No. 17-108

In the Supreme Court of the United States

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, ET AL., PETITIONERS,

v.

STATE OF WASHINGTON, ET AL.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF *AMICI* UNITED STATES SENATORS AND REPRESENTATIVES SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Does the creation and sale of custom floral arrangements to celebrate a wedding ceremony qualify as artistic expression, and if so, does compelling their creation violate the Free Speech Clause?

2. Does the compelled creation and sale of custom floral arrangements to celebrate a wedding, as well as attendance of that wedding against one's religious beliefs, violate the Free Exercise Clause?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

Like the *Masterpiece Cakeshop* case the Court has already agreed to hear, this case involves more than a clash between norms of non-discrimination and religious liberty. The more fundamental question in both cases is whether a government can coerce religious believers to speak or act contrary to their sincerely held religious beliefs.

Like the Colorado Court of Appeals in *Masterpiece Cakeshop,* the Washington Supreme Court held here that the First Amendment *permits* a government to coerce such violations of free speech and religious conscience, without the government's having to establish a case-specific compelling interest or otherwise satisfy strict scrutiny. If upheld, the reasoning of the court below—and several other courts around the country—would trample on religious minorities and substantially undermine religious liberty and free speech throughout the country.

The possibility of such an outcome is of great concern to *amici,* members of the U.S. Senate and House of Representatives (listed in the Appendix) who are committed to free speech and religious liberty. *Amici* may hold a variety of views about same-sex marriage. But they are united in their concern about the way in which the court below and others have misinterpreted

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[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have filed blanket consents in communications on file with the Clerk. Counsel for all parties received the requisite ten-day notice.

the First Amendment to permit coercion contrary to religious beliefs, and in so doing have departed from the longstanding American tradition of respect for conscience. Granting review in this case will assist the Court in rectifying this serious problem.

STATEMENT

Petitioner's story, alongside that of Jack Phillips in *Masterpiece Cakeshop*, illustrates the extent to which some courts are willing to go in condoning or facilitating coercion of speech or action, even where it violates the conscience of the speaker or actor.

1. Petitioner Barronelle Stutzman owns and runs a flower shop in Washington. Pet. 6. She is an avowed Christian who follows her faith in her business as well as personal life. Pet. App. 312a, 349a.

Both Stutzman and her employees considered her work creating custom floral arrangements for weddings to be art. App. 314a-318a, 349a-350a. Indeed, a former employee noted that "[o]ne cannot create something beautiful" like Stutzman's flower arrangements "without becoming personally invested in it." Pet. App. 349a.

2. Before the events at issue here, Stutzman had often provided flowers and flower arrangements for the individual respondents—primarily Robert Ingersoll. Pet. App. 318a-319a. Stutzman had also employed members of the LGBT community. Pet. App. 319a, 348a-349a. One such employee called her "one of the nicest women I've ever met." Pet. App. 349a.

In February 2012, Ingersoll came into the shop, asking for a custom arrangement for his upcoming wedding to respondent Curt Freed. Pet. App. 319a. Based on past practice,[2] Stutzman believed that to adequately provide Robert her wedding services, she would have to:

- "custom design his floral arrangements";
- "deliver these arrangements in Arlene's delivery vans to his wedding";
- "attend his wedding ceremony" so that she could "perform touch-ups to the flowers" there, and "clean up after the ceremony"; and
- "potentially provide other assistance at the ceremony … such as greeting guests [and] encouraging the [couple]." Pet. App. 319a-320a.

Based on the comprehensive nature of her services, combined with her faith's prohibition on either "participat[ing] in events that are dishonoring to God," or "using [her] artistic talents and business to participate in such events," Stutzman determined she could not fulfill Ingersoll's request. Pet. App. 320a.

When she conveyed that determination to Ingersoll, she met him in a quiet corner, took his hand, and reaffirmed their friendship. Pet. App. 321a, 429a. She then explained that she could not design the flowers

[2] See Pet. App. 314a-318a (Stutzman's explanation of services provided to wedding customers); Pet. App. 353a-355a (another customer's description of Stutzman's services).

for his weddings because of her relationship with Jesus Christ. Pet. App. 321a, 429a. Ingersoll acknowledges that Stutzman was "considerate" and took no "joy or satisfaction" in making this decision but was merely "sincere in her beliefs." Pet. App. 420a-421a. Stutzman gave him the names of three other local florists and they hugged before he left. Pet. App. 321a-322a, 401a.

