FIRST AMENDMENT — FREE EXERCISE CLAUSE — WASHINGTON SUPREME COURT LIMITS *MASTERPIECE CAKESHOP* TO THE CONTEXT OF ADJUDICATIONS. — *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

In a recent series of so-called "wedding-vendor cases," same-sex couples and wedding-service providers have clashed over the proper relationship between First Amendment rights and nondiscrimination statutes.[1] When the Supreme Court took one such case — *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[2] — it failed to settle this debate, instead ruling for a religious objector after finding that state officials had shown "a clear and impermissible hostility" toward the objector's religious beliefs.[3] In *State v. Arlene's Flowers, Inc.*,[4] the Washington Supreme Court, on remand in light of *Masterpiece*, held that *Masterpiece*'s prohibition on religious hostility only applies to the conduct of adjudicatory bodies.[5] Accordingly, it treated a claim that the Washington Attorney General had shown religious hostility as a Fourteenth Amendment selective enforcement claim instead.[6] The Washington Supreme Court's narrow reading of *Masterpiece* is not supported by *Masterpiece*'s language, related First Amendment case law, or the fact that the florist's free exercise defense included allegations of selective enforcement. This stark narrowing of *Masterpiece* signals that broader First Amendment protections may be necessary to ensure governmental neutrality toward religion in practice.

Between 2004 and 2013, Barronelle Stutzman arranged flowers worth several thousand dollars for Robert Ingersoll, knowing they were for Ingersoll's same-sex partner, Curt Freed.[7] But in February 2013 — four months after Washington's voters approved same-sex marriage — Ingersoll came to Stutzman's store, Arlene's Flowers, with a new kind of request.[8] This time he wanted to discuss wedding flowers.[9] Stutzman told Ingersoll that she could not arrange flowers for his wedding without violating her religious beliefs, and she referred him to other florists who

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[1] *See, e.g.*, Telescope Media Grp. v. Lucero, No. 17-3352, 2019 WL 3979621, at *1 (8th Cir. Aug. 23, 2019) (wedding videography); Gifford v. McCarthy, 23 N.Y.S.3d 422, 426 (App. Div. 2016) (wedding venues). *See generally* Douglas Laylock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 52–58, 53 n.25 (2018) (collecting cases and providing doctrinal background).

[2] 138 S. Ct. 1719 (2018).

[3] *Id.* at 1729.

[4] 441 P.3d 1203 (Wash. 2019).

[5] *See id.* at 1209–10, 1218.

[6] *See id.* at 1218.

[7] *Id.* at 1210–11.

[8] *Id.* at 1211.

[9] *Id.*

would be able to serve him.[10] Ingersoll left the conversation feeling very upset and mentioned the encounter in a Facebook post the next day.[11]

Ingersoll's post went viral, drawing the attention of numerous media outlets, the ACLU, and Washington Attorney General Bob Ferguson.[12] Although the Attorney General's office received no complaint about the incident,[13] the office contacted Stutzman and requested an "Assurance of Discontinuance" which stated that she would provide wedding floral services equally to same-sex and opposite-sex couples.[14] When Stutzman refused to sign the document, the State sued Arlene's Flowers — as well as Stutzman in her personal capacity — alleging violations of the Washington Law Against Discrimination[15] (WLAD) and the Consumer Protection Act.[16] Stutzman raised a number of constitutional defenses, principally relying on free speech and free exercise rights, as well as a selective enforcement claim under the Fourteenth Amendment.[17]

The Washington Superior Court granted summary judgment to the State with respect to Stutzman's constitutional defenses.[18] First, the court found that there was "no persuasive authority in support of a free speech exception (be it creative, artistic, or otherwise) to antidiscrimination laws applied to public accommodations."[19] Turning to Stutzman's free exercise defense, the court found that although the WLAD

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[10] *Id.*

[11] *Id.*

[12] Warren Richey, *A Florist Caught Between Faith and Financial Ruin*, CHRISTIAN SCI. MONITOR (July 12, 2016), https://www.csmonitor.com/USA/Justice/2016/0712/A-florist-caught-between-faith-and-financial-ruin [https://perma.cc/M2VV-E6T3].

[13] Ingersoll and Freed initially thought that Stutzman had "a right to refuse their business based on her religious beliefs," and they did not intend to take legal action against her. *Id.*

[14] *Arlene's Flowers*, 441 P.3d at 1212.

