No. 19-333

In the Supreme Court of the United States

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN, *Petitioners*
v.
STATE OF WASHINGTON, *Respondent.*

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN, *Petitioners,*
v.
ROBERT INGERSOLL AND CURT FREED, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are legal scholars who teach and write about the First Amendment. They are committed to maintaining the fundamental constitutional principles associated with that Amendment, and to reconciling these principles with the nation's historic commitment to equality.

SUMMARY OF ARGUMENT

It is a "fixed star" in the American constitutional system that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess *by word or act* their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). The principle articulated in *Barnette* has deep roots in the American constitutional tradition, and it has been repeatedly reaffirmed by this Court–including in three major decisions issued just last year. This case tests whether that "fixed star" will continue to be honored.

The First Amendment's free speech protections including the principle against compelled affirmations are implicated when, as this Court explained in *Reed v. Town of Gilbert*, a law or legal

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *amici curiae* or their counsel contributed money intended to fund preparation or submission of this brief. This brief is filed with consent of the parties. All parties were given timely notice of *amici's* intent to file.

action restricts expression or expressive conduct "because of *disagreement with the message* [conveyed]." 135 S. Ct. 2218, 2227 (2015) (emphasis added). *Reed*'s admonition applies precisely to this case. In its essence, the case is all about messages: it is about a message that plaintiffs found offensive, and about a message that they would compel defendant Stutzman to make. Nor does the fact that these messages would be expressed not in printed or spoken words but rather in floral artistry in any way forfeit the protection of the First Amendment, as this Court has made clear in numerous decisions over the decades. Indeed, *Barnette* itself explicitly declared that its prohibition applied to governmental efforts to compel expression "by word *or act*."

Honoring the commitment against compelled affirmation in this case is fully compatible with the national commitment to promote equality and prevent invidious discrimination. As her conduct over the years amply demonstrates, Stutzman did not and would not decline service to plaintiffs, or to anyone, *because* of their sexual orientation. In that respect, the case is similar to *Lee v. Ashers Baking Co.*, [2018] UKSC 49,[2] in which the Supreme Court of the United Kingdom ruled that Christian bakers who declined a gay man's request for a cake endorsing same-sex marriage did not violate British antidiscrimination law because, as the Court explained, the bakers' "objection was to the message, not the messenger." *Id.* at 7.

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[2] https://www.supremecourt.uk/cases/docs/uksc-2017-0020-judgment.pdf

Indeed, although Stutzman believes that same-sex marriage is contrary to the will of God, her free speech defense does not even depend on any potentially expansive notion of "complicity" in such a marriage. Her objection, once again (as demonstrated by her recommendation of other qualified florists and her willingness to provide raw materials for plaintiffs' wedding), is solely to being compelled to use her artistic gifts to *create and convey messages* celebrating such marriages.

Such compulsion, ordered by the Washington courts, directly violates the constitutional commitment solemnly articulated in *Barnette* and other cases.

ARGUMENT

Washington's effort to compel Stutzman to use her floral artistry to create a message incompatible with her sincere beliefs offends the constitutional prohibition against compelled affirmations.

I. The Prohibition Against Compelling Expression "by word or act" is a "fixed star" in Our Constitutional Tradition.

In one of the most revered statements ever uttered by this Court, Justice Robert Jackson wrote for the Court that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess *by word or act* their faith therein." *Barnette*, 319 U.S. at 642

(emphasis added). *Barnette*'s celebrated declaration, which has been lauded as "eloquent and epochal," "among the great paeans to human liberty," "haunting" and "among the most eloquent pronouncements ever on First Amendment freedoms,"[3] is one among numerous testaments to the centrality in the American constitutional tradition of the freedom of expression — and, crucially, to the understanding that this freedom includes not just the right to say what one believes but also the right *not* to affirm, "*by word or act*," ideas or opinions that one does not believe.

Barnette's solemn pronouncement was not the product of any passing political fashion or enthusiasm. On the contrary, it articulated a longstanding and venerated commitment, and one that has been repeatedly reaffirmed by this Court—including in three important decisions rendered just last year.

Thus, the commitment against compelled affirmations developed against the backdrop of recurrent abuses and injustices, committed over the course of centuries, to which governments are perennially prone but which the makers and guardians of American constitutionalism have been determined to avoid. The book of Daniel in Hebrew scripture narrates the story of Hananiah, Mishael,

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[3] The quotations—by Leo Pfeffer, John Noonan, and Rodney Smolla—are collected in Steven D. Smith, *Fixed Star or Twin Star? The Ambiguity of Barnette*, 13 FLA. INT'L. U. L. REV. 801 n.2 (2019).

and Azariah, (given the Babylonian names of Shadrach, Meshach, and Abednego), who were thrown into a fiery furnace for refusing to bow before a golden statue honoring the king. In late antiquity, Christians were often required to cast incense on pagan idols or to pay obeisance to divinized emperors; this practice seemed utterly innocuous to Roman authorities but was a sacrilege to devout Christians.[4] Later, under Christendom, Jