No. 17-108

In the

Supreme Court of the United States

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN,

Petitioners,

v.

THE STATE OF WASHINGTON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
To the Washington Supreme Court

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTIONS PRESENTED

Barronelle Stutzman is a floral design artist. The Washington Supreme Court held that she engaged in sexual orientation discrimination under the Washington Law Against Discrimination ("WLAD") by respectfully declining to create custom floral arrangements celebrating the same-sex marriage of a longtime customer based on a conflict with her sincerely held religious beliefs. As a result, it affirmed the trial court's award of civil penalties, damages, and attorneys' fees and costs against Barronelle's business and against her personally.

The Washington Supreme Court found no violation of the First Amendment because it deemed Barronelle's creation of artistic expression to be conduct that is not "inherently expressive," and thus incapable of implicating the freedom of speech or the free exercise of religion. This reasoning conflicts with the precedent of this Court and the Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

The questions presented are:

1. Whether the creation and sale of custom floral arrangements to celebrate a wedding ceremony is artistic expression, and if so, whether compelling their creation violates the Free Speech Clause.

2. Whether the compelled creation and sale of custom floral arrangements to celebrate a wedding and attendance of that wedding against one's religious beliefs violates the Free Exercise Clause.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES......................................iv

INTEREST OF AMICUS CURIAE.............................1

SUMMARY OF ARGUMENT.....................................1

REASONS FOR GRANTING REVIEW 3

I. This Court Should Grant Review of This Case to Consider Whether Religious Exercise (Practicing the Tenets of One's Faith) Is Protected by the Free Exercise Clause of the First Amendment................... 3

II. The Original Understanding of the Free Exercise Clause at the Time of the Ratification of the First Amendment Was a Broad Prohibition of Government Compulsion to Violate Religious Beliefs. 7

A. The higher duty rationale supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs. 7

B. The record of the First Congress supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs. 9

C. The Oath Clause supports an interpretation of the Free Exercise Clause as prohibiting government

compulsion to violate religious beliefs. 11

D. Historical practices at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs................13

III. State Courts Authorizing Punishment of Businesses and Individual for Adherence to Faith Based on the *Elane Photography* Decision Perpetuate Errors of the New Mexico Supreme Court...............................15

A. The New Mexico Supreme Court misconstrued this Court's precedents on the First Amendment's protection against compelled speech. 16

B. The New Mexico Supreme Court failed to recognize commercial photographers as constitutionally protected speakers in their own right...21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Am. Civil Liberties Union of Ill. v. Alvarez,
679 F.3d 583 (7th Cir. 2012) 23

Brown v. Hot, Sexy, Safer Productions, Inc.,
68 F.3d 525 (1st Cir. 1995) 6

Burwell v. Hobby Lobby,
134 S. Ct. 678 (2014)..1

Christian Legal Society v. Martinez,
561 U.S. 661 (2010)..5

City of Boerne v. Flores,
521 U.S. 507 (1997)..8, 9

Cmty. for Creative Non-Violence v. Reid,
490 U.S. 730 (1989)..22

Combs v. Homer-Center School Dist.,
540 F.3d 231 (3rd Cir. 2008) 6

Elane Photography LLC v. Willock,
309 P.3d 53 (N.M. 2013) 3, 15, 17

Employment Division v. Smith,
494 U.S. 872 (1990)..4, 5, 9

Glik v. Cunniffe,
655 F.3d 78 (1st Cir. 2011) 23

Henderson v. Kennedy,
253 F.3d 12 (D.C. Cir. 2001)....................................6

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013)................................2

*Hosanna-Tabor Evangelical Lutheran Church and
School v. Equal Employment Opportunity*

Commission,
565 U.S. 171 (2011)..5

Jimmy Swaggart Ministries v. Board of Equalization of California,
493 U.S. 378 (1990)...4, 5

Keller v. State Bar of Cal.,
496 U.S. 1 (1990)...18, 20

Kissinger v. Board of Trustees of Ohio State University, College of Veterinary Medicine,
5 F.3d 177 (6th Cir. 1993) 6