3. Ingersoll and Freed then sued, claiming Stutzman's refusal to participate in the wedding violated the Washington Law Against Discrimination (WLAD). Pet. 11-12. Washington's Attorney General similarly sued. Pet. 11-12.

In response to the suits, Stutzman explained that the application of the law to her violated the Free Speech and Free Exercise clauses of the First Amendment. But the trial court and Washington Supreme Court rejected her constitutional claims, leading to this petition. Pet. App. 1a-57a; 58a-203a.

4. The Washington Supreme Court held that Washington's antidiscrimination law forces individuals to avoid any kind of discrimination between same-sex and opposite couples. Pet. App. 10a-20a. Describing participation in a same-sex wedding as "conduct fundamentally linked to" sexual orientation, the court concluded that "all discriminatory acts, including any act 'which directly or indirectly results in any distinction, restriction, or discrimination' based on a person's sexual orientation is an unfair practice in violation of the WLAD[.]" Pet. App. 16a-17a (emphasis removed).

Based on that reasoning, the Washington courts approved a final injunction that—besides imposing a thousand dollars in damages and several hundred thousand in legal fees—requires that petitioner offer "all goods, merchandise and services offered or sold to opposite sex couples … on the same terms to same-sex couples, including but not limited to goods, merchandise and services for weddings and commitment ceremonies." Pet. App. 61a-63a. As conclusively interpreted by the Washington courts, then, the law coerces full participation in a same-sex wedding on the same terms as an opposite-sex wedding.

The Washington Supreme Court sought to avoid the obvious free speech problems with its holding by denying that Stutzman's participation in the Ingersoll-Freed wedding constitutes expressive speech. Instead, notwithstanding the extensive personal participation her wedding services would ordinarily entail, the court concluded that Stutzman's actions did not "communicate[] something to the public at large." Pet. App 26a. As to the free exercise issue, the Supreme Court held that *Smith* squarely foreclosed Stutzman's claim, because the Washington law was a "neutral, generally applicable law subject to rational basis review." Pet. App. 40a.

In short, the lower courts in this case implicitly acknowledged that, as they interpreted it, the state's antidiscrimination law coerces petitioner to engage in conduct that offends Mrs. Stutzman's religiously informed conscience. Yet they squarely held that the First Amendment poses no bar to such coercion.

REASONS FOR GRANTING THE PETITION

This case warrants review alongside *Masterpiece Cakeshop* for two reasons. First, like other decisions in similar settings, the Washington Supreme Court decision sanctions governmental coercion of speech contrary to the speaker's conscience, and it does so through an unduly constricted understanding of the very meaning of "speech" for First Amendment purposes. Second, like other recent decisions, the decision below sanctions governmental coercion of conduct contrary to the actor's religiously informed conscience, and it does so through an overly broad reading of this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872, 882 (1990). If left uncorrected, both errors will seriously erode the First Amendment rights of all Americans, especially but not limited to people of faith.

Both errors are also illustrated by a simple hypothetical. Suppose a Christian church has scheduled a fancy Easter service and is looking for someone to provide flower arrangements for the event. The church approaches a local flower shop owned and run by an Orthodox Jew—call her Mrs. Jones. The florist declines to provide the arrangements on grounds similar to those asserted by Mrs. Stutzman—i.e., that doing so would necessarily entail participation in celebrating a message she finds objectionable on religious grounds. The state human rights commission then determines, as a matter of state law, that the florist has violated the religious discrimination provision of the state's antidiscrimination law—in part because she provided flower arrangements for bar mitzvahs

and other celebrations by non-Christian congregations—and orders her to provide floral services to all customers regardless of religion.

As shown below, any reasonable First Amendment analysis would demand that the government coercion aimed at our hypothetical Mrs. Jones be subject to strict scrutiny when challenged under either the Free Speech or Free Exercise Clauses.[3] And that is no less true of the governmental coercion to which Mrs. Stutzman has been subjected.