[15] The WLAD provides that "[t]he right to be free from discrimination because of . . . sexual orientation . . . is recognized as and declared to be a civil right," and it prohibits such discrimination in all places of public accommodation. WASH. REV. CODE § 49.60.030(1) (2013).

[16] *Arlene's Flowers*, 441 P.3d at 1212. Although Ingersoll originally did not want to sue Arlene's Flowers, a phone call from Attorney General Ferguson — plus conversations with friends — changed his mind, and shortly after Ferguson sued, the couple also filed suit. Richey, *supra* note 12.

[17] In total, Stutzman raised seven constitutional defenses: (1) freedom of speech under the First Amendment; (2) free exercise of religion under the First Amendment; (3) freedom of association under the First Amendment; (4) hybrid rights under the First Amendment; (5) free exercise under the Washington Constitution; (6) freedom of speech under the Washington Constitution; and (7) selective enforcement under the Fourteenth Amendment. *See* State v. Arlene's Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213, at *19–28 (Wash. Super. Ct. Feb. 18, 2015).

Stutzman also raised several defenses based on standing doctrine and her interpretation of the WLAD, but the court rather easily rejected these arguments. *See id.* at *19 (noting that although Stutzman "vigorously contested all aspects of these actions," her "primary defense" was constitutional preemption).

[18] *Id.* at *2.

[19] *Id.* at *20. The court rejected Stutzman's parallel free speech defense under the Washington Constitution on similar grounds. *Id.* at *27.

contained exceptions for clergy and religious organizations, it was still a neutral and generally applicable law, and it passed rational basis review because it advanced the government's interest in eradicating discrimination.[20] Finally, the court denied Stutzman's selective enforcement claim, finding that she had not presented evidence of discriminatory purpose and effect sufficient to overcome the "strong presumption of regularity" afforded to prosecutors.[21]

The Washington Supreme Court affirmed. Writing for a unanimous court, Justice McCloud[22] first rejected Stutzman's statutory arguments, finding that a refusal to provide services for a same-sex wedding constituted discrimination on the basis of sexual orientation.[23] Then, she denied Stutzman's free speech claim, finding that flower arrangements are neither literal speech nor conduct that is "clearly expressive, in and of itself, without further explanation."[24] Finally, like the Superior Court, Justice McCloud rejected Stutzman's free exercise claim after finding that the WLAD was a neutral and generally applicable law subject to rational basis review.[25] The court did not address Stutzman's selective enforcement claim, as she had waived it on appeal.

While Stutzman's petition for certiorari was pending before the U.S. Supreme Court, the Court decided *Masterpiece*, holding that Colorado showed impermissible hostility toward religion in its handling of a similar clash between First Amendment claims and an antidiscrimination statute.[26] Meanwhile, a separate incident brought into question Washington's own neutrality in its enforcement of the WLAD. On October 1, 2017, the owner of Bedlam Coffee in Seattle confronted a group of Christian customers and expelled them from his shop after

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[20] *See id.* at *22. The court also summarily dismissed Stutzman's freedom of association claim as insufficient to justify "[i]nvidious private discrimination," and it rejected her hybrid rights claim after reiterating its position that the WLAD did not burden her free speech rights. *Id.* at *22–23 (alteration in original) (quoting Hishon v. King & Spalding, 467 U.S. 69, 78 (1984)). It then denied Stutzman's state free exercise claim, finding that even if the compelling interest test were to apply, "[t]he State's compelling interest in combatting discrimination in public accommodations is well settled." *Id.* at *26 (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987)).

[21] *Id.* at *28.

[22] Justice McCloud was joined by Chief Justice Fairhurst and Justices Johnson, Madsen, Owens, Stephens, Wiggins, González, and Yu.

[23] *See* State v. Arlene's Flowers, Inc., 389 P.3d 543, 553 (Wash. 2017).

[24] *Id.* at 558.

[25] *Id.* at 561–62. In the course of rejecting Stutzman's state free exercise claim, the court also found that this application of the WLAD would satisfy strict scrutiny. Even though other florists would have been willing to arrange Ingersoll and Freed's flowers, the WLAD's "broader societal purpose" of eradicating discrimination was compelling enough to justify the burden on Stutzman's religion. *Id.* at 566.