Knight v. Conn Dep't of Pub. Health,
275 F.3d 136 (2d Cir. 2001) 6

Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)..6

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974)..19

Moxley v. Town of Walkersville,
601 F. Supp. 2d 648, (D. Md. 2009).........................2

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998)..21

New York Times Co. v. Sullivan,
376 U.S. 254 (1964)..21

Reynolds v. United States,
98 U.S. 145 (1878)..3

Riley v. Nat'l Fed'n of the Blind,
487 U.S. 781 (1988)...................................18, 19, 21

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006)..17

Sherbert v. Verner,
374 U.S. 398 (1963)..4

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991)..21

Stormans, Inc. v. Wiesman,
794 F.3d 1064 (9th Cir. 2015), *cert. denied* 136 S.Ct. 2433 (2016) 2

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014)..1

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994)..22

United States v. Stevens,
559 U.S. 460 (2010)..16

Watchtower Bible and Tract Society v. Village of Stratton,
536 U.S. 150 (2002)..5

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943)...18, 19

Wisconsin v. Yoder,
406 U.S. 205 (1972)..4

Wooley v. Maynard,
430 U.S. 705 (1977)..18

Statutes

42 U.S.C. §1985(3)..2

Other Authorities

1 Annals of Cong. (J. Gales ed. 1834) 10

Clarke, Graham, *The Photograph* (1997) 22

Const. of N.J. (1776) 14

Hirst, Margaret E., THE QUAKERS IN PEACE AND WAR, (Garland 1972) 14

Kohn, Stephen M., JAILED FOR PEACE, THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS 1658-1985 (Praeger 1987) 14, 15

Letter from James Madison to Edmund Pendleton, 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, (John P. Kaminski, *et al.* eds. (Univ. of Virginia Press (2009)) 12

Madison, J., *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in 5 THE FOUNDERS CONSTITUTION (Phillip Kurland and Ralph Lerner, eds.) (Univ. of Chicago Press 1987) 8, 9

Mass. Const. (1780) 13

McConnell, Michael W., *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) 11

N.Y. Const. (1777) 13

Proclamation issued January 25, 1777 in GEORGE WASHINGTON, A COLLECTION, W. B. Allen (Liberty Classics 1988) 15

William Penn, *The Great Case for Liberty of Conscience* (1670) in WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002) 9

Rules

Sup. Ct. Rule 37.2(a) 1

Sup. Ct. Rule 37.6 1

Constitutional Provisions

U.S. Const., Art. VI 12

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issue in this case that the state may not compel individual citizens to violate the dictates of their religious faith. The Center has previously participated in a number of cases before this Court of constitutional significance addressing religious liberty, including *Burwell v. Hobby Lobby*, 134 S. Ct. 678 (2014) and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

SUMMARY OF ARGUMENT

Barronelle Stutzman does *not* discriminate in choosing her customers because of their sexual orientation. Mrs. Stutzman, on behalf of her business, Arlene's Flowers, designed and created thousands of dollars worth of floral arrangements for Robert Ingersoll over an approximately nine-year period before this case. Mrs. Stutzman prepared those arrangements for Ingersoll knowing that he was gay and that the flowers were for his same-sex partner, Curt Freed. However, because of her sincerely held Christian belief about marriage, she does not – and cannot – use her floral artistry to design custom arrangements to

[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

celebrate the event of a same-sex marriage and, thereby, participate in the ceremony.

But, the State of Washington has made it illegal for Mrs. Stutzman to practice her faith. Her choice is between "abiding by [her] religion or saving [her] business." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1156 (10th Cir. 2013, Gorsuch, J., concurring) (*aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014)). The State of Washington may believe Mrs. Stutzman's religious views are offensive. But, as then Judge Gorsuch noted in his concurring opinion in the Tenth Circuit's *Hobby Lobby* decision, "no one disputes that they *are* sincerely held religious beliefs. This isn't the case, say, of a wily businessman seeking to use an insincere claim of faith as cover to avoid a financially burdensome regulation." *Id*. (emphasis in original).