I. The Washington Supreme Court's decision impermissibly restricts speech.

To its credit, the Washington Supreme Court correctly identified the relevant precedent of this Court, which explains that laws compelling speech are subject to strict scrutiny. Pet. App. 24a (quoting *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012)); *accord, e.g., Wooley* v. *Maynard*, 430 U.S. 705, 713-717 (1977); *W. Va. State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 639-642 (1943). But the court incorrectly held that petitioner's arranging and presenting the flowers for a same-sex wedding are not speech at

[3] That would be equally true in more extreme situations—for example, an African-American florist or baker who belongs to a church preaching racial equality (and who is also a member of the local NAACP) being asked to provide a custom floral arrangement or cake for a "White Pride" celebration at a white supremacist church. Surely no one would think a state could force such a professional to lend her hand to a celebration she finds objectionable on religious grounds, without violating her First Amendment rights.

all. That is misguided. As explained below, the actions sought from Mrs. Stutzman and the hypothetical Mrs. Jones are, in part, the very type of expression that has been considered "speech" since the founding era. And the legal test used by the court below would inappropriately narrow the range of expression subject to strict scrutiny under the First Amendment.

A. The type of symbolic action at issue here has long been considered "speech" for First Amendment purposes.

Our national history and case law make it clear that "[s]ymbolism is a primitive but effective way of communicating ideas." *Barnette*, 319 U.S. at 632; *accord Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569 (1995). Americans have always used symbolic conduct to communicate various ideas to others. Such symbolism is protected by the First Amendment, which protects not only "particularized message[s]," but also any symbolic speech that "affects" or "alter[s]" the "underlying message" the citizen wishes to convey. *Hurley*, 515 U.S. at 569, 572-574.

One of the earliest examples of symbolic speech comes from the American Revolution. To signify their disgust with the British Stamp Act, many colonial women would drank "Liberty Tea"—drinks made from lemon, rose, peppermint, or raspberry—instead

of imported British tea.[4] Their message was clear: disgust with the British system of taxation without representation—as well as with the specific tax on tea.[5]

Since then, Americans have engaged in speech through a variety of symbolic conduct:

- burning royal officers in effigy;[6]
- burning flags or draft cards;[7]
- taking a seat on a bus that members of one's race were not allowed to use;[8]
- marching in parades;[9]
- giving red roses;[10]

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[4] See, *e.g.*, Dorothy A. Mays, Women in Early America: Struggle, Survival, and Freedom in a New World 51 (2004).

[5] *Id.*

[6] Erin Blakemore, *The Morbid Way Colonists Protested King George's Stamp Act*, Mental Floss, (Mar. 17, 2017), available at: http://mentalfloss.com/article/62268/morbid-way-colonists-protested-king-georges-stamp-act.

[7] *Texas* v. *Johnson*, 491 U.S. 397, 399 (1989); *United States* v. *O'Brien*, 391 U.S. 367, 369-370 (1968).

[8] See History.com, *Rosa Parks*, available at: http://www.history.com/topics/black-history/rosa-parks (last visited Aug. 17, 2017).

[9] See, *e.g.*, *Hurley*, 515 U.S. at 569.

[10] See, *e.g.*, Reader's Digest, 6 Rose Color Meanings, *available at*: http://www.rd.com/advice/relationships/6-rose-colors-and-their-meanings/ (last visited Aug. 17, 2017).

- boycotting products;[11] and
- hiding fugitive slaves.[12]

To be sure, some of these types of conduct convey symbolic messages—and thus constitute speech—only on some occasions but not others. Drinking a tea substitute was symbolic speech at the time of the Revolution, but is not symbolic speech if one simply enjoys the substitute's flavor. Cf., *e.g.*, *Jacobs* v. *Clark Cty. Sch. Dist.*, 526 F.3d 419, 438 (9th Cir. 2008) (uniforms only convey speech in some contexts). Moreover, not all of the speech in these examples would enjoy absolute First Amendment protection. For example, even though this court in *R.A.V.* v. *City of St. Paul* struck down an overbroad statute aimed at cross burning, the court also noted that appropriately crafted laws can prevent the destruction of property without violating the First Amendment. 505 U.S. 377, 396 (1992).

Still, though, regulation of speech of the sort conveyed by Liberty Tea or the other examples listed above remains subject to heightened scrutiny. See, *e.g., Hurley*, 515 U.S. at 577. And similarly, if Washington law were to *prohibit* Mrs. Stutzman from providing flower arrangements for an opposite-sex wedding—or prohibit Mrs. Jones from providing them

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[11] See*, e.g., NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (nonviolent boycotts receive protection under the First Amendment).