[26] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

expressing disagreement with their anti-abortion views.[27] Although several complaints were filed with the Attorney General's office after the incident, the office did not conduct an investigation or seek to enforce the WLAD against Bedlam Coffee.[28] Stutzman filed supplemental briefing with the U.S. Supreme Court, arguing that the Attorney General's markedly different response to the Bedlam Coffee incident, together with other aspects of his handling of Stutzman's case, betrayed impermissible religious hostility in violation of *Masterpiece*.[29] Shortly afterwards, the Court granted Stutzman's petition for certiorari and vacated and remanded her case for further consideration in light of *Masterpiece*.[30] The parties submitted another round of briefing, and Stutzman moved to supplement the record with information relating to the State's alleged religious hostility, including its dissimilar treatment of Arlene's Flowers and Bedlam Coffee.[31]

On remand, the Washington Supreme Court again unanimously affirmed.[32] The court first interpreted *Masterpiece* as merely holding "that the adjudicatory body tasked with deciding a particular case must remain neutral."[33] Because Stutzman alleged that Washington's Attorney General, rather than an adjudicatory body, had acted with religious hostility, the court found *Masterpiece* irrelevant to her claim.[34] Rather, the court argued, Stutzman was essentially raising a selective enforcement claim by trying to show disparate treatment and religious hostility in the State's law enforcement.[35] Because *Masterpiece* "says nothing about selective-enforcement claims," the court instead relied on U.S. Supreme Court cases addressing such claims under the Fourteenth Amendment, which have "emphasized that the standard for proving

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[27] *See* Edward J. Hamilton, *Seattle Coffee Shop Illustrates Bedlam Surrounding First Amendment*, PUB. DISCOURSE (Oct. 12, 2017), https://www.thepublicdiscourse.com/2017/10/20266/ [https://perma.cc/N5U9-JJQR].

[28] Brief for Appellants at 21, *Arlene's Flowers*, 441 P.3d 1203 (Wash. 2019) (No. 91615-2).

[29] *See* Supplemental Brief of Petitioners at 2–3, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (mem.) (No. 17-108), 2018 WL 2735473.

[30] *Arlene's Flowers*, 138 S. Ct. at 2671–72.

[31] *Arlene's Flowers*, 441 P.3d at 1217. Stutzman's additional evidence supporting her claim of religious hostility included the following: (1) the Attorney General's decision to sue Stutzman without receiving a complaint; (2) the fact that the suit was filed against Stutzman in her personal and professional capacities; (3) the Attorney General's public communications criticizing the morality of Stutzman's conduct; and (4) the Attorney General's choice to bypass the Washington State Human Rights Commission, which is generally responsible for enforcing the state's nondiscrimination laws. *See* Brief for Appellants at 13–14, 20, 22–23, *Arlene's Flowers*, 441 P.3d 1203 (Wash. 2019) (No. 91615-2).

[32] *Arlene's Flowers*, 441 P.3d at 1203. Justice McCloud authored the court's opinion for a second time.

[33] *Id.* at 1214.

[34] *See id.* at 1218.

[35] *Id.*

[selective-enforcement claims] is particularly demanding."[36] Finding that the "same demanding standard" should govern Stutzman's claim, the court denied her motion to supplement the record and refused to consider whether Attorney General Ferguson's actions indicated hostility toward her beliefs.[37] The court then rejected Stutzman's other statutory and constitutional defenses for a second time, reproducing "major portions of [its] original (now vacated) opinion . . . verbatim."[38]

The Washington Supreme Court's narrow interpretation of *Masterpiece* is difficult to square with most of that case's language. Related First Amendment case law also demonstrates the propriety of reviewing executive and legislative — as well as judicial — actions for signs of religious hostility. Nor can the court's reference to the demanding standard for Fourteenth Amendment selective enforcement claims justify its decision not to apply *Masterpiece*'s religious neutrality requirement. The Washington Supreme Court's choice to narrowly confine *Masterpiece* may indicate that broader First Amendment protections will be necessary to curb prejudicial treatment of unpopular religious beliefs.

On the whole, the Washington Supreme Court's decision to confine *Masterpiece* to adjudications was unsupported by *Masterpiece*'s language, which instead suggested that the Free Exercise Clause requires each branch of government to act with neutrality toward religion. *Masterpiece* did have some language that could be read to support the court's narrow reading: for instance, when discussing the appropriateness of inferring hostility, the U.S. Supreme Court noted that the facts underlying *Masterpiece* arose in the specific context of "an adjudicatory body deciding a particular case."[39] But the case nowhere limited itself to adjudications, and on the contrary, its language frequently implied that its elucidation of the Free Exercise Clause's meaning should apply more broadly. For example, rather than stemming from a constitutional requirement of judicial impartiality, *Masterpiece*'s holding was grounded in "the *State's* duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[40] And the Court made clear that the "State's duty" is not just a duty for adjudicators, but rather is one that "all officials" must remember.[41] Elsewhere, the *Masterpiece* Court drew broadly on "the First

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[36] *Id.* (alteration in original) (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999)).