The State of Washington and other respondents have decided to punish this honest exercise of religious faith. Some lower courts are taking notice of such conspiracies against an individual's "equal privileges and immunities under the law" (42 U.S.C. §1985(3)) – at least with respect to non-Christian religions. *See Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 662–64 (D. Md. 2009). Washington's recent actions against Mrs. Stutzman and other religious objectors (*See Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied* 136 S.Ct. 2433 (2016)), and the decisions of other state courts imposing penalties on the exercise of religion show that this problem is wide-spread and requires this Court's attention.

Religion, as understood by the Founders and as practiced today, is a way of life. This is true of Christianity, Islam, Judaism, and other religions as well. Religious belief informs our every action, both in business and private interactions. The Founders understood this and their practices inform the original understanding of the Religion Clauses of the First Amendment. Free exercise meant that in the absence of a compelling interest, the government may not compel people of faith to take actions in violation of their religious beliefs.

State courts rely extensively on the New Mexico decision in *Elane Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013), to support rulings against artists who refuse to use their art to speak in favor of same-sex marriage. The New Mexico court in that decision, however, misread this Court's rulings on compelled speech and erroneously ruled that commercial activity robs an expressive work of its First Amendment Protection. Review by this Court is necessary to correct these errors so other state courts no longer rely on this flawed ruling.

REASONS FOR GRANTING REVIEW

I. This Court Should Grant Review of This Case to Consider Whether Religious Exercise (Practicing the Tenets of One's Faith) Is Protected by the Free Exercise Clause of the First Amendment.

This Court's own First Amendment religious liberty jurisprudence has experienced major shifts in what the Court views as protected by the First Amendment. In *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878), the Court adopted what it believed

was the Jeffersonian position that the Free Exercise Clause protected only "mere opinion," but left the legislature free "to reach actions which were in violation of social duties or subversive of good order."

A century later, this Court ruled that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). In other cases, this Court ruled that a state must prove a "compelling state interest," and demonstrate that its regulation is narrowly tailored to further that interest, to defeat a religious conscience claim. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

Less than two decades after the decision in *Yoder*, however, this Court retreated from the position that the Free Exercise Clause protects the individual liberty to live out one's faith, to a position closer to its opinion in *Reynolds*. In *Employment Division v. Smith*, 494 U.S. 872, 882 (1990), the Court ruled that a state law does not implicate the Free Exercise Clause so long as the law is facially neutral and it does not specifically target religion. Yet in the same term that *Smith* was decided, this Court cited *Yoder* for the proposition that "'[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 384 (1990). In 2002, this Court struck down a licensing ordinance that restricted door-to-door canvassing, recognizing that exercise of religion requires action beyond the four walls of a house of worship. This Court noted: "It is more than

historical accident that most of these cases [striking down restrictions on door-to-door canvassing] involved First Amendment challenges brought by Jehovah's Witnesses, *because door-to-door canvassing is mandated by their religion*." *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150, 160 (2002) (emphasis added).

In 2010, this Court seemingly switched directions again and upheld a state university rule interfering with the Christian Legal Society's membership and officer selection because the university rule was one of "general application." *Christian Legal Society v. Martinez*, 561 U.S. 661, 697 n.27 (2010).

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2011), however, the Court rejected the idea that a rule of "general applicability" could be applied against a church, to force it to rehire a teacher. The Court held that, although the Americans with Disabilities Act was undoubtedly a neutral law of general applicability, "government interference with an internal church decision" was unconstitutional. *Id*. at 190.

As noted, the ruling in *Smith* cannot be reconciled with the earlier decision in *Yoder* (a decision that the Court relied on the same term that it issued *Smith* to review a state regulation challenged as a violation of Free Exercise (*Jimmy Swaggart Ministries*, 493 U.S. at 384)). The *Smith* Court did not overturn *Yoder* and other earlier rulings. Instead, the Court classified those rulings as involving "hybrid rights," that is, the cases involved a combination of Free Exercise claims with other constitutional rights. *Smith*, 494 U.S. at 881 & n. 1. Justice Souter argued that this "hybrid

rights" distinction was ultimately untenable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring). The lower federal courts have proved Justice Souter's point.

