

What is more, in the related area of employment law—which would surely be affected should the Court grant businesses a license to discriminate here—incidents of religious discrimination premised on employers' or fellow employees' religious beliefs are legion.

In *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007, at *1–2 (D.N.J. Aug. 21, 2015), for instance, a Catholic maintenance worker in New Jersey was repeatedly harassed by his supervisor and colleagues, who identified as Protestant and Reformed Christian. They called Catholicism a "'Mickey Mouse religion' and criticized Catholics for worshipping saints," encouraged the employee to leave his church, put religious literature in his locker, and "wanted to shoot [him]." *Id.* at *2. The supervisor fired the employee "because, as a Roman Catholic, he was an 'outsider' who did not 'fit in.'" *Id.* at *3.

In *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 612 (9th Cir. 1988), an atheist was constructively discharged from his job at a plant in California that held mandatory weekly meetings with

[2] *Accord* Complaint ¶¶ 24, 32, 34, *Fatihah v. Neal*, No. 6:16-cv-00058-KEW (E.D. Okla. Feb. 17, 2016), http://tinyurl.com/ycgey87l (alleging that gun-range owners posted sign declaring facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when Muslim man wanted to use facility, and accused him of wanting to murder them because "'[his] Sharia law' required" it); Steven Cook, *Gun Shop Says it Won't Sell to Muslims*, DAILY GAZETTE (July 31, 2015), http://tinyurl.com/y7m6nywk (sporting-goods retailer in New York adopted policy of not selling guns to Muslims, "since [the owner] cannot tell a radical Muslim . . . from the 6 non radical Muslims left in the world").

"prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters." The Ninth Circuit rejected the business owners' defense "that the Bible and their covenant with God require[d] them to share the Gospel with all of their employees," concluding that "[p]rotecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination." *Id.* at 620–21.

A painter in Oregon was fired after refusing to participate in Bible study. *See* Rachel Siegel, *He Said He Wouldn't Join His Company's Bible Study. After Being Let Go, He's Suing*, WASH. POST (Aug. 31, 2018), https://tinyurl.com/y9bwdlxb. In Illinois, a supervisor called a Muslim employee who wore hijab "evil," denied her time off for Islamic religious holidays, and engaged in "social shunning, implicit criticism of non-Christians, and uniquely bad treatment of [the employee] and her daughter." *Huri v. Office of the Chief Judge of the Circuit Court*, 804 F.3d 826, 830, 834 (7th Cir. 2015). And a gym in Minnesota "justifie[d its] . . . rigid policy" discriminating against applicants and employees not living according to the gym owners' faith based on the owners' "religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers.'" *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 846–47 (Minn. 1985) (en banc).

2. Granting the flower shop the exemption that it seeks would undermine protections for religious freedom.

Religiously motivated discriminatory actions like those described above would become permissible across Washington if the Free Exercise Clause were interpreted as the flower shop desires. Though the shop asserts that it is willing to sell flowers for non-wedding purposes to lesbians and gay men, there is no logical limit to the exemption that it seeks. Indeed, the shop's owner asserts that "[h]er faith informs 'every aspect of [her] life,' including how she runs her business and uses her artistic skills." Appellants Br. 5 (second alteration in original). The basic structure of the shop's argument is that, because the business disapproves of something based on its owner's religious views, it has a free-exercise right to refuse service on the basis of a protected characteristic, all antidiscrimination laws to the contrary notwithstanding. *See id.* at 25–32.

That argument is as expansive as it is troubling. If accepted, it would also permit other religiously motivated denials of service, including discrimination based on race, religion, national origin, sex, and any other protected characteristics.

In the wedding context, suppose that an interfaith couple wished to marry, and in keeping with the religion of one partner, the couple planned to serve kosher food. But the only kosher caterer in town refused to prepare food for interfaith weddings based on its religious beliefs. Should the caterer have the right, even in the face of public-accommodations protections

against religious discrimination, to force the couple to choose between forgoing a catered wedding reception, on the one hand, and violating the one partner's sincere beliefs through serving non-kosher food, on the other?

And what of the children who are part of a family that, in the opinion of any number of business owners, should not exist because the parents are of different faiths or were married within a faith that the merchants find offensive or contrary to their own religious beliefs? Might the children be denied a birthday cake or a party celebrating a bar or bat mitzvah?

More broadly, may the local movie theater refuse to sell a ticket to a boy in a yarmulke because his faith is at odds with that of the manager? May a restaurant deny service to a Muslim woman who wears a hijab, a Hindu woman who wears a sari, or a Sikh man who wears a turban? May the only grocer in town refuse to sell fruit to an unmarried mother and her child? And what about the recently widowed Catholic whose Protestant spouse would have wanted a Protestant funeral? May she be barred from all the nearby funeral homes on account of *her* faith, so that she is unable to find a place to honor and say goodbye to her spouse in accordance with the dictates of her beloved's faith?

If the Free Exercise Clause licensed religiously motivated denials of service to same-sex couples, as the flower shop contends, then it would sanction and authorize all other religiously motivated denials, including exclusions based on customers' faiths, in just the same way. One could be refused employment, thrown out of a hotel, or barred from purchasing a hamburger just for being of the "wrong" religion (or race, or sex, or sexual

orientation). And no state or local authority or law could do anything to remedy the situation. Such a system would devastate religious freedom, not protect it.

CONCLUSION

A legal scheme that granted religious objectors the right to evade neutral, generally applicable antidiscrimination laws would unconstitutionally grant favored faiths the power to harm others and to undermine both fundamental rights and important governmental interests. It would also give official imprimatur to discrimination on the basis of protected characteristics, including religion. The judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 5, 2019, I caused to be served, via electronic mail, a true and correct copy of the proposed Brief of Religious and Civil-Rights Organizations as *Amici Curiae* in Support of Respondents and Affirmance, on the following:

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APPENDIX

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church–state cases decided by the U.S. Supreme Court and by the lower federal and state courts throughout the country. Americans United has long fought to uphold the guarantees of the First Amendment and equal protection that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, innocent third parties.

Anti-Defamation League

Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, the Anti-Defamation League is a leading anti-hate organization with the timeless mission to protect the Jewish people and to secure justice and fair treatment for all. Today, we continue to fight all forms of hate with the same vigor and passion. A global leader in exposing extrem-

ism, delivering anti-bias education, and fighting hate online, ADL's ultimate goal is a world in which no group or individual suffers from bias, discrimination, or hate.

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Disciples Center for Public Witness

The Disciples Center for Public Witness informs, connects, and empowers Disciples and other people of faith for ecumenical and interfaith justice advocacy. As a strong advocate for both church–state separation and nondiscrimination, the Center opposes any effort to practice or promote discrimination using the language of religious liberty.

Disciples Justice Action Network

Disciples Justice Action Network is a multi-racial, multi-ethnic, multi-generational, and multi-issue network of congregations and individuals within the Christian Church (Disciples of Christ), all working together

to promote greater justice, peace, and the celebration of diversity in our church, our society, and our world. DJAN strongly supports the separation of church and state as the best way to guarantee equal freedom to all our churches, as well as the houses of worship of other communities of faith.

Equal Partners in Faith

Equal Partners in Faith is a multi-faith network committed to ending racism, sexism, homophobia, and religious intolerance. As part of our commitment to authentic religious liberty for all, EPF strongly opposes all efforts to use the term "religious liberty" as the justification for business or government-funded activities that discriminate against others because of their race, sex, religion, sexual orientation, or gender identification.

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 300,000 members, associates, and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pacesetting healthcare, education, and youth institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of

religious liberty and equal protection, and rejects discrimination on the basis of sexual orientation.

Hindu American Foundation

The Hindu American Foundation is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on the areas of education, policy, and community building and works on a range of issues from an accurate understanding of Hinduism, civil and human rights, and addressing contemporary problems by applying Hindu philosophy. Since its inception, HAF has made religious liberty one of its main areas of advocacy. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or as an *amicus curiae*.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization committed to advancing religious freedom for all Americans. Founded in

1994, Interfaith Alliance Foundation promotes policies that respect individual freedom of conscience and strengthen the boundary between religion and government. Our membership reflects the rich religious and cultural diversity of the United States, adhering to over 75 faith traditions as well as no faith tradition.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is an organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last 2,000 years, Jews lived in countries in which the full benefits of social society were denied to them, where they were denied the right to participate in the economic life of the community on the same basis as others, and where governments either officially encouraged or tacitly approved as private citizens refused to do business with Jews because they did not share the same faith. Jews who emigrated to the United States in the nineteenth and twentieth centuries encountered many of the same prejudices, but here those private religious prejudices did not have official governmental protection. Gradually, civil liberties were expanded to protect religious minorities and other discrete and insular groups such as the LGBT community. JSPAN joins this brief because it views the issue in this case as fundamental to the safety and security of the Jewish community. The Religion Clauses of the First Amendment cannot be turned into tools to marginalize others by

denying them generally applicable rights in the name of someone else's religious beliefs.

National Council of Jewish Women

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "[l]aws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition." Consistent with our Principles and Resolutions, NCJW joins this brief.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principles of the Free Exercise Clause of the

First Amendment as a shield for the free exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to obtain accommodations that unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to obtain exemptions based on religion from antidiscrimination laws, which protect against discrimination based on race, gender, sexual orientation, and other grounds, and which are also an important protection for religious free exercise.

Reconstructionist Rabbinical Association

The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 340 Reconstructionist rabbis and the rabbinic voice of the Reconstructionist movement and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality.

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