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.

WASHINGTON, ET AL.
Respondents.

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

BRIEF OF *AMICI CURIAE* INTERNATIONAL CHRISTIAN PHOTOGRAPHERS AND THE NATIONAL CENTER FOR LAW AND POLICY IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

The International Christian Photographers ("ICP") is an association of like-minded photographers who believe their faith influences how they practice the art of photography. Founded almost thirty years ago, the association has had members in every state, as well as members from several countries around the world.

As an association of Christian photographers, the ICP has a unique understanding of how photography tells stories and expresses powerful messages to clients and the world alike. The ICP represents members with a wide range of photography experience, including weddings, portraits, newborns, and landscapes, to name a few subjects. This allows the ICP to provide a rich perspective regarding photography as a unique form of expression. It also knows well the practice of many individuals and photographers who integrate faith principles with business services.

Of particular relevance to this case, ICP members often work in wedding photography. The ICP has an interest in protecting the First Amendment rights of photographers to be free from

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk as required by Rule 37.2(a). The Parties have been timely notified of the intent to file this amici curiae brief. *See* Rule 37.2.

compelled speech as well as the freedom to exercise religion without undue government interference.

The ICP's members are diverse and some may not hold a religious objection to photographing a same-sex wedding or celebration. The association is united, however, on each photographer having the right to act consistent with their sincere religious convictions on this developing and, often, emotionally-charged issue. The ICP's voice will assist the court in the evaluation of the free speech and free exercise rights raised by Arlene's Flowers' petition for certiorari.

The National Center for Law and Policy ("NCLP") is a non-profit legal and public policy advocacy organization that has, since its inception, promoted and defended constitutionally protected rights of conscience and religious freedom in the courts and culture. The NCLP is deeply concerned about the future of religious freedom in the United States, including the growing threat state anti-discrimination statutes pose to the constitutionally protected liberties of individuals, groups, and organizations to believe, express, and live out their religious faith, free from the oppressive burden of coercive government control.

SUMMARY OF ARGUMENT

The sincerely held religious beliefs of the Petitioner that preclude someone from participating in a same-sex wedding ceremony are broadly held. Many Christian photographers, for example, likewise have religiously grounded objections to being compelled to participate in a same-sex wedding ceremony or celebration. The conflict

between religious believers and public accommodations laws has become increasingly common. There is no need for the issue to percolate any longer.

The ability of many religious citizens to participate in the wedding service provider industry will be imperiled if the Washington Supreme Court decision is not reviewed separately or in conjunction with the pending *Masterpiece Cakeshop* case. As an example, wedding photography is a well-recognized form of artistic creation subject to First Amendment protection. The artistic skill of a photographer figures prominently in the reasons any prospective customer selects a wedding photographer.

Unfortunately, the Washington Supreme Court failed to protect the Free Speech rights of the Petitioner by failing to follow the correct First Amendment doctrine and instead minimizing the artistic value of Petitioner's custom floral arrangements by applying out-moded case law regarding anti-war protest conduct, not artistic expression. The proper First Amendment protection for artistic creation should preclude the State of Washington from compelling the Petitioner to create art in these circumstances. The expressive conduct cases from this Court, in contrast, entail the Free Speech rights for certain conduct, not those creative endeavors, such as custom floral arrangements, that result in a lasting, communicative form (*e.g.*, floral arrangements). Regardless, even under the narrower expressive conduct cases, the Petitioner's activity should have been protected Free Speech activity. The lower court decision should be reviewed and reversed, either in conjunction with the similar

lower court decision in *Masterpiece Cakeshop* or independently.

ARGUMENT

I. The Washington Supreme Court's Opinion Undermines the Rights of Citizens and Businesses Far Beyond the Petitioner.

Applying Washington's public accommodations law to force Arlene's Flowers to participate in same-sex wedding celebrations calls into question the right of many other citizens who desire to act and speak consistent with their conscience. Photographers, in particular, are vulnerable to the same conflict in this case: namely, the use of public accommodations laws to force unwilling citizens to speak and act against their beliefs.