Two courts have concluded that a Free Exercise hybrid rights claim deserves strict scrutiny if it is "conjoined with an independently protected constitutional protection." *Brown v. Hot, Sexy, Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995); *see also Henderson v. Kennedy*, 253 F.3d 12, 18 (D.C. Cir. 2001). Meanwhile, the Second, Third, and Sixth Circuits have concluded the hybrid rights language is purely dicta and not binding. *Combs v. Homer-Center School Dist.*, 540 F.3d 231, 245-47 (3rd Cir. 2008); *Knight v. Conn Dep't of Pub. Health*, 275 F.3d 136, 167 (2d Cir. 2001). The Sixth Circuit complained that it is "completely illogical" that a state law would violate the Free Exercise Clause if it implicates other constitutional rights but could not violate the Free Exercise Clause if it did not implicate other constitutional rights. *Kissinger v. Board of Trustees of Ohio State University, College of Veterinary Medicine*, 5 F.3d 177, 180 (6th Cir. 1993). This Court should accept review in this case to return to its prior jurisprudence requiring government to show a compelling state interest to justify an infringement on the fundamental right of religious exercise.

Justice Souter noted: "There appears to be a strong argument … that the [Free Exercise] Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State." *Church of the Lukumi*

Babalu Aye, 508 U.S. at 575-76 (Souter, J., concurring). It is time to reconsider the ruling in *Smith* and return to that original understanding. This case presents an appropriate vehicle to do so.

II. The Original Understanding of the Free Exercise Clause at the Time of the Ratification of the First Amendment Was a Broad Prohibition of Government Compulsion to Violate Religious Beliefs.

Important clues to the scope of religious liberty the Founders recognized and intended to protect in the First Amendment can be found in the writings of James Madison, the record of the First Congress, the 1787 Constitution, and the actual practices of state governments at the time of the founding.

A. The higher duty rationale supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

The Free Exercise of Religion contained in the First Amendment reflects a pre-governmental, higher duty to the Creator. Because this fundamental right pre-existed the Constitution, the Court should broadly accommodate Free Exercise claims. James Madison articulated the principal religious argument for the right to accommodation of religion directly under the First Amendment in his famous attack on Patrick Henry's general assessment bill, *Memorial and Remonstrance.*

Madison defined religion in that text in the constitutional sense as "the duty we owe to our Creator." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), ¶ 11 reprinted in 5 THE

FOUNDERS CONSTITUTION 83 (Phillip Kurland and Ralph Lerner, eds.) (Univ. of Chicago Press 1987). Because beliefs cannot be compelled, he wrote, the "[r]eligion…of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate." *Id.* According to Madison, the free exercise of religion is, by its nature, an inalienable right because a person's beliefs "cannot follow the dictates of other men" and because religion involves a "duty towards the Creator." *Id.* He went on to explain, "This duty [towards the Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society" and, therefore, "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Id.*

The right to Free Exercise of Religion, Madison reasoned, precedes civil society and is superior even to legitimate government. In *City of Boerne v. Flores*, Justice O'Connor pointed out that "Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law." *City of Boerne v. Flores*, 521 U.S. 507, 561 (1997) (O'Connor, J., dissenting). The Founders appealed to "the Laws of Nature and Nature's God" to justify signing the Declaration of Independence. Decl. of Independence, ¶ 1. Free Exercise claims likewise entail duties to a higher authority. Because the Founders likely operated on the belief that God was real, the consequence of refusing to exempt Free Exercise

claimants from even facially benign laws would have been to unjustly require people of faith to "sin and incur divine wrath." William Penn, *The Great Case for Liberty of Conscience* (1670) in WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002).

Madison, therefore, did not likely conceive "of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law," *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting), but rather he likely conceived of a society in which citizens have the individual liberty under the Free Exercise Clause to live out their faith. Madison anticipated the *Smith* Court's insistence (494 U.S. at 890) that those who seek protection for religious exercise must do so through the majoritarian political process. Madison observed that in matters of religion, a man "cannot follow the dictates of other men." *Memorial and Remonstrance*, 5 THE FOUNDERS CONSTITUTION 83. Such trespasses on the actual Free Exercise of Religion by the majority are an illegitimate interference with that inalienable right and would effectively write the Free Exercise Clause out of the Constitution.