[37] *Id.* at 1218–19.

[38] *Id.* at 1210 n.1.

[39] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1730 (2018).

[40] *Id.* at 1731 (emphasis added).

[41] *Id.* (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993)).

Amendment's guarantee that our laws be applied in a manner that is neutral toward religion" and reiterated the impermissibility of any "official expressions of hostility to religion."[42] The Court did not limit the applicability of any of these principles to the act of adjudication, suggesting that *Masterpiece*'s articulation of the religious neutrality that the Free Exercise Clause requires applies to government conduct more broadly.

An examination of related case law further indicates that *Masterpiece* may appropriately be invoked outside the context of adjudications. In *Masterpiece*, the Court derived its strict religious neutrality requirement from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[43] a case involving city ordinances which had been "gerrymandered" to apply only to Santeria adherents and their religious practices.[44] This gerrymandering had been accomplished by legislative and executive officials working in tandem,[45] outside of any adjudicatory context, yet the Court still prohibited these actors from "singl[ing] out [religious practice] for discriminatory treatment."[46] And subsequently, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[47] the Court allowed a religious school to invoke "the *Lukumi* line of cases" to establish antireligious discrimination even though the school was challenging a discretionary decision of a state's executive branch.[48] The requisite evidence needed to sustain a religious hostility claim will vary by context, and the standard will likely be different when the allegations implicate the discretion of a state's chief prosecutor.[49] But the Supreme Court's precedents in *Lukumi*, *Trinity Lutheran*, and *Masterpiece* suggest that courts should still apply the Free Exercise Clause's requirement of religious neutrality to all government actors — whether in the adjudicatory context or not.

Nor can the Washington Supreme Court's analogy to Fourteenth Amendment selective enforcement claims justify its failure to apply *Lukumi* and *Masterpiece*. The court argued that because selective

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[42] *Id.* at 1732. Even Justice Kagan, whose concurrence articulated the narrowest rationale in favor of the baker, viewed the Court as holding that "*state actors* cannot show hostility to religious views." *Id.* at 1732 (Kagan, J., concurring) (emphasis added).

[43] 508 U.S. 520 (1993).

[44] *Id.* at 542.

[45] *Lukumi* is primarily remembered for invalidating particular ordinances that the city of Hialeah enacted, *see id.* at 524, 526–28, but the Court also condemned the Florida Attorney General's prejudicial interpretation of the State's animal cruelty statute, *see id.* at 537, which had been necessary to avoid preemption of Hialeah's ordinances by state law, *id.* at 526–27.

[46] *Id.* at 538.

[47] 137 S. Ct. 2012 (2017).

[48] *See id.* at 2023 (quoting Locke v. Davey, 540 U.S. 712, 720 (2004)).

[49] *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489–90 (1999) (noting particular concerns that attend judicial supervision of prosecutorial behavior, and emphasizing the "presumption that a prosecutor has acted lawfully," *id.* (citing United States v. Armstrong, 517 U.S. 456, 463–65 (1996))).

enforcement was a component of Stutzman's religious hostility claim, her claim had to meet the demanding standard for Fourteenth Amendment selective enforcement claims set forth in cases like *United States v. Armstrong*.[50] Yet selective enforcement was only one element of Stutzman's free exercise defense, which used numerous aspects of Washington's overall handling of her case to argue that the State had shown impermissible hostility toward her beliefs.[51] Moreover, the court's approach simply assumed that the same standards should apply to selective enforcement claims arising under the Free Exercise and Equal Protection Clauses.[52] This assumption is in some tension with the growing patchwork of distinct protections that the Supreme Court has constructed for free exercise claimants,[53] and it conflicts with the approach of the only federal appellate court to consider the issue.[54] It also results in an anomalous pattern of free exercise protections: *Lukumi* and *Masterpiece* may be used as swords to affirmatively challenge discriminatory executive branch decisions on free exercise grounds,[55] but

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[50] 517 U.S. 456; *see Arlene's Flowers*, 441 P.3d at 1218. This approach also allowed the court to make much of the fact that Stutzman had abandoned her Fourteenth Amendment selective enforcement claim on appeal. *See id.* But if Stutzman's allegations of disparate treatment and antireligious bias had been analyzed as part of her First Amendment defenses, then waiver would not have been an issue.

[51] *See supra* note 31.