Without a doubt, the decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) have recognized new rights for same-sex couples to receive state marriage licenses as well as the rights and benefits of marriage under state and federal law. Those rights are not at issue here. Instead, the rights at issue are those of citizens with deeply held beliefs who simply wish to be free from compulsion in creating art in violation of their conscience.

A. The lower court's decision will curtail the rights of Christian photographers who have a religious conviction that precludes support for same-sex marriage.

The state high court's decision will be applied to many other businesses and individuals engaged in the wedding service industry who have religious convictions that interfere with their ability to participate in same-sex weddings or celebrations. For the ICP members who engage in wedding photography, this is not mere speculation. For instance, the Colorado court of appeals in *Craig v. Masterpiece Cakeshop*, 2015 COA 112, ¶¶ 35, 40, 65, 68 (Colo. Ct. App, Aug. 13, 2013), *cert. granted* No. 16-111, relied, repeatedly, on *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), a similar public accommodation case from New Mexico that resulted in a Christian photographer being found in violation of the law for declining to photograph a same-sex wedding. The Colorado court endorsed the holding and reasoning of *Elane Photography*, leaving no doubt that the decision will influence the way Christian photographers operate in Colorado. *Id.*

The lower court decisions in this case and in *Masterpiece Cakeshop* will provide a roadmap for litigation against Christian photographers who are bound by religious conviction not to photograph a same-sex wedding ceremony or celebration. The core facts in this case cannot be limited to the parties and circumstances. The same scenario could have just as easily arisen from a Christian photographer who happens to hold similar religious convictions to those of the owner of Arlene's Flowers.

As explained in more detail below, photography provides an irreplaceable form of expression that should not, consistent with First Amendment precedent, be subject to compelled speech on account of a state public accommodations law. *See infra* part II. Absent correction from this court, Christian photographers will have their rights chilled by the prospect of litigation under the legal theories adopted by the state high court in this case.

B. The lower court decision will curtail the rights of many citizens and businesses, not just florists and photographers.

Christian photographers, like Arlene's Flowers, are not the only individuals who face the prospect of being "made an example of" through future litigation. The facts of this case may be readily replicated across the spectrum of wedding services providers. All that is necessary to trigger legal liability for acting consistent with one's religious conscience, under the court of appeals' holding, is for the service provider (a public accommodation under the statute) to decline to serve a prospective customer's same-sex wedding. The following list highlights some affected businesses:

- Photographers
- Videographers
- Bakers
- Florists
- Decorators
- Singers and DJs
- Jewelers

The tension between religious service providers and public accommodations laws has increased in recent years. Prominent cases have been brought against artists, such as bakers, photographers, and florists. The conflict is not likely to dissipate as the number of same-sex weddings increases throughout the country.

All these types businesses are currently subject to potential litigation, and may be forced to withdraw from the public sphere. Citizens who believe they are called to act consistent with their sincerely-held religious beliefs in both public and private life will face increasing pressure to withdraw from public life and refrain from speaking and acting consistent with those beliefs. With the dramatic increase in litigation across the country involving same-sex weddings and religious institutions or individuals who are duty-bound not to celebrate a form of marriage contrary to their religious conviction, there will be far more disputes under this law in the future.

C. Wedding photography is the artistic expression of the photographer and thus protected by the First Amendment.

The members of the ICP who chronicle wedding stories through the medium of photography are engaged in protected First Amendment expression. While relatively new on the scale of recorded history, photography has become a universally-beloved form of expression: "Ever since 1839 photography has been a vital means of communication and

expression." Beaumont Newhall, *The History of Photography* 7 (5th ed. 1988); Bill Hurter, *The Best of Wedding Photojournalism* 15 (2d ed. 2010) ("Above all, the skilled wedding photojournalist is an expert storyteller."). Indeed,

> Photography is a form of non-verbal communication. At its best, a photograph conveys a thought from one person, the photographer, to another, the viewer. In this respect, photography is similar to other forms of artistic communication such as painting, sculpture, and music.

Bruce Barnbaum, *The Art of Photography: An Approach to Personal Expression* 1 (1st ed. 5th update 2012). As with more traditional forms of art, many photographers decline to create art that conveys a message contrary to the artist's religious beliefs.

If allowed to stand, the court of appeals' decision threatens the ability of photographers to create art without being compelled to express a message about a same-sex wedding or celebration that conflicts with their sincere convictions. Many photographers who ply their craft for weddings command a premium price due to the artistic value of their skill. It is common for photographers to spend substantial time and effort setting up and obtaining the perfect wedding shot, and then editing the raw images to imprint their unique voice on the finished product. Wedding photography is not fungible. All the characteristics of artistic expression are seen in the wedding photography sphere.

II. Washington has undermined broadly-held Free Speech rights.

The First Amendment's cherished rights to the freedom of speech sits at the core of the American system of government. Free Speech rights are imperiled by the application of Washington's public accommodation law in this circumstance. The members of the ICP recognize the threat to these Constitutional rights as chilling artistic expression beyond the parties to this case. Free Speech often protects, as in this case, religiously motivated speech. A failure to correct the court's opinion below will put a dint in Free Speech protections that serve as an important bulwark of individual liberty.

The Free Speech clause has a venerable tradition of protecting communication and activity beyond the paradigmatic case of audible speech. Petitioner's artistic floral arrangements, similar to the artistic photography that members of the ICP are familiar with, most naturally fit within the Court's artistic expression line of cases. The court below, however, erroneously analyzed the Petitioner's conduct through the lens of expressive conduct cases and compounded the error by misapplying the current state of Free Speech doctrine from those cases.

This Court should correct the error by treating Petitioner's artistic creation as fully protected Free Speech, or at the very least, recognizing that it must be protected as expressive conduct in these circumstances.

A. Robust Free Speech protections outside the expressive conduct cases prohibit

Washington State from compelling the creation of art for a wedding.

The State of Washington, as blessed by its highest court, brings the power of the State to bear against Arlene's Flowers to force a conscientious objector to same-sex marriage to create a customized artistic arrangement of flowers. The First Amendment protects Petitioner from being so compelled. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' " *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 ("[T]he First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees.").

In *Wooley*, the Court examined New Hampshire's law compelling citizens to express the state motto, "Live Free or Die" on license plates. The Court held that requiring this expression made the citizens "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable," and this violated the First Amendment. 430 U.S. at 715. This was so because "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Id.*

This Court has consistently shielded private citizens from governmental efforts to compel them to speak against their will. *Miami Herald Publ'g Co. v.*

Tornillo, 418 U.S. 241, 258 (1974) (government may not compel a newspaper to print an unwanted editorial). It matters not that the speech to be protected in this case is artistic, a custom floral arrangement, rather than verbal speech or written words. The Free Speech clause has long protected communication in forms other than verbal speech.

For example, this Court has recognized that paintings, music without lyrics, and poetry are afforded robust First Amendment protection. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (speaking of the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll"); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("The Constitution prohibits [censorship of music] in our own legal order."). Still other cases establish that "pictures, films, paintings, drawings, and engravings," are similarly protected. *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (stating that "[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection").

Artistic creation has thus long garnered Free Speech protection as communication outside the literal speech rubric. One lower court has helpfully reviewed the wide range of protected art cases as examples of "self-expression." *See Cressman v. Thompson*, 798 F.3d 938, 951–53 (10th Cir. 2015) (reviewing artistic creation cases). Petitioner's artistic creations easily fall within the protected realm of self-expression such as paintings, music, and pictures. The "expressive character" of a custom

floral arrangement, like artistic photography, "falls within a spectrum of protected 'speech' extending outward from the core of overtly political declarations." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998).

Similar to the circumstances of this case, this Court has already taken up the conflict between the right against compelled speech in the context of anti-discrimination laws protecting sexual orientation. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) the Court considered whether an annual parade in Boston, organized by a private party, could be forced as a "public accommodation" to admit a gay and lesbian group to march in the parade, contrary to the wishes of the parade organizers. The Court found that the parade was a protected form of expression under the First Amendment and that the public accommodations law could not compel the parade organizers to accept a group claiming protection under the protected class of sexual orientation.

As the Court explained in *Hurley*, "[t]he protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. Thus, even though the participant being excluded was "equally expressive," all speech "inherently involves choices of what to say and what to leave unsaid …." *Id.* at 570. The Court held the state public accommodations law, while having a "venerable history," had to make way for the freedom of speech right and the parade organizers' right to be free from compelled expression. *Id.* at 580–81. Here, as a

matter of compelled artistic expression, the Petitioner's Free Speech rights were violated by the State of Washington.

B. Even if viewed as expressive conduct, Petitioner's artistic creations are fully protected by the First Amendment.

The lower court failed to protect the Petitioner's creative work as Free Speech akin to the traditional artistic creations such as paintings, music, or pictures. Instead, the court looked upon outmoded protest conduct cases as justifying the lack of Free Speech protection for custom wedding arrangements. This was both the wrong doctrine and the wrong conclusion.

First, the lower court should not have applied the protest activity cases, such as *Spence v. Washington,* 418 U.S. 405 (1974), since those cases deal with conduct where the citizen's activity itself is part of the expression. With flag burning, for example, there is no lasting medium of communication; it is simply the act of destroying a flag that is inherently expressive. Creating a custom floral design for a wedding is more like the protected works of art discussed in *Hurley* than like the anti-war protests of *Spence* or even *Johnson*. *See Hurley*, 515 U.S. at 569 (speaking of the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll"). In *Hurley*, there was no discussion of whether paintings or orchestral music meet the two-part test as discussed in *Spence*. *See id.*

While the artistry involved in creating a floral arrangement is without question expressive conduct,

it is not the same as the expressive conduct line of cases running through *Spence* and *Johnson*. Rather, the floral arrangement here is a work of art in its finished product—not simply based on the act of creating it. Accordingly, it should not be subject to the test in *Spence* nor the "inherently expressive" test articulated in *Rumsfeld*. The Petitioner's conduct is afforded more First Amendment protection than the expressive conduct line of cases because it is "unquestionably shielded" as a work of art. *Hurley*, 515 U.S. at 569.

Second, even under the expressive conduct line of cases, the Petitioner's activity should have been protected as Free Speech. This Court's expressive conduct free speech cases have focused almost exclusively on protest activity, where the physical activity of the citizen, be it tearing up a draft card or burning an American flag, communicates a message. Before this Court's seminal decision in *Texas v. Johnson*, 491 U.S. 397, 399–402 (1989), upholding the burning of the American Flag as protected Free Speech, some courts, such as the lower court here, have required so-called expressive conduct to communicate a particular message in order to qualify for Free Speech protection.

This additional requirement for Free Speech protection derived from *Spence*, where this Court protected an individual's protesting of military activity by displaying a flag upside down with a peace symbol taped onto the flag. 418 U.S. 405. The *Spence* opinion, contrasting the protest activity with an "act of mindless nihilism" noted that "an intent to convey a particularized message was present." *Id.* at 410–11. This Court has clarified in later cases,

however, that even expressive conduct of the protest variety need not be reducible to one precise message to garner Free Speech protection. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (analyzing military protest activity without reiterating any *Spence* test for a particularized message). The Court now describes protected protest activity as being "inherently expressive" as opposed to conveying any specific message. *Id.* at 66.

Even under the protest cases, as this Court's most recent precedent establishes, the Petitioner's activity should have been given Free Speech protection since the challenged conduct is, without question, communicative and inherently expressive. Thus, if this Court applies the expressive conduct line of cases to Petitioner's floral art, the activity deserves First Amendment protection.

Moreover, as explained above, the Petitioner's communicative activity fits more precisely with artistic conduct afforded more robust Free Speech protection than the anti-military protest activity in the expressive conduct line of cases. Under either line of cases, the Petitioner's conduct should have been afforded protection.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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