B. The record of the First Congress supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

There was only one treatment of accommodation of religion from generally applicable laws in the record of the First Congress. A special committee had proposed a provision on religion declaring "no person religiously scrupulous shall be compelled to bear arms."

1 Annals of Cong. 749 (J. Gales ed. 1834) (Aug. 17, 1789). The discussion that followed tends to show the Founders recognized, as part of their legal landscape, broad accommodation of religion.

Representative Jackson proposed to modify the provision to accommodate people who were religiously scrupulous against bearing arms to require that those individuals pay for a substitute. 1 Annals of Cong. 750 (J. Gales ed. 1834) (proposal of Rep. Jackson, Aug. 17, 1789). Representative Sherman objected to Jackson's "upon paying an equivalent" modification, however. Sherman reminded his colleagues "those who are religiously scrupulous at bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other." 1 Annals of Cong. 750 (J. Gales ed. 1834) (remark of Rep. Sherman, Aug. 17, 1789).

In Sherman's view, a separate provision like Jackson proposed was not absolutely necessary to protect religious conscience because our national charter was unlike the seventeenth-century governments that arbitrarily threatened the liberty of conscience and other inalienable rights. *Id.* On the contrary, Sherman stated, "[w]e do not live under an arbitrary Government." *Id.* The implication of Sherman's remarks is that no express, textual protection was needed in the Bill of Rights over and above the Free Exercise Clause for those situations where the Founders predicted potential conflicts between a common, secular task and a religious belief because refusing to accommodate pacifist sects like the Quakers and Moravians from military service would be the very definition of arbitrary government.

Sherman's view that Congress had nothing to do with religion was very common at the time the First Amendment was ratified. But even the position of the representatives who believed the provision was essential to Free Exercise, like Elias Boudinot who hoped the new government would show the world that the United States would not restrict anyone's religious exercise, "strongly suggests that the general idea of free exercise exemptions was part of the legal culture." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1501 (1990). That the Founders recognized and intended to protect the importance of religious conscience, which may sometimes conflict with federal practice, is further supported by the noticeable parallel between that proposal and the Oath Clause, which ended up in the 1787 Constitution.

C. The Oath Clause supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

The 1787 Constitution contained an express recognition of religious exercise. The Oath Clause contemplated a protection for Free Exercise of Religion for those situations in which the Founders foresaw a potential conflict between federal practice and individual liberties.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several

> states, shall be bound by oath *or affirmation*, to support this Constitution.

U.S. Const., Art. VI (emphasis added). Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or Affirmation*:--'I do solemnly swear (*or affirm*)…."

The exception for "affirmations" was an important addition to preserve religious exercise. Oaths were not sworn under penalty of secular punishment. The concept of an oath at the time of the founding was explicitly religious. To take an oath, one had to believe in a Supreme Being and some from of afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. Letter from James Madison to Edmund Pendleton, 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, (John P. Kaminski, *et al.* eds. (Univ. of Virginia Press (2009)) at 125 ("Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?").

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths. In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion. The Constitution, however, resolved this concern by providing that public office holders could swear an oath *or* give an affirmation. This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding

generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead protected freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

D. Historical practices at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

All the early state constitutions sought to guarantee the Free Exercise of Religion. In every state the government had no power to prohibit peaceful religious exercise. Although some state constitutions included the pragmatic Jeffersonian provision permitting governmental interference with religiously motivated acts against public peace and good order, those state constitutions challenge the *Smith* Court's holding that religiously informed conduct as opposed to mere beliefs is not protected against generally applicable laws. *E.g.*, N.Y. Const. (1777), section 38; Mass. Const. (1780), art. II. Rather, in recognizing exceptions to Free Exercise even where the individual's acts are religiously motivated, those provisos tend to confirm that the founding generation understood "free exercise" to mean "freedom of action" and to include conduct as well as belief.

