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 WASHINGTON

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, ALABAMA, ARIZONA, IDAHO, LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND WISCONSIN, THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AND PAUL R. LAPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

LESLIE RUTLEDGE
Attorney General of Arkansas

LEE RUDOFSKY
Solicitor General of Arkansas

NICHOLAS BRONNI
Deputy Solicitor General of Arkansas

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

MICHAEL P. MURPHY
JOHN C. SULLIVAN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional provisions, statutes and rules:

Miscellaneous:

INTEREST OF AMICI CURIAE

Amici are the States of Texas, Arkansas, Alabama, Arizona, Idaho, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, West Virginia, and Wisconsin, the Commonwealth of Kentucky, and the Governor of Maine.[1] Amici have an interest in protecting the rights of their citizens to express themselves and peaceably conduct their lives in accordance with deeply-held religious beliefs and moral convictions. In contrast, States do not have a legitimate interest in eliminating private expression or compelling citizens to engage in it. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

On respondents' view, however, citizens may be coerced—as a condition of earning a living through artistic expression—to use their artistic talents to engage in expression supporting contested social and political issues. This type of compelled speech, whether by States or even local municipalities that seek to enact similar laws, is constitutionally forbidden. And for good reason—government having the ability to order individuals to speak in a manner that violates their conscience is fundamentally at odds with the freedom of expression and tolerance for a diversity of viewpoints that this Nation has long enjoyed and promoted.

States have other alternatives for ensuring that same-sex couples have access to particular ceremonial expression. States can easily take steps such as creating registries for artists who wish to create expression

---

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. The parties received timely notice of filing and consents are on file with the Court. *See* Sup. Ct. R. 37.

celebrating same-sex wedding ceremonies. Compelled speech is unnecessary.

SUMMARY OF ARGUMENT

Governments in our Nation have long protected individual rights in furtherance of "a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Tolerance in "a pluralistic society," of course, "presupposes some mutuality of obligation." *Id.* at 590-91. The crucial mutuality of tolerance was emphasized by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Obergefell* held that the Constitution does not allow government to prohibit same-sex marriage, but it simultaneously explained that the free-expression and free-exercise rights of individuals who disagree with same-sex marriage must be "given proper protection" by government. *Id.* at 2607.

This case is about artistic expression that should be protected by government rather than threatened by it. Not only is free expression intrinsically valuable to society, the art at issue here involves a particular type of ceremony that has been traditionally tied closely to religion. And public-accommodation concerns of past eras are not present here; customized pieces of art are not public accommodations, and plaintiffs had immediate access to other artists. States should thus look to more nuanced approaches to achieve their goals. Above all, States should not use their police power to truncate the First Amendment by compelling a person to create a piece of artwork—particularly one that violates the artist's conscience.

I. This case, like *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. cert. granted June 26, 2017), addresses the liberty that artists have to refrain from engaging in expression—or

to express dissent. Artistic work, whether viewed as pure speech or conduct that is inherently expressive, has always received full First Amendment protection. And arranging flowers in a way that expresses themes and messages—in this case showing that a wedding has taken place—or simply conveys beauty in an artistic fashion, is artistic work. Flower arrangement—at least arrangements customized to celebrate and express approval of the event for which they are created—is a form of art deserving of the same protections afforded other artistic works, such as paintings, sculptures, or photography.

The protection given to artistic endeavors has never been subject to the decreased scrutiny that expressive conduct receives. Respondents rely on precedent that allows preventing someone from *engaging* in conduct, such as burning a draft card, that is partially expressive but partially non-expressive. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). But no precedent allows the state to *compel* artistic expression. Because art is fully expressive, it is "pure speech." Hence, the State's compulsory rule violates Stutzman's freedom of speech.