[12] Fugitive Slave Act, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 § 7 (1850).

for a religious celebration with which she *agrees*—such an application of the law would be subject to strict scrutiny, or at a minimum, intermediate scrutiny, as regulation of speech. See, *e.g.*, *id.* After all, providing flowers for a particular celebration has long been viewed as a form of approval.[13]

2. If actions like those of Mrs. Stutzman and Mrs. Jones constitute speech when the government attempts to prohibit them—and they do—such actions must also constitute speech when the government attempts to compel them. If a state government attempted to compel, for example, the drinking of Liberty Tea in response to an onerous federal sales tax, that would be compelled speech. Such government action would therefore be subject to the settled rule that a "sufficiently compelling" reason must apply whenever a state "require[s] an individual to participate in the dissemination of an ideological message …." *Wooley*, 430 U.S. at 713.

So too here. Just as red roses send a message of love, a customized floral arrangement can express approval of same-sex marriage. And even without a symbol specifically connoting approval of same-sex marriage—or in Mrs. Jones' case, the Christian belief in the resurrection of Jesus—the mere provision of flowers has always been understood to convey positive feelings toward the event or person for whom they are

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[13] See, *e.g.,* Khalil Gibran, Song of the Flower XXIII (noting flowers are the "kind word uttered and repeated," "the lover's gift," "the wedding wreath," "the memory of a moment of happiness," and "the last gift of the living to the dead.").

provided. Ordinarily, for example, one does not send flowers to the funeral of someone whose life one found distasteful.

In short, like Mrs. Jones in our hypothetical, Mrs. Stutzman is being coerced by Washington law to convey through her flower arrangements a message of endorsement for an event that offends her religious conscience—a position this Court has already said can be held "in good faith by reasonable and sincere people ...." See *Obergefell* v. *Hodges,* 135 S. Ct. 2584, 2594 (2015). If such coercion can be justified at all, it is clearly subject to strict scrutiny under the First Amendment. The Court should grant review to make clear that strict scrutiny applies to all such coercion—whether the compelled speech promotes a "progressive" value, a "conservative" value, or something in between.

B. The Washington Supreme Court's attempt to escape this conclusion impermissibly narrows the protection of the Free Speech Clause.

The Washington Supreme Court attempted to escape this conclusion by invoking two novel arguments—which themselves reinforce the need for this Court's review.

1. Most important, the court below applied the wrong legal standard in determining whether actions can be considered as speech. The court held that "[t]he decision to … refuse to provide flowers for a wedding" was not speech because, in the court's view, it "does not *inherently* express a message about that

wedding." Pet. App. 27a (emphasis added). But this Court has defined the phrase "inherently express" to include much more conduct than the court below acknowledged.

Hurley is instructive. In that case, a private organization chose to exclude a pro-LGBT group's float from a parade. 515 U.S. at 560-561. The group sued under an anti-discrimination law, it was unfairly discriminated against. *Id.* at 561-562. This Court held that action is speech—and strict scrutiny applies—if pressuring a speaker to act a certain way would "affect[]" or "alter" the underlying message that person wishes to convey. *Id.* at 572-573; see also *Rumsfeld* v. *Forum for Acad. & Inst. Right*s, 547 U.S. 47, 63 (2006) (affirming the rule in *Hurley* that compelled speech exists when "the complaining speaker's own message was *affected* by the speech it was forced to accommodate[.]") (emphasis added). And because the forced including of the pro-LGBT group in *Hurley* would "affect" or "alter" the parade organizers' underlying message, strict scrutiny applied. *Hurley*, 515 U.S. at 572-573.

There can be no doubt that this standard is satisfied as to both Mrs. Stutzman and our hypothetical Mrs. Jones. Both wish to convey a certain message to those around them—Mrs. Stutzman a belief in what she views as the Christian understanding of marriage, and Mrs. Jones a deep belief in the correctness of her Jewish faith as compared with Christianity. In both cases, the conduct in which they are forced to engage—providing floral arrangements for a same-sex

wedding and a Christian Easter celebration—will undoubtedly "affect" or "alter" their ability to convey their desired messages to their fellow citizens. In both cases, participation in the offending celebration will at a minimum *dilute* their ability to convey the messages they wish to convey by assisting others in conveying a contrary message. And dilution is certainly one way to "affect" or "alter" a message.

The Washington Supreme Court's "inherency" test would also undermine free speech rights for religious minorities—and all people of faith—in a variety of other contexts.[14] To give just two examples:

- It would allow a government to compel a Muslim to host a Christian baptismal service on his property, if he rented the property for other purposes. At least one adjudicative body has already erroneously embraced this logic in revoking the tax-exempt status of a church property. See *Bernstein* v. *Ocean Grove Camp Meeting Assoc.*, N.J. Div. on Civ. Rights, No. PN34XB-03008 at 6 (Dec. 29, 2008); *Moore* v. *Ocean Grove Camp Meeting Assoc.*,

[14] We recognize of course that the majority of Americans share Mrs. Stutzman's Christian faith. But it appears the majority do not share her particular religious belief that marriage can only be a union of a man and a woman. See Justin McCarthy, *US Support for Gay Marriage Edges to New High*, Gallup (May 15, 2017), available at: http://www.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx (latest polling indicates that 64% of Americans support legalization of same-sex marriage). So in that sense, Mrs. Stutzman is a member of a religious minority.

N.J. Div. on Civ. Rights, No. PN34XB-03012 (Dec. 29, 2008).

- It would allow a symphony orchestra comprised of musicians from one faith to be forced to perform at events that celebrate conflicting religious beliefs.

To avoid such obvious violations of free speech rights, the Court should grant review and reject the Washington Supreme Court's narrowing of the "inherency" standard for determining when conduct becomes speech, and reaffirm *Hurley*'s "affect the message" standard.

2. The Washington Supreme Court also embraced the idea that individuals effectively lose free speech rights when they operate through a business. The Court quoted favorably from a similar case, *Elane Photography*, distinguishing the actions of a lone photographer from the actions of a photography business: "[W]hile photography may be expressive, the operation of a photography business is not." Pet. App. 29a (quoting *Elane Photography* v. *Willock*, 309 P.3d 53, 86 (N.M. 2013)). That distinction is misguided: If the core activity of a business is expressive, the business itself at least has an expressive component. See *Hurley*, 515 U.S. at 573-574 (noting that the choice of "what not to say" is "enjoyed by business corporations generally"). And it is difficult to imagine the Washington or New Mexico Supreme Courts relying upon such vapid reasoning to reject a Free Speech claim by someone like Mrs. Jones.

Be that as it may, the logic of the decision below would apply to *any* business with a substantial speech component. For example:

- It could be used to justify rules requiring attorneys to accept clients or advocate positions with which they disagree. "While individual legal advocacy may be expressive," the argument would go, "the operation of a legal practice is not."
- It could be used to justify rules requiring tattoo parlors to create tattoos with message the artists find offensive. Cf. *Buehrle* v. *City of Key West*, 813 F.3d 973, 976-978 (11th Cir. 2015); *Anderson* v. *City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010). "While tattooing may be a form of speech," the reasoning would go, "the operation of a tattooing business is not."

Such examples could also arise in medicine, accounting, or virtually any profession.

But the Washington Supreme Court's position is both wrong and in direct conflict with the Eleventh Circuit's decision *Buehrle*. That decision correctly explained that "[t]he First Amendment protects the artist who paints a piece" as well as associated businesses—there, "the gallery owner who displays it." 813 F.3d at 977. That decision also quoted this Court's opinion in *Griswold* v. *Connecticut* for the proposition that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute"—something that is almost always done by businesses rather than individuals.

Buehrle, 813 F.3d at 977 (quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965)). And of course, the idea that speech loses its First Amendment protection when undertaken by a business is impossible to reconcile with a long line of decisions invoking the First Amendment to protect large businesses from libel, slander and disparagement claims.[15]

This Court should grant review to make clear that speech does not lose its First Amendment protection simply because it is undertaken through a business—an issue that is presented more squarely in this case than in *Masterpiece Cakeshop*.

[15] See*, e.g,. New York. Times.* v. *Sullivan*, 376 U.S. 254 (1964); *Bose* v. *Consumers Union of United States*, 466 U.S. 486 (1984).

II. The Washington Supreme Court misinterpreted this Court's free exercise precedent to permit governments to coerce action in violation of sincerely held religious beliefs.

The courts below did no better in evaluating petitioner's free exercise claim. To be sure, *Employment Division* v. *Smith* teaches that rational basis scrutiny applies to some neutral and generally applicable laws that burden religious actions. 494 U.S. 872 (1990). But it is erroneous to extend *Smith* to government actions that *coerce* believers to act contrary to their religious beliefs. This is apparent from historical practice as well as this Court's precedents.

A. Longstanding American tradition precludes government coercion of action that violates the actor's religious belief.

The recognition that governments may not coerce actions contrary to religious scruples began during the founding era.

A classic example of this—cited in both Justice Scalia's and Justice Stevens' opinions in *District of Columbia* v. *Heller*—is exemptions from laws conscripting military service. 554 U.S. 570, 589-590 (2008); *id.* at 660-661 (Stevens, J., dissenting). During the founding generation, at least eight of the thirteen

original state or colonial legislatures granted such exemptions for religious objectors—primarily Quakers.[16]

Later, when James Madison was president, Maryland Quakers requested a pardon for defying a state law attempting to coerce them into military service. Madison granted the pardon,[17] thereby illustrating his understanding that, absent a compelling government interest, coercive pressure to violate religious

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[16] 1792 Conn. Pub. Acts 429 (Oct. 11, 1792); Mass. Laws 1763, Ch. 294 (date of passage unknown); *An Act for the more Speedy Levying One Thousand or at least Eight Hundred Men Inclusive of Officers to be Employd in his Majestys Service in the Current Year* in 32 George II. Original Acts, vol. 4, p. 55; Recorded Acts, vol. 2, p. 412 (March 9, 1759) (New Hampshire); Minutes of the Provincial Congress and the Council of Safety in State of New Jersey 82 (Oct. 28, 1775), *reprinted in* 4 *American Archives* 3: 1235; *An Act to Continue an Act Entitled An Act for Regulating the Militia of the Colony of New York with Some Additions thereto*, 1757 Laws of the Colony of New York 178 (date of passage unknown) [Ch. 1042]; 1770 Laws of North Carolina 787-788 (Dec. 5, 1770); *Militia Act* in 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders Comm'r. 1898) (enacted Mar. 29, 1757); Conscience in America: A Documentary History of Conscientious Objection in America, 1757-1967 28 (Lillian Schlissel, ed. 1968) citing Rufus M. Jones, The Quakers in the American Colonies 179 (1962) (Rhode Island) (date of passage unknown).

[17] James Madison, Presidential Pardon, November 20, 1816, in The Gilder Lehrman Institute of American History, *Conscientious Objectors: Madison Pardons Quakers, 1816* at 4: https://www.gilderlehrman.org/sites/default/files/inlinepdfs/00043_FPS.pdf; *id.* at 7 (reproducing original document).

scruples contradicts our national tradition of religious freedom.

Other early presidents acted similarly in applying other laws. For example, the draconian Fugitive Slave Act penalized those who sought to obstruct the return of slaves to their masters or even to "harbor or conceal such fugitive[s]"—or to "obstruct" attempts to find a fugitive.[18] This included a lack of cooperation with attempts to extract from an objector the location of a fugitive slave.[19] For religious objectors, the law thus coerced action in violation of religious conscience. Following in Madison's footsteps, two presidents—James Buchanan and Abraham Lincoln—pardoned individuals who violated the act, including those who violated it act because of their religious beliefs.[20]

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[18] Fugitive Slave Act, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 § 7 (1850).

[19] See *Norris* v. *Crocker,* 54 U.S. (13 How.) 429, 438-439 (1852) (noting how the text forbade "obstruct[ing]" those seeking to arrest a fugitive "either with or without process"). A failure to cooperate with attempts to coerce testimony as to the location of a fugitive is the classic definition of obstruction. See Black's Law Dictionary 1246 (10th Ed. 2014) (defining "obstruction of justice" to include "giving false information to or withholding evidence from a police officer or prosecutor.")

[20] Stephen Middleton, The Black Laws: Race and the Legal Process in Early Ohio 239-40 (2005) (noting pardon of Reverend George Gordon by Abraham Lincoln); Ruby West Jackson & William T. McDonald, Finding Freedom: The Untold Story of Joshua Glover, Runaway Slave 89 (2007) (pardon of Sherman Booth by James Buchanan).

This tradition of avoiding coercion of conduct that violates religious belief is also reflected in the evidence rules of all fifty states, which date to the founding, and which uniformly hold that courts cannot force a pastor to break the priest-penitent privilege and testify in court.[21] The first such case, *People* v. *Phillips*, involved stolen goods recovered through a Catholic priest.[22] In an effort to punish the thief, the state sought to force the priest to testify as to who gave him the goods to return, but the priest objected. [23] The New York court sustained the objection, noting that "[i]t is essential to the free exercise of a religion" that the Church be allowed to do "the sacrament of penance."[24] This founding generation court thus recognized that coercing a priest to testify would violate basic free exercise principles.

The cases against Mrs. Stutzman and the hypothetical Mrs. Jones both fall squarely within this tradition. Even assuming the actions at issue—making flower arrangements for celebratory events—do not constitute speech, they obviously fall within the Free Exercise Clause, which has long been held applicable to inaction as well as action. See, *e.g., Wisconsin* v.

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[21] *See* Julie Ann Sippel, Comment, Priest-Penitent Privilege Statutes: Dual Protection in the Confessional, 43 Cath. U. L. Rev. 1127, 1128 n. 6 (1994) (cataloging state statutes).

[22] N.Y. Ct. Gen. Sess. (1813). This case was not officially reported, but an "editor's report" of the case is quoted in *Privileged Communications to Clergymen*, 1 Cath. Law 199 (1955).

[23] 1 Cath. Law at 199-200, 207.

[24] *Id*. at 207-208.

Yoder, 406 U.S. 205, 207 (1972*)* (declining to send a child to school). Just as long-standing tradition precludes coercing conscientious objectors to participate in military service, participate in the return of fugitive slaves, or divulge statements made in a confessional, so too that tradition counsels strongly against coercing people like Mrs. Stutzman and Mrs. Jones to participate in celebrations that offend their religious sensibilities.

B. This Court's free exercise decisions likewise make clear that *Smith* does not apply to government attempts to coerce action in violation of religious conscience.

Contrary to this history, the Washington Supreme Court, among others, has interpreted *Smith* to endorse coercing an individual to affirmatively utilize her person and resources in violation of her religious conscience. Pet. App. 1a-57a; see also *Craig* v. *Masterpiece Cakeshop,* 370 P.3d 272 (Colo. App. 2015); *Elane Photography* v. *Willock*, 309 P.3d 53 (N.M. 2013). This Court should grant certiorari to clarify that *Smith* does not extend to such governmental coercion.

First, the legal issue in *Smith* was very different from the issue presented here and in such cases as *Masterpiece Cakeshop* and *Elane Photography*. *Smith* addressed the question whether a religiously motivated action—there, using peyote—that violates a neutral and generally applicable law is entitled to the protection of strict scrutiny review. 494 U.S. at 890. And as this Court made clear just last Term, *Smith's*

holding was limited to the proposition that "the Free Exercise Clause d[oes] not entitle the church members to a special dispensation from the general *criminal* laws on account of their religion." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S.Ct. 2012, 2021 (2017) (emphasis added). Accordingly, *Smith* simply does not address the situation presented here, that is, an attempt by government, not to *prohibit* a religiously motivated action, but to *coerce* action that violates the actor's religious conscience.

Two terms after *Smith*, however, the Court confronted a case presenting that very issue—*Lee* v. *Weisman*, 505 U.S. 577 (1992)—which involved "subtle coercive pressures" to participate in a public school graduation featuring public prayer. *Id.* at 588. The majority explained that both of "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* at 589. Thus, when a state seeks to subject "freedom of conscience [to] subtle coercive pressure," both religion clauses come into play. And on that basis, the Court held that the graduation arrangement violated the First Amendment's Establishment Clause—even though the subtle coercive pressures to attend were applied to all students, and were thus both neutral and generally applicable. *Id.* at 588-590.

Furthermore, in the other two free exercise cases decided by this court since *Smith—Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 508 U.S. 520 (1993), and *Hosanna-Tabor Evangelical Lutheran*

Church & School v. *EEOC*, 565 U.S. 171 (2012)—the Court has twice recognized that *Smith* does not always foreclose the application of strict scrutiny to free exercise claims. Both cases involved situations that were not squarely presented in *Smith*—i.e., laws that are in form neutral and generally applicable but are specifically designed to target religion, and laws attempting to impose secular standards on the hiring and firing of ministerial personnel. See *Lukumi*, 508 U.S. at 533-534; *Hosanna-Tabor*, 565 U.S. at 188-189. The Court's willingness to cabin *Smith* in those cases strongly suggests that the Court should likewise cabin *Smith* in the situation presented here—government coercion of action that violates the actor's religiously informed conscience.