State efforts to ensure religious liberty focused on preventing government compulsion of ordinary citizens to violate their religious beliefs. Thus, some state constitutions contained religious conscience ex-

emptions. The constitution of New Jersey, for example, excused any person from paying religious taxes. Const. of N.J. (1776), art. 18. Delaware, New Hampshire, New York, and Pennsylvania included exemptions from militia service for Quakers in their state constitutions. Stephen M. Kohn, JAILED FOR PEACE, THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS 1658-1985 (Praeger 1987). Statutes containing a similar exemption from militia service for Quakers were enacted in Georgia, Rhode Island, and Virginia. Margaret E. Hirst, THE QUAKERS IN PEACE AND WAR, (Garland 1972) at 331, 396-97. These early protections acknowledged the Quakers' higher duty to their Creator and accepted that Quaker religious belief forbade the use of arms and chose to honor religious liberty even at the expense of additional soldiers.

This protection of religious liberty is most clearly illustrated during the Revolutionary War where the religious consciences of pacifists were treated with great delicacy. If ever there was a "compelling governmental interest," certainly it was the muster of every able-bodied man to prepare to defend towns from the oncoming British army. Yet George Washington would not compel Quakers to fight. Indeed, when some Quakers were forced to march into Washington's camp at Valley Forge with muskets strapped to their back, Washington ordered their release. *Id.* at 396.

Washington's commitment to this accommodation of religious conscience was also demonstrated in his orders issued to towns that were in the path of the British army's march. In January 1777, as the British army advanced on Philadelphia, Washington ordered "that every person able to bear arms (*except such as*

are Conscientiously scrupulous against in every case) should give their personal service." George Washington, Letter of January 19, 1777, in JAILED FOR PEACE, *supra* at 10 (emphasis added). The call for every man to "stand ready…against hostile invasion" was not a simple request. The order included the injunction that "every person, who may neglect or refuse to comply with this order, within Thirty days from the date hereof, will be deemed adherents to the King of Great Britain, and treated as common enemies of the American states." Proclamation issued January 25, 1777 in GEORGE WASHINGTON, A COLLECTION, W. B. Allen (Liberty Classics 1988) at 85. Again, however, the order expressly excused those "conscientiously scrupulous against bearing arms." *Id.* Even in the face of the most extreme need for militia to resist the British army, Washington's army would not compel Quakers and Mennonites to violate their religious beliefs.

These examples demonstrate that the founding generation understood religious liberty to mean that even generally applicable laws do not permit government to compel a citizen to violate his religious beliefs. The original understanding of the Free Exercise Clause thus forbids the State of Washington from compelling Mrs. Stutzman to violate her religious beliefs.

III. State Courts Authorizing Punishment of Businesses and Individual for Adherence to Faith Based on the *Elane Photography* Decision Perpetuate Errors of the New Mexico Supreme Court.

Several state courts, including the court below, have relied on the New Mexico Supreme Court decision in *Elane Photography, LLC v. Willock*, 309 P.3d

53 (N.M. 2013) to uphold penalties assessed against individuals who refuse to lend their expressive arts to same-sex wedding ceremonies. The *Elane Photography* decision was one of the first state court decisions on the issue of whether individuals had a right to refrain from speaking in favor of same-sex marriage, so it is natural that other courts would look to that decision for direction. Yet the reliance on that decision has merely magnified the constitutional errors of the New Mexico court. This Court should grant review in this case to correct these conflicts with Supreme Court precedent.

A. The New Mexico Supreme Court misconstrued this Court's precedents on the First Amendment's protection against compelled speech.

In concluding that wedding photographers Jonathan and Elaine Huguenin lacked a First Amendment right to refuse to photograph a same-sex wedding, the New Mexico Supreme Court never expressly acknowledged that creation of a photograph is an artistic endeavor entitled to protection under the First Amendment. There can be little doubt, however, that photography is a constitutionally protected form of speech. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 231 (1977) ("But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters - to take a nonexhaustive list of labels - is not entitled to full First Amendment protection."). The photograph itself is speech, and it is the speech of the photographer. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (noting that regulation of the content of photographs

is content-based regulation under the First Amendment requiring strict scrutiny). Resolution of this issue should have been the first step for the New Mexico court. Instead of explicitly acknowledging that the application of the New Mexico law to Elane Photography regulated speech, the court chose instead to attempt to distinguish the relevant precedent of this Court. The distinctions posited by that court, however, are not supported by the law.

First, and most problematic, the New Mexico court ruled that application of the state's public accommodations law to Elane Photography passed constitutional muster because the law "does not compel Elane Photography to either speak a government mandated message or to publish the speech of another." *Elane*, 309 P.3d at 59. To support this cramped view of the compelled speech doctrine, the New Mexico court relied on a passage from the Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), where this Court noted: "Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Id.* at 63. From this passage, the New Mexico court concluded that compelled speech doctrine was limited to these two narrow areas. *See id*. There is nothing in *Rumsfeld*, however, that indicates that this Court meant to give an exhaustive list of all types of compelled speech that conflict with the First Amendment. This Court has consistently ruled that an individual cannot be compelled to speak a message with which he disagrees, irrespective of whose message it is. *E.g.*, *Knox v. Serv. Employees*

Int'l Union, 567 U.S. 298, 309 (2012); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988); *Keller v. State Bar of Cal.*, 496 U.S. 1, 9-10 (1990); *Abood*, 431 U.S. at 234-35.

Although the New Mexico court acknowledged this Court's decisions in *West Virginia State* Board *of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), the New Mexico court argued that those cases "are narrower than Elane Photography suggests." *Elane*, 309 P.3d at 64. Rather than finding a broad principle that the government may not compel individuals "to engage in unwanted expression," the New Mexico court's analysis limited *Wooley* and *Barnette* to their unique facts. *See id*. The New Mexico court's analysis finds no support in this Court's decisions and misses several other important decisions involving compelled speech.

For instance, in *Riley*, this Court struck down a state law that required professional solicitors of charitable donations to disclose financial information. *Riley*, 487 U.S. at 795. This Court held that laws that mandated the content of speech were content-based regulations, subject to strict scrutiny, *id.*, because the freedom of speech *necessarily* includes "both what to say and what *not* to say," *id.* at 797. That the *Riley* Court cited *Wooley* and *Barnette* as support for its conclusions is the best evidence that this Court does not consider those cases limited to instances where the regulation "require[s] an individual to 'speak the government's message'"; the speech compelled in *Riley* was the solicitors' own. *Cf. Elane*, 309 P.3d at 63.

Another line of cases demonstrates the error of the New Mexico court's narrow reading of compelled speech cases. In *Knox*, *Abood*, and *Keller*, this Court

ruled that assessing compulsory fees to be used for political speech "constitute a form of compelled speech" and thus triggered First Amendment scrutiny. *Knox*, 567 U.S. at 310; *see also Abood*, 431 U.S. at 235 (citing *Barnette*); *Keller*, 496 U.S. at 9-10. The New Mexico court did not even mention *Riley*, *Abood*, *Knox*, or *Keller* in its decision.

Also instructive is *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), in which this Court struck down a Florida law requiring newspapers to publish a reply by political candidates to any criticism published in the paper. This Court noted that the regulation punished the newspaper based on its content. *Id*. at 256. In the same way, the New Mexico statute punished Elane Photography based on the content of photographs it refused to create. *Elane*, 309 P.3d at 72. The *Elane* court tried to distinguish *Tornillo* by noting that this Court was concerned that the Florida law would deter newspapers from publishing certain stories, and, again, by limiting it to its facts. 309 P.3d at 67. Yet the New Mexico opinion also argued that the Huguenins could avoid the compelled speech if they would cease doing wedding photography altogether. *Id*. at 66, 68. This is no different than saying that the *Miami Herald* could avoid the right-of-reply statute by refraining from criticizing candidates altogether. In both cases, the state law impermissibly requires an individual to forgo protected speech as a means of avoiding unwanted compelled speech.