II. Washington's rule against Stutzman's ability to choose when to create customized celebratory art also violates her free-exercise rights. Weddings have been considered a religious event for most people throughout history. The strong, historic link between that celebration and religious norms distinguishes conduct celebrating weddings from the public accommodations regulated by other laws. That religious distinctiveness, combined with compelled-speech concerns, shows the infirmity of Washington's regulation here. Allowing Washington to compel speech implicating sincerely held religious beliefs would be plainly inconsistent with this Na-

tion's long-standing traditions of liberty and personal autonomy.

III. This case provides an ideal vehicle for answering the questions presented. The record shows that Stutzman plainly had no invidious animus toward plaintiffs or anyone else. Stutzman's choice was a question of religious conscience with respect to the nature of an event. Furthermore, plaintiffs suffered at most only a dignitary-type harm in hearing a message with which they disagreed, a harm that anyone might claim when their beliefs conflict with the beliefs of others—a type of disagreement long tolerated, and indeed protected, in our pluralistic society. This Court has long recognized that such dignitary-type harms cannot override First Amendment freedoms, placing this case in a significantly different posture than cases from past eras involving whether a service provider must sell a non-expressive commodity to a buyer.

All this underscores why artists such as Stutzman cannot be punished for declining a commission to create artistic expression that violates their conscience or religious beliefs. The Court should either grant review or hold the petition pending resolution of *Masterpiece Cakeshop*.

ARGUMENT

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox ... or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. Yet Washington has declared that its officials may do exactly that—compel citizens to create works of artistic expression that violate their consciences. Its defense, based on public-accommodation laws, is misplaced; this is compelled speech aimed at enacting

the State's preferred orthodoxy. The decision below violates both the Free Speech and Free Exercise components of the First Amendment. And this case is an ideal vehicle for restoring the "mutuality of obligation" necessary for a "pluralistic," "tolerant" society, *Weisman*, 505 U.S. at 590-91, that this Court envisioned in *Obergefell*. 135 S. Ct. at 2607.

I. As Artistic Works, Commissioned Floral Arrangements Are Protected by the First Amendment's Freedom of Expression and May Not Be Compelled.

Barronelle Stutzman's custom wedding arrangements are artistic expression. They are therefore protected under the First Amendment, and government cannot compel her to create artistic expression. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (upholding "the right to refrain from speaking").

A. Artistic works receive full First Amendment protection because they are inherently expressive.

Freedom of speech has long been cabined by only a few "historic and traditional [exclusions]—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). Hence, the Court long ago recognized art's inherently expressive nature and developed a tradition of protecting artistic works, even works that some might find offensive. *See Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam). Thus, artistic works, with limited exceptions not present here, presumptively fall within the First Amendment's protections. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-67 (1981) ("Entertainment, as well as political and ideological speech, is

protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.").

The wide berth of what qualifies as artistic expression is most clearly seen in the realm of sexually explicit material: "material dealing with sex *in a manner* ... *that has* literary or scientific or *artistic value* ... may not be branded as obscenity and denied constitutional protection." *Jacobellis v. State of Ohio*, 378 U.S. 184, 191 (1964) (emphases added); *see also Kois*, 408 U.S. at 231 ("[W]e believe that [the sexually explicit poem] bears some of the earmarks of an attempt at serious art."). Hence, if the thing in question has "artistic value" or even "bears some of the earmarks of an attempt" at art, then the First Amendment's strong protections apply. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246-56 (2002) (invalidating ban on *virtual* child pornography in part because it "prohibit[ed] speech despite its serious literary, artistic, political, or scientific value").[2]

The First Amendment's protections apply equally to artistic expression that may not be literal speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (upholding a time-place-manner restriction on music, but recognizing that the First Amendment's protections apply to regulations of music). And unlike "symbolic speech"—*see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 400-06 (1989) (flag burning)—with artistic expres-

---

[2] This Court has one noted exception to the general rule about artistic works: child pornography may be prohibited regardless of any claimed artistic value. *New York v. Ferber*, 458 U.S. 747, 756-65 (1982). *Ferber*, however, "presented a special case" involving "'conduct in violation of a valid criminal statute'" tied to a compelling interest. *Stevens*, 559 U.S. at 471.

sion it is unnecessary to inquire as to the speaker's message or whether it will be understood by viewers. Art in its various forms is "unquestionably shielded" by the First Amendment—be it nonsensical poetry (Lewis Carroll's Jabberwocky), awkward instrumentals (Arnold Schönberg's atonal musical compositions), or seemingly incomprehensible paintings (Jackson Pollock's modern art). *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995).

The scope of protection given to artistic works has parallels with *Hurley*. That decision involved a parade, which, like art, is expressive in and of itself. *Id.* at 569-70. Because such expressive conduct was at issue, the parade was treated as speech: parade organizers could not be compelled to include other speech with which they disagreed. *Id.* at 572-73 (preventing organizers from having "to alter the expressive content" of their private conduct). The overlap between speech and conduct was complete, leaving no room to apply the state non-discrimination law. Likewise here. Washington interprets its statute to effectively "regulate[] expression based on content," meaning the law is "'presumptively invalid.'" *Stevens*, 559 U.S. at 468 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000)).

B. Commissioned floral arrangements are art.

Art is the "expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power." New Oxford Am. Dictionary 89 (3d ed. 2010). When Stutzman accepts a commission to create a floral arrangement for a wedding, the result is unquestionably an expression of "human creative skill and imagination"

that creates something to be appreciated primarily for its beauty. And this is not a unique or novel view; the Department of Labor recognized this decades ago, finding that "floral design" is "original and creative in character in a recognized field of artistic endeavor." Dep't of Labor, Wage and Hour Div., Fair Labor Standards Act Op. Letter, No. WH-73, 1970 WL 26442, at *1 (Sept. 4, 1970).

Specifically, floral arranging is in line with a tradition known as Floral Art Forms. Norah T. Hunter, *The Art of Floral Design* 30 (2d ed. 2000). These art forms include creating artificial flowers and floral fabric patterns, painting flowers, and designing flower tattoos. *See* Charles E. Colman, *The History and Doctrine of American Copyright Protection for Fashion Design: Managing Mazer*, 7 Harv. J. Sports & Ent. L. 150, 167, 183 n.65 (2016).[3]

Stutzman's skill—designing and crafting flower arrangements—has long been recognized as one of the floral arts. *See, e.g.*, Grace Rymer, *The Art of Floral Design* 6 (1963). Floral arrangement is the subject of art classes offered at the Smithsonian Institution. *E.g.*, Smithsonian Associates, Studio Arts, https://perma.cc/PR2Z-C9WN (course on "the classical art of floral design").

---

[3] The art of floral design is taught at many colleges and institutions including at least nine community colleges, *see* Floriculture Mgmt., Floral Design Schools & Colleges in the U.S.: *Schools with Floral Design Programs*, https://perma.cc/W347-SHQZ; Brookhaven College, Workforce & Continuing Education Class Schedule, *Floral Design*, https://perma.cc/5WRM-VANB; and fourteen accredited schools, *see* American School of Flower Design, Links to Complete Schedule of Classes in various cities, https://perma.cc/439M-C8GM.

Floral arts trace their roots to Egyptian, Greek, and Roman civilization. *E.g.*, Texas A&M University, Instructional Materials Service, *History of Floral Design* (2002), https://perma.cc/X3DJ-JK5S. Noting appreciation of this art "since prehistoric times," the Governor of Massachusetts has proclaimed a Floral Design Day, recognizing that "[f]loral design is a unique art form, utilizing natural media and applying such variables as line, balance, color, structure & symbolism, and [through which] individuals are able to express many emotions including love, sympathy, friendship and hope." Commonwealth of Massachusetts, A Proclamation by His Excellency Governor William F. Weld (1995), https://perma.cc/3ZGA-26AK.

One of the largest floral-art events in our Nation is Pasadena, California's annual New Year's Day Rose Parade, where "[e]very inch of every float must be covered with flowers or other natural materials." Pasadena Tournament of Roses, Rose Parade Participants (2017), https://perma.cc/G568-TE8P. And there are many other floral-art events throughout the country. For example, the University of Virginia Art Museum has traditionally held an annual event on floral art. Jane Ford, UVA Today: *Community Invited to Participate in Annual 'Flowers Interpret Art' Event at U.VA. Art Museum During Garden Week* (Apr. 14, 2008), https://perma.cc/6DN7-AYTP. And the Minneapolis Institute of Arts recently celebrated the 25th year of "Art in Bloom," an annual exhibit combining floral art with the Institute's permanent collection. Lois Ann Helgeson, Rose Arranger's Bulletin: *Art, Vases & Flowers* 6 (2008), https://perma.cc/A46X-W6YH.

In the floral art of flower arranging, the artist combines the color, shape, and design of different flowers to

create moods or themes. Rymer, *supra*, at 6. This art is derived from an ancient Japanese practice known as *Ike-bana*—an ordering of flowers in an artistic fashion to enhance their natural beauty. Mary Averill, *Japanese Flower Arrangement (Ike-bana) Applied to Western Needs* 17-18 (1913). This led to the creation of different schools of flower-arrangement art, each with their own masters who created philosophies and design principles for the art. *Id.* at 33. The Japanese culture even expanded flower arrangement into a meditative practice, making it an art form that transcended traditional decorative and devotional functions. *Id.* at 30.

In addition to the Eastern flower-arrangement schools that focus on the lines in the flowers, other broad styles have since developed. The Garden Club of Virginia, *Floral Styles & Designs* 4 (2015), https://perma.cc/A6XF-6YMQ. These include the Traditional or Western school (that focuses on using many different types of flowers) and the Modern school (that eschews rules altogether). *Id.* at 4, 18. As the petition notes, Stutzman's works represent yet another style: European. Pet. 8-9.

As with any art form, several underlying principles help guide an artist in flower arrangement. Rhythm, for example, refers to the visual organization of an arrangement—the way colors, lines, and textures align to form a pathway that carries the viewer's eye through and around the arrangement while directing attention toward the focal point. Baxter County Master Gardeners, *Principles of Floral Arrangement* 15 (2005), https://perma.cc/8ZZ7-MA4B. Scale refers to the size of an arrangement relative to its surroundings. *Id.* at 16. An arrangement will also rely on balance, both with respect to the number of flowers and their color. Dark colors, for example, give a visual effect of weight and so

are used low in the arrangement. *Id.* at 13-14. Harmony and unity also play a role as the artist must take care that the design matches the occasion. *Id.* at 12.

These principles are paramount to the success of the artwork as it conveys themes and messages, and to the aesthetic beauty of the piece. For instance, if the flower stem is arranged vertically, the piece will stress height and communicate power. The American Institute of Floral Designs, *The AIFD Guide to Floral Design: Terms, Techniques, and Traditions* (2005). If one arranges the stem horizontally, however, it communicates calm and stability. *Id.* And while arranging too many stems diagonally will cause too much eye movement and create confusion, curved lines will convey comfort. *Id.*

All of these "rules" form artistic boundaries, and these boundaries require floral artists, in the course of designing their arrangements, to make many intricate decisions. Stutzman implements these artistic characteristics in her custom designs—a fact unchallenged in the record. *See* Pet. 8-9. It is thus unsurprising that the Washington Attorney General was forced to concede that the arrangements were expression normally meriting First Amendment protection. *See* Pet. App. 292a-93a. In short, Stutzman creates art, which enjoys the free-speech protections of any other purely expressive form of communication.

C. Artistic works are not subject to decreased scrutiny, as is some expression.

The lower court's primary rationale for rejecting Stutzman's free-speech claim is that her art is merely conduct that can be regulated under a test that finds its genesis in *O'Brien*. *See id.* at 25a-33a (citing the conditions for analyzing "expressive conduct" highlighted in *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per

curiam), and *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 64 (2006)). That test was never fashioned to be applied to a work of art. An extension of those cases to artwork would be inconsistent with the rationale that underlies them.

When O'Brien burned his draft card, it may not have been art, but it was clearly expressive conduct. *O'Brien*, 391 U.S. at 376. The complication was that the nonexpressive element of the conduct—destroying a government form necessary to the effectuation of a constitutional power of Congress (raising armies)—was unprotected. Had O'Brien made and burned a *copy* of his completed draft card—the copy itself having no use in the government's program—the result would have been different. But because the government had a substantial interest in O'Brien not destroying the government form at issue, the Court held that he could not justify doing so in the name of free speech.[4]

The result differed when this Court examined the placement of a peace sign on an upside-down American flag. *Spence*, 418 U.S. at 406. *Spence* also rejected "the

---

[4] While *O'Brien* is typically used to justify the use of something less than strict scrutiny with regard to expressive conduct, it also indicated that the regulation at issue cannot burden speech more than is necessary to further the governmental interest at stake. 391 U.S. at 377 (noting that "the incidental restriction on alleged First Amendment freedoms [must be] *no greater than is essential* to the furtherance of that interest" (emphasis added)). The real issue was that the card was essentially the government's property and related to an important governmental interest requiring that it not be destroyed. *Id.* at 381. In the present case, however, States could achieve their goal of access to wedding expression services without *any* burden being imposed on speech. *See infra* pp. 17-18. Nevertheless, this type of analysis is unnecessary here because compelling any type of speech based on content is unconstitutional.

view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 409 (quoting *O'Brien*, 391 U.S. at 376). But the Court held that the "activity, combined with the factual context and environment in which it was undertaken, le[d] to the conclusion that [Spence] engaged in a form of protected communication." *Id.* at 410. This Court reached that conclusion by determining that Spence had "[a]n intent to convey a particularized message" and that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11.

Thus, in establishing limitations on expressive conduct, context is the key. Burning an American flag outside of the Republican National Convention, as in *Texas v. Johnson*, was calculated to display a message of displeasure with the renomination of President Reagan. 491 U.S. at 406. But a military veteran retiring a tattered flag by burning it and burying the ashes evidences a message of respect for the flag and the Nation. *See id.* at 411, 420. As *O'Brien* recognized, it may be necessary on occasion for a court to inquire into whether the expressive conduct has significant non-expressive aspects—where the message and action do not perfectly overlap. That is because *O'Brien* addressed a legal violation of a law aimed at conduct beyond the expression.

But that is not so with works of art. Unlike mere conduct, art is protected whether or not there is "a succinctly articulable message." *See Hurley*, 515 U.S. at 568-69. And when the medium chosen by the artist to convey the expression is visual art—be it a painting, a musical composition, a sculpture, or a floral arrangement—the art constitutes the entirety of the "conduct," and there is no non-expressive element left to be regu-

lated. *See id.* at 569. Thus free-speech protection for artwork does not depend on assessing the degree of communicativeness of its message—which need not even be "understood by those who view it" for protection to attach. *Johnson*, 491 U.S. at 404; *see Hurley*, 515 U.S. at 569 (citing works of art meaningless to most observers).[5]

The lower court also attempted to rely on *FAIR*, reasoning that the law schools in that case could not deny military recruiters access to students because that conduct was not "inherently expressive." Pet. App. 26a. But art, by its nature, is inherently expressive. In contrast, the speech/conduct divide in *FAIR* was important because the law regulated *only* the school's conduct—allowing military recruiters equal access to rooms in the law school. 547 U.S. at 60. As this Court noted, the law at issue there "neither limit[ed] what law schools may say nor require[d] them to say anything." *Id.*

The State of Washington cannot evade the inherent expressive nature of art by inapt appeals to public-accommodation laws. There is a fundamental difference between ensuring that individuals have, on the one

---

[5] Even if Stutzman's art was treated as mere conduct, arranging flowers to convey a message or theme is of at least the same communicative quality as marching in a parade—and therefore equally protected by the First Amendment. *See Hurley*, 515 U.S. at 569-70; *cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (treating pure symbolic act as "closely akin to pure speech . . . entitled to comprehensive protection under the First Amendment"). But because the law at issue here is "related to the suppression of [her] free expression," this case is "outside of *O'Brien*'s test altogether." *Johnson*, 491 U.S. at 410. After all, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

hand, access to the commodities of food and shelter and, on the other hand, the ability to compel the creation of custom artwork by a specific artist. The harm faced by plaintiffs here was a perceived dignitary-type harm—and Stutzman worked hard to avoid that. Pet. 10. But the exercise of First Amendment rights may cause plaintiffs dignitary-type harms, and this has always been understood as an acceptable cost for achieving the pluralistic society treasured in this Nation—and it also alleviates substantial dignitary-type harms incurred by defendants not wanting to engage in certain expression. *See Weisman*, 505 U.S. at 590-91. The "enduring lesson" taught by this Court's cases is that "government may not prohibit expression"—including dissent from celebrating certain ceremonies—"simply because it disagrees with its message." *Johnson*, 491 U.S. at 416. The State of Washington cannot punish Stutzman for adhering to her conscience rather than the State's prevailing orthodoxy.

Nor is there justification for regulating Stutzman's expression under any other category of censorship. The creation or sale of art has never been subject to commercial-speech doctrines. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("We fail to see why operation for profit should have any different effect in the case of motion pictures."). Commercial speech has never been treated as on the same level with the creation of art and, more importantly, the commercial speech doctrine does not allow content-based restrictions on expression. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

The record also illustrates that the exercise of First Amendment rights here contained no threat of harm and was not thought to incite anyone to violence. Pet. App. 321a, 429a. In fact, rather than being harmed by

Stutzman's speech, plaintiffs received offers for free floral arrangements. *Id.* at 357a-58a.

Finally, the exercise of First Amendment rights here did not somehow contain any obscene elements of some unprotected "art" forms. *See Miller v. California*, 413 U.S. 15, 23-37 (1973) (allowing censorship of obscene materials that lacked "serious literary, artistic, political, or scientific value"). Washington is therefore without justification for its censorship here.

D. Neither art nor expressive conduct may be compelled.

As this Court has recognized, the more a government seeks to have a speaker or artist say or create, the greater the personal-liberty interest at stake. *See Wooley*, 430 U.S. at 715 ("Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree."). Moreover, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. It is unsurprising, then, that this Court has never allowed a government entity to compel art or expressive conduct.

It is clear that a government cannot force a citizen to engage in or endorse expression—whether saluting a flag, *Barnette*, 319 U.S. at 642, or even passively carrying a message on a license plate, *Wooley*, 430 U.S. at 717. And, unlike a cable company hosting someone else's message, for example, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the artistic endeavor here belongs directly to the party the government is seeking to coerce. Additionally, not compelling

the artistic expression here does not create a bottleneck for people seeking the expression at issue. *Id.* at 652, 656.

It is no answer to say the government is not compelling speech because Stutzman does not have to create wedding floral arrangements for *anyone*. The Jehovah's Witness students in *Barnette* did not have to attend public school. 319 U.S. at 626. And the individual in *Wooley* did not have to drive a car. 430 U.S. at 717. These observations, of course, are entirely beside the point, as they do not respect the individual's personal liberty, and accepting these as legitimate rationales for compelling speech would just create unconstitutional conditions. That is why this Court has held that a newspaper not only has the right to publish political expression, it also has the right not to be compelled to publish replies to such expression. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

There are all sorts of examples of artistic expression that government cannot compel. A painter is free to decline a commission for a painting. A cake designer is free to decline an order celebrating or alternatively disparaging same-sex marriage. The bottom line is simple: "The government may not . . . compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

In all events, States have alternative means of accomplishing the goal of promoting the dignity of individuals entering into a same-sex marriage. And even merely expressive conduct subject to *O'Brien* cannot be regulated unless the regulation is narrowly tailored, *i.e.*, "that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799). It would be easy for a

State to create or facilitate a database of artists without objections to creating works for same-sex weddings, which couples could reference to find nearby artists to commission expression for a same-sex wedding. Such resources already exist in the private sector. *See, e.g.*, Pridezillas, A Wedding Resource for the LBGT Community (2013), https://perma.cc/U8U4-WFCH. In fact, Stutzman here provided that service to plaintiffs by giving them references to other nearby florists who would create floral art for their ceremony. Pet. App. 321a-22a, 401a.

Perhaps most straightforwardly, a State could define "public accommodations" in the manner done so by the federal government and not capture businesses that selectively choose clients. *See* 42 U.S.C. § 2000a (applying accommodation statute only to establishments such as hotels, restaurants, and stadiums); *see also Amy Lynn Photography Studio, LLC v. City of Madison*, No. 2017-cv-00555 (Dane Cty. Ct. Aug. 11, 2017) (affirming that Wisconsin's similar anti-discrimination law does not apply in similar circumstance to this case).

Critically, Washington cannot be allowed to define its interest as "anti-discrimination" broadly speaking. Not only would such a sweeping definition open the door for government-compelled speech, it would be beyond the scope of this case. As the record shows, Stutzman performs services for same-sex couples as long as they are not part of a same-sex wedding. Pet. App. 323a. She will also sell non-commissioned floral arrangements for a same-sex ceremony. *Id.* at 401. The situation here thus parallels the "peculiar way" that the State in *Hurley* interpreted its law when no individual had been discriminated against because of their sexual orientation, but only because of the message at stake.

515 U.S. at 572-73 (making "speech itself" the "public accommodation").

II. Compelling Stutzman to Create Customized Art for Events that She Cannot Celebrate Consistent with Her Religion Also Violates Her Free-Exercise Rights.

Not only does the law at issue violate Stutzman's freedom of speech, it impermissibly burdens her free exercise of religion. The Washington Supreme Court rejected this claim by holding that (1) there was no fundamental right implicated beyond free exercise, whereas only hybrid-right claims are subject to strict scrutiny after *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and (2) the law could survive strict scrutiny anyway. Pet. App. 54a. Both premises are wrong.

First, *Smith* preserved strict-scrutiny review for generally applicable laws in "hybrid situation[s]," involving both free-exercise rights and other rights. 494 U.S. at 882. For example, some "cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion." *Id.* (comparing *Wooley*, 430 U.S. at 705). *Smith* thus envisioned that free-speech and parental-rights claims can be bolstered by a Free Exercise Clause claim; "a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id.* (comparing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Those are all instances where "the conduct itself must be free from governmental regulation." *Id.* at 882.

Some courts have argued that the "other constitutional protection[]," *id.* at 881—besides the Free Exercise Clause claim—must be an independently viable

claim, Pet. 33. But, as Stutzman notes, requiring the "other" claim to stand on its own is nonsensical. *Id.* It would make the Free Exercise Clause claim superfluous and, essentially, render the Clause a dead letter. Erasing part of the First Amendment cannot be the correct solution and is surely not the result *Smith* sought to achieve. The best account of *Smith*'s explanation is to allow free-exercise concerns to raise any substantial claim regarding a companion fundamental right (such as free speech) to the level of a violation. *Id.* at 34.

Not only has Stutzman alleged a compelled-speech claim that is substantial, at the least, but that claim is enhanced in this case by its interplay with Stutzman's right to the free exercise of religion. Throughout history, weddings have often been tied to religious ceremonies. *Obergefell*, 135 S. Ct. at 2594. This link not only distinguishes marriage from the goods and services regulated by other forms of public-accommodation laws, it prevents Washington's attempt at compelling Stutzman to create customized artwork for this ceremony. The State is not just attempting to compel speech, it is compelling what Stutzman genuinely understands as *religious* speech. So, as *Smith* presaged, this is a case dealing with "the communication of religious beliefs"; it therefore goes beyond *Smith*'s general rule that individuals must conform their behavior to neutral laws of general applicability, where hybrid rights are not in play. 494 U.S. at 879-82. At the least, this case presents a hybrid-right situation in which Stutzman's religiously-connected art cannot be compelled by government. *See generally* Rotunda National Archives, Founder Online: *Letter from Thomas Jefferson to Richard Douglas* (Feb. 4, 1809) ("No provision in our Constitution ought to be dearer to man, than that which protects the rights

of conscience against the enterprizes of the civil authority."), https://perma.cc/Q3MW-7RLD.

Second, as noted previously, the State has less-restrictive means available for ensuring that same-sex couples can find artists to create works for their wedding ceremonies. *See supra* pp. 17-18. Those less-restrictive means show that the Washington law impermissibly burdens both free-speech rights (it cannot satisfy even *O'Brien*'s relaxed standard) and free-exercise rights (it cannot satisfy the strict scrutiny applicable in this hybrid-rights context).

III. This Case Is an Ideal Vehicle for Addressing the Questions Presented Regarding Constitutional Rights and Same-Sex Weddings.

As part of our fixed constellation of rights, it is clear that no government—even one with the best intentions—may commandeer the artistic talents of its citizens in order to create expression with which the government agrees but the artist does not. Even worse here, the expression at issue deals with a topic over which this Court has recognized that people of "good faith" are divided. *Obergefell*, 135 S. Ct. at 2594. The very purpose of the First Amendment's Free Speech Clause—and among its highest uses—is allowing opposing sides of a debate to express themselves as they see fit. *See Roth v. United States*, 354 U.S. 476, 484 (1957). This case provides an ideal vehicle for ensuring that continued personal autonomy.

Plaintiffs have suffered no tangible harm, and no invidious animus exists here. Stutzman employs members of the LGBT community, provides non-wedding services to same-sex couples, and even served plaintiffs here for many years before denying this request to create customized art celebrating a same-sex marriage

ceremony. Pet. App. 306a-07a, 312a-13a. The record allows no basis to find that Stutzman is discriminating on the basis of sexual orientation, as she was simply exercising her good-faith moral objection to creating artistic expression celebrating a marriage contrary to the tenets of her religious faith. *See also id.* at 307a (Stutzman would not design flower arrangements for heterosexual polygamists either, if such unions became legal: "Agreeing to do flowers for any marriage ceremony not between one man and one woman would violate my conscience and my deeply held religious beliefs.").

The artistic works at issue in this case are custom-made expressive floral arrangements. Indeed, plaintiffs wanted Stutzman to do the arrangements precisely because of her skill at creating these expressive works of art. She did not refuse to provide all services to plaintiffs. She only declined to create specialty expressive arrangements designed specifically for a same-sex wedding. And for that, the State of Washington saddled not only her business but also her personally with fines and attorneys' fees expected to total in the hundreds of thousands of dollars. Pet. 13.

This is compelled expression—plain and simple. And it is anathema to the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LESLIE RUTLEDGE
Attorney General of
Arkansas

LEE RUDOFSKY
Solicitor General of
Arkansas

NICHOLAS BRONNI
Deputy Solicitor General
of Arkansas

STEVE MARSHALL
Attorney General of
Alabama

MARK BRNOVICH
Attorney General of
Arizona

LAWRENCE G. WASDEN
Attorney General of
Idaho

JEFF LANDRY
Attorney General of
Louisiana

DOUG PETERSON
Attorney General of
Nebraska

ADAM PAUL LAXALT
Attorney General of
Nevada

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney
General

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

MICHAEL P. MURPHY
JOHN C. SULLIVAN
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

PATRICK MORRISEY
Attorney General of
West Virginia

BRAD SCHIMEL
Attorney General of
Wisconsin

MATTHEW G. BEVIN
Governor of Kentucky

PAUL R. LAPAGE
Governor of Maine

AUGUST 2017