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.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

THOMAS BREJCHA
Counsel of Record
President and Chief Counsel,
THOMAS MORE SOCIETY
19 South LaSalle Street
Suite 603
Chicago, IL 60603
(312) 782-1680
tbrejcha@
thomasmoresociety.org

JOAN M. MANNIX
JOAN M. MANNIX, LTD.
135 South LaSalle Street
Suite 2200
Chicago, IL 60603
(312) 521-5845
jmannix@joanmannixltd.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Washington Supreme Court's Analysis Of Whether Petitioners' Custom Floral Arrangements Are "Speech" Protected By The First Amendment Sharply Conflicts With The Precedent Of This Court And The Decisions Of The Second, Sixth, Seventh, Ninth, Tenth And Eleventh Circuits..... 3

II. The Washington Supreme Court's Analysis Of Whether Petitioners' Custom Floral Arrangements Constitute Expressive Conduct Conflicts With The Precedent Of This Court 9

CONCLUSION..... 11

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010) 6

Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) 5

Buehrle v. City of Key West, 813 F.3d 973 (11th Cir. 2015) 7

Cressman v. Thompson, 798 F.3d 938 (10th Cir. 2015) 7

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 5

ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915 (6th Cir. 2003) 6

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 3, 4, 6, 10

Mastrovincenzo v. City of New York, 435 F.3d 78 (2d Cir. 2006) 5

Piarowski v. Illinois Comm. Coll. Dist. 515, 759 F.2d 625 (7th Cir. 1985).....6

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) 4

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).....5

Spence v. State of Wash., 418 U.S. 405 (1974) 4, 10

Ward v. Rock Against Racism, 491 U.S. 781 (1989).....4

White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007) 5, 6

BRIEF OF THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Thomas More Society ("TMS") is a non-profit organization devoted to the defense and advocacy of First Amendment rights, including freedom of speech and religious freedom. Incorporated as a 501(c)(3) not-for-profit corporation in Illinois and based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case easily satisfies the criteria that this Court has indicated it will consider in determining to grant *certiorari*. Indeed, as noted by petitioners, this Court recently granted *certiorari* (on June 26, 2017) in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, a case that presents similar and overlapping issues.

---

[1] Blanket letters of consent from all parties to the filing of *amicus* briefs have been lodged with the Clerk. Pursuant to S. Ct. Rule 37.2, *amicus* Thomas More Society states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* further states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

In this case, the Supreme Court of Washington, a state court of last resort, has decided an important federal question as to whether the First Amendment's protection of pure "speech" (as opposed to expressive conduct) is limited to literal speech (written or spoken words) or whether it encompasses non-verbal artistic expression. In this case, custom wedding floral arrangements are the form of non-verbal artistic expression at issue. The Washington Supreme Court has resolved the question of whether such expression constitutes pure "speech" in a way that conflicts with the relevant decisions of this Court and with the decisions of the United States Courts of Appeals for the Second, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits. Non-verbal forms of artistic expression, however, constitute pure "speech" within the meaning of the First Amendment and, in fact, can transcend the limitations of words to induce emotion, conjure a mood, summon memories and to otherwise convey meaning. Review by this Court is imperative not only because of the conflict but also because the Washington Supreme Court's decision constitutes a dangerous, unprecedented contraction of the First Amendment's critical protection of such forms of pure speech.

Review is also warranted because, even under the "expressive conduct" test applied by the Washington Supreme Court (a test that has never before been applied to visual art forms), petitioners' conduct is entitled to First Amendment protection. Requiring petitioner, Baronnelle Stutzman ("Stutzman"), to create custom floral arrangements for a wedding to which she

objects on the basis of her religious beliefs impermissibly compels her to convey approval of the wedding and that it should be celebrated, in conflict with this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

ARGUMENT

I. The Washington Supreme Court's Analysis Of Whether Petitioners' Custom Floral Arrangements Are "Speech" Protected By The First Amendment Sharply Conflicts With The Precedent Of This Court And The Decisions Of The Second, Sixth, Seventh, Ninth, Tenth And Eleventh Circuits.