Another error in the *Elane* decision is the holding that compelled speech must involve "perceived endorsement" to violate the First Amendment. *Elane*, 309 P.3d at 68-69. The case cited by the New Mexico

court for this proposition, however, explicitly disclaimed any reliance on such a theory. *Id*. at 69 (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 577 (1995) ("*Without deciding on the precise significance of the likelihood of misattribution* . . . .").

The compelled fee cases are also relevant here. Having held that compelled payment of fees for ideological purposes is compelled speech, *Knox*, 567 U.S, at 310, this Court was not concerned with whether dissenters would be perceived endorsers of the union's speech. Instead, the compelled speech violated the "freedom of belief." *Abood*, 431 U.S. at 235. This Court emphasized the inherent violation of core First Amendment principles created by compelled speech by reference to "Thomas Jefferson's view that '"to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."'" *Keller*, 496 U.S. at 10 (quoting *Abood*). It is not what other people might think the Huguenins believe. The Constitution protects the Huguenins' own freedom of belief. *Abood*, 431 U.S. at 234–35 ("'For at the heart of the First Amendment is the notion that an individual should be free to believe as he will . . . .'").

Third, the conclusion of the New Mexico court that accepting commissions for their work diminished the constitutional protections available to the Huguenins, *see Elane*, 309 P.3d at 66, is also contrary to this Court's precedent. The New Mexico court relied on Elane Photography's for-profit status to avoid applying *Hurley*, in which this Court upheld the right of a not-for-profit parade organizer to exclude a gay, lesbian, and bisexual group from the parade, in violation

of state law similar to the one in *Elane*. The fact that the Huguenins sought to make money from the creation of photographic expressions does not alter the nature of the First Amendment protection of their speech. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801; *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116-17 (1991).

B. The New Mexico Supreme Court failed to recognize commercial photographers as constitutionally protected speakers in their own right.

The New Mexico Supreme Court also demonstrated considerable confusion about the nature of the Huguenins' compelled speech claim. It is beyond doubt that photographs are speech protected by the First Amendment. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 594-96 (Scalia, J., concurring in the judgment), 600-01 (Souter, J., dissenting) (1998).

The *Elane* court compounded its error when it concluded that the Huguenins' expression would not be compelled by displaying photographs in their studio or on their public website, noting that they were not required to display the photographs in their business at all. 309 P.3d at 68. The Huguenins, however, objected not only to the photographic images them-

selves, but also to being forced to be a part of the process of posing, lighting, capturing, and editing photographs of a same-sex wedding. The process—and not just the result—is inherently expressive of a view they do not wish to express: the "celebration and approval" of such ceremonies. *See id.* at 65.

Wedding photographers are not merely objective stenographers of an event.[2] As this Court has noted, the simple exercise of editorial selection of speech is expressive enough to merit First Amendment protection. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). But the Huguenins' work is not merely stenography; they craft and tell their own unique story.

Two other areas provide further insight into how producers of expressive content are regarded by the law. In each, it is well established that expressive rights are held by the producers of expressive material—not by the commissioners or the subjects of that content. First, federal copyright ownership remains with an independent contractor who is commissioned to create an artistic work. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989) (citing 17 U.S.C. §§ 201(a), 102). Second, the emerging articulations of a First Amendment right to record the police are based on the stenographic act alone, with no requirement that the photographer contribute artistic,

[2] There is no such thing as objective photography. "[W]e must remember that the photograph is itself the product of a *photographer*. It is always the reflection of a specific point of view, be it aesthetic, polemical, political, or ideological. One never 'takes' a photograph in any passive sense. To 'take' is active." Graham Clarke, *The Photograph* 29 (1997).

editorial, or other self-expression to the visual or audio recording. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

These, and other errors, are being multiplied by the continued reliance on *Elane* by other state courts. Review by this Court is necessary to resolve the conflict with this Court's precedents created by that reliance.

CONCLUSION

This Court should grant review of this case to return to the original understanding of the Free Exercise Clause as a protection of individual liberty for citizens to live out their faith and to resolve the conflicts with the decisions of this Court created by lower state court reliance on the decision in *Elane Photography*.

DATED: August 2017

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Const'l Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866

Counsel for Amicus Curiae