[52] *See Arlene's Flowers*, 441 P.3d at 1218. The Washington Supreme Court's choice to equate the First and Fourteenth Amendments also implicated a long-running academic debate over whether the Free Exercise Clause *should* provide greater protection to religion than what the Equal Protection Clause affords. *Compare* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6 (2007) (promoting an "Equal Liberty" approach to religious freedom which denies unique constitutional treatment to religious beliefs), *and* PHILIP B. KURLAND, RELIGION AND THE LAW 17–18 (Aldine Publ'g Co. 1962) (1961) (arguing that the religion clauses should be "read together as creating a doctrine more akin to the reading of the equal protection clause"), *with* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1862 (2004) ("[T]he appropriate constitutional principle for assessing government actions that treat religion differently from nonreligion is not equal protection, which is concerned with facial neutrality, but rather free exercise, which assesses the relative burden of a government action on religious practice."), *and* Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 12 (2004) (arguing that an "equality emphasis misses much of importance in religion clause jurisprudence" and that courts should attend to "a broader range of values with regard to both religion clauses").

[53] In addition to the First Amendment–specific protections afforded in *Lukumi*, *Trinity Lutheran*, and *Masterpiece*, the Court has recently expanded First Amendment protections in other contexts as well. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (holding that the religion clauses protect a religious organization's freedom to choose its own ministers).

[54] In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the Third Circuit applied *Lukumi* and its own First Amendment precedent to evaluate — and eventually uphold — a free exercise challenge to religion-based selective enforcement. *Id.* at 167–72. The court nowhere mentioned the standard for selective enforcement claims arising under the Fourteenth Amendment.

[55] Indeed, litigants have already pursued this strategy in a context similar to *Arlene's Flowers*. In *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), a Catholic adoption agency brought a free exercise challenge to Pennsylvania's enforcement of its sexual-orientation nondiscrimination

the same cases provide no shield against religious discrimination when defending actions originally brought by the state. Thus, the fact that Stutzman's free exercise claim included a selective enforcement allegation did not justify the Washington Supreme Court's refusal to apply the religious neutrality requirement articulated in *Lukumi* and *Masterpiece*.

Based on straightforward application of precedent, the Washington Supreme Court should have applied *Masterpiece*'s religious neutrality requirement in *Arlene's Flowers*. Yet the fact that *Masterpiece* is binding precedent is not the only reason to apply First Amendment protections in this type of context. American attitudes toward religion have become increasingly polarized over the last two decades, fueling cultural and legal battles in which "[e]ach group views the other's values as threatening and incomprehensible."[56] Given the risk of prejudice which arises from this lack of empathy and understanding, *Masterpiece* importantly reaffirmed the neutrality and respect owed to all religious convictions, even when government officials find them objectionable. But *Arlene's Flowers* cabined this duty very narrowly, compromising the First Amendment's ability to allow a diversity of viewpoints to flourish. Perhaps the test *Masterpiece* provided is not the optimal way to ensure neutrality and diffuse our polarization.[57] Yet the Washington Supreme Court's choice to confine that test so narrowly illustrates a need to rethink the treatment of free exercise claims, perhaps with an eye toward broader First Amendment protections which ensure that *Masterpiece*'s guarantee of governmental neutrality toward religion is respected in practice.

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laws. *Id.* at 146. While the court ultimately rejected the challenge, it did so by applying *Lukumi*, *Masterpiece*, and *Trinity Lutheran* — not the Supreme Court's selective enforcement cases. *See id.* at 154–59.

[56] Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 713 (2019).

[57] Applying *Masterpiece*'s hostility-based test broadly requires judges to appraise a variety of contextual indicia of animus. As Professor Thomas Berg has pointed out, judicial inquiries into animus risk embittering polarization, in part because "[l]abeling the contenders in a legitimate socio-cultural-political dispute as 'bigots' may inflame rather than calm the situation." Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017–2018 CATO SUP. CT. REV. 139, 157.

Furthermore, *Masterpiece*'s focus on procedural neutrality — barring "subtle departures from neutrality" in a state's application of its laws — encourages litigants to try to sufficiently disparage a state official, or group of officials, to convince a judge of the state's hostility or bias. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993)). Such a test may be necessary for uncommonly clear instances of antireligious bias — as in *Masterpiece* itself — but a doctrine that requires litigants to impugn the character of a public official to win should likely not be the *primary* way to vindicate free exercise rights. *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) ("[A]pparent assaults on the character of fairminded people will have an effect, in society and in court.").