The Court should grant the petition because, in determining that custom floral arrangements for weddings do not constitute pure "speech" within the meaning of the First Amendment, the Washington Supreme Court applied a test that drastically and impermissibly circumscribes the scope of the First Amendment and conflicts with the prior precedent of this Court and the Second, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits. The Washington Supreme Court concluded that petitioners' art is not expression protected by the First Amendment as pure "speech" because it is not "'speech' in a literal sense and is thus properly characterized as conduct." (Pet. App. 25a). The distinction between "speech" and conduct is significant because expressive conduct is not protected by the First

Amendment unless "inherently expressive" (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006)), or "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ." *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974).

The premise of the Washington Supreme Court's analysis, that only literal speech is protected by the First Amendment as pure "speech," ignores innumerable decisions of this Court and of the Courts of Appeals. In fact, the Washington Supreme Court failed to cite a single authority in support of its interpretation that only literal speech constitutes pure "speech" for purposes of the First Amendment.

This Court has repeatedly recognized that non-verbal forms of expression, including painting, music and dance, are entitled to First Amendment protection. For example, in *Hurley*, *supra*, this Court observed that some forms of expression are "unquestionably shielded" by the First Amendment, such as the painting of Jackson Pollock, and the music of Arnold Schöenberg (as well as the Jabberwocky verse of Lewis Carroll), even though they fail to convey "a narrow, succinctly articulable" or "particularized" message which, in *Spence*, this Court found was necessary to a determination that "expressive conduct" is entitled to First Amendment protection.

Prior to *Hurley*, this Court similarly chose not to apply *Spence* to non-verbal artistic forms. For example, in *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), the Court acknowledged that music is "a form

of expression and communication" that is protected under the First Amendment. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981), this Court recognized that live entertainment, including musical works and dance, are included in "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." Similarly, in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975), this Court concluded that the ordinance at issue impermissibly prohibited First Amendment protected speech or expression, including a ballet and "other works of unquestionable artistic and socially redeeming significance."

The Second, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits have also recognized that artistic expression is protected by the First Amendment as pure "speech," even if it does not involve literal speech. The Second Circuit has held: "Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996). The court went on to conclude that paintings, photographs, prints and sculptures "always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection." *Id.* at 696. *See also Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006) (graffiti-painted clothing is protected First Amendment expression).

In *White v. City of Sparks*, 500 F.3d 953 (9th Cir. 2007), the Ninth Circuit held that the original paintings of an "itinerant artist" are expression protected by

the First Amendment. The court held that original paintings reflect the artist's "sense of form, topic, and perspective" and that an artist's self-expression is protected irrespective of whether his or her paintings "express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica,*" or simply "the artist's vision of movement and color, as with 'the unquestionably shielded painting of Jackson Pollock.'" *White*, 500 F.3d at 956, citing *Hurley*, 515 U.S. at 569. The court concluded: "So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective." *Id. See also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) ("We have little difficulty recognizing that a tattoo is a form of pure expression entitled to full constitutional protection.")

In concluding that stained glass windows were protected by the First Amendment, the Seventh Circuit similarly acknowledged, "the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression." *Piarowski v. Illinois Comm. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985). The Sixth, Tenth and Eleventh Circuits have also held that the First Amendment protects as pure "speech" not only literal speech but also other mediums of expression. *See ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings,

engravings, prints, and sculptures.") [Citations omitted.] *See also Cressman v. Thompson*, 798 F.3d 938, 952-953 (10th Cir. 2015) (recognizing that "[t]he concept of pure speech is fairly capacious" and extends to non-verbal media that genuinely and primarily reflect the self-expression of the artist, including the artist's sale of his or her own original artwork); *Buehrle v. City of Key West*, 813 F.3d 973, 976-977 (11th Cir. 2015) (First Amendment prohibition against any law abridging speech extends beyond the spoken or written word and includes various forms of artistic expression including the display of a tattoo).

Petitioners' custom floral arrangements are a visual medium of artistic expression with the same characteristics as those forms of non-verbal expression that this Court and the Courts of Appeals have found are protected by the First Amendment as pure "speech." The record establishes that original floral designs require a floral designer to use his or her artistry and creativity in arranging raw materials, such as flowers, plants, containers, adornments and other elements, to convey a desired message and mood. (Pet. App. 310a-311a; Stutzman Decl., para. 9. *See also* Pet. App. 332a-333a; Robbins Decl., paras. 24-25). In creating floral arrangements, floral design artists "focus on a variety of components including, but not limited to, design, harmony, unity, balance, proportion, scale, focal point, rhythm, line, form, color, space, depth, texture and fragrance." (Pet. App. 331a; Robbins Decl., para. 20). They also frequently incorporate the meaning and symbolism