For reasons already explained, there is no doubt that Stutzman has been coerced into acting contrary to her religious conscience. *Smith* does not apply to her any more than it would if she objected to going to war or returning fugitive slaves—or if, like Mrs. Jones, she objected to providing flowers for an Easter celebration. This Court should grant review to make clear that *Smith* does not apply to affirmative governmental coercion of action that violates the actor's religiously informed conscience.

C. *Yoder* provides the proper test for assessing governmental coercion of action that violates the actor's religious beliefs, and it requires reversal.

Rather than being presumptively constitutional under *Smith*, government action that coerces a person to use her person or resources in violation of her religious beliefs is subject to strict scrutiny. That was the rule this Court applied to compulsory school attendance in the pre-*Smith* case of *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) (analyzing compulsory attendance under the compelling interest standard). And that decision squarely recognized that coercing religious persons to perform acts that violate their religious conscience is a "not only severe, but inescapable" burden on free exercise. *Id.* at 218.

To be sure, *Smith* expressly repudiated *Yoder* to the extent it suggested that *non-coercive* government action burdening religious exercise is subject to strict scrutiny. See *Smith*, 494 U.S. at 883-890. But *Smith* did not purport to overrule *Yoder* in its entirety.[25] Moreover, as noted, *Smith* dealt with a specific subset of religious burdens—those in which government prohibits religiously motivated conduct. *Smith* did not address situations like that present here and in *Yoder*, in which the burden on religion is governmen-

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[25] See *Smith*, 494 U.S. at 881 (*Yoder* involved "the Free Exercise Clause in conjunction with other constitutional protections" and was thus reaffirmed in *Smith* partly because of the due process right of parents to control the rearing of children).

tal coercion of action that violates the actor's conscience. Accordingly, *Smith* did not affect *Yoder*'s core holding that such governmental coercion is subject to strict scrutiny.

Under *Yoder,* the Free Exercise Clause requires that strict scrutiny be applied here as well—and to situations like that presented in the Mrs. Jones hypothetical. In both situations, the state has employed the force of law to compel believers to perform acts that—rightly or wrongly—they find morally or religiously repugnant. Like the compulsion in *Yoder,* such coercion must be and is subject to strict scrutiny. The Court should grant certiorari to reiterate that core principle.

CONCLUSION

Government coercion of speech or conduct that violates the religious conscience of the speaker or actor is not only a violation of the First Amendment and the traditions surrounding that Amendment, it is also a gross violation of personal liberty. Any such government action must be subject to strict scrutiny. The Court should grant review to reestablish that fundamental principle.

Respectfully submitted,

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Appendix

APPENDIX: List of *Amici*

Members of the U.S. Senate

Sen. Ted Cruz (Texas)
Sen. James Inhofe (Oklahoma)
Sen. Mike Lee (Utah)
Sen. James E. Risch (Idaho)
Sen. Luther Strange (Alabama)
Sen. Roger Wicker (Mississippi)

Members of the U.S. House of Representatives

Rep. Vicky Hartzler (Missouri)
Rep. Robert Aderholt (Alabama)
Rep. Jodey Arrington (Texas)
Rep. Brian Babin (Texas)
Rep. Mo Brooks (Alabama)
Rep. Warren Davidson (Ohio)
Rep. Jeff Duncan (South Carolina)
Rep. Bill Flores (Texas)
Rep. Trent Franks (Arizona)
Rep. Louie Gohmert (Texas)
Rep. Glenn Grothman (Wisconsin)
Rep. Andy Harris (Maryland)
Rep. Jody Hice (Georgia)
Rep. Randy Hultgren (Illinois)
Rep. Walter B. Jones (North Carolina)
Rep. Steve King (Iowa)
Rep. Doug Lamborn (Colorado)
Rep. Thomas Massie (Kentucky)
Rep. Pete Olson (Texas)
Rep. Robert Pittenger (North Carolina)
Rep. Keith Rothfus (Pennsylvania)
Rep. Randy Weber (Texas)
Rep. Daniel Webster (Florida)