of particular flowers. *Id.* Moreover, "[a]s with most artistic mediums, each floral designer has his or her own style, which expresses itself in the final creation." (Pet. App. 332a; Robbins Decl., para. 22). With respect to wedding arrangements, "[t]he floral design artist makes hundreds of decisions that factor in shapes, shades, colors, stem height, geometry, flower and foliage availability, physical location of the arrangements, and the overall presentation of every vase, flower, and filler, and how all separate arrangements – from the boutonnieres, pew markers, table center, and bouquet – express their unique elements appropriate for their purpose." (Pet. App. 333a; Robbins Decl., para. 25).

Stutzman designs her arrangements, especially those for wedding ceremonies, in order to convey "an expressive message." That message relates to the intended mood and feeling of the ceremony, as well as her clients' relationship and personalities. (Pet. App. 313a, 315a-316a; Stutzman Decl., paras. 22, 28, 30-31. *See also* Pet. App. 332a-333a; Robbins Decl., para. 24 (in creating wedding floral arrangements, "[t]he florist attempts to create a mood or feeling consistent with the personalities of the couple and to create arrangements that express the unity of the couple.")). Customers "almost always" give Stutzman discretion to exercise her "artistic judgment to determine . . . how to convey a mood and message through the requested arrangements." (Pet. App. 312a; Stutzman Decl., para. 15).

There is no principled distinction between an artist who conveys his or her perspective through a painting, including, for example, a painting of a flower

arrangement, and an artist who conveys his or her perspective through an actual custom floral arrangement. The record in this case establishes that custom floral arrangements, especially those prepared for weddings, are, like paintings, music and dance, the product of the floral designer's creativity and distinct style. They are the artist's expression of mood and feeling and evocation of the participants in the wedding ceremony and their relationship. The Washington Supreme Court's failure to even consider whether a custom floral arrangement constitutes a visual art form that constitutes pure "speech," simply because it does not incorporate written or spoken words, cannot be reconciled with the decisions of this Court and the Courts of Appeals construing the First Amendment.

II. The Washington Supreme Court's Analysis Of Whether Petitioners' Custom Floral Arrangements Constitute Expressive Conduct Conflicts With The Precedent Of This Court.

Even if categorized and subject to evaluation as expressive conduct (a previously unprecedented analysis with respect to visual art forms), petitioners' creation of custom wedding floral arrangements is protected by the First Amendment. In order to determine whether conduct is sufficiently communicative to warrant protection, the courts evaluate a number of additional factors. Those considerations include the nature of the activity and the factual context and environment in which it was undertaken in order to determine the

presence of "[a]n intent to convey a particularized message . . . and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *See Spence*, 418 U.S. at 410-411. The Washington Supreme Court concluded that, irrespective of how Stuzman's conduct is characterized ("whether it is characterized as creating floral arrangements, providing floral arrangement services for opposite-sex weddings, or denying those services for same-sex weddings"), it does not communicate something to the public at-large and is not inherently expressive conduct. (Pet. App. 26a, 31a).

Stutzman's conduct is, however, analogous to the conduct in *Hurley* which this Court found was protected by the First Amendment. In *Hurley*, the Court held that the panel that organized a parade (the "Council") could not be compelled to include the Irish-American Gay, Lesbian and Bisexual Group because to do so would constitute compelled speech in violation of the First Amendment. The Court explained: "Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Hurley*, 515 U.S. at 574. As in *Hurley*, even if characterized as expressive conduct, compelling Stutzman to create custom floral arrangements for a wedding to which she objects based on her sincerely held religious beliefs impermissibly compels her to use her medium of artistic expression and creativity to convey, at a

minimum, "to the public at-large" approval of the wedding as an event to be celebrated.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

THOMAS BREJCHA
Counsel of Record
President and Chief Counsel,
THOMAS MORE SOCIETY
19 South LaSalle Street
Suite 603
Chicago, IL 60603
(312) 782-1680
tbrejcha@
thomasmoresociety.org

JOAN M. MANNIX
JOAN M. MANNIX, LTD.
135 South LaSalle Street
Suite 2200
Chicago, IL 60603
(312) 521-5845
jmannix@joanmannixltd.com

August 21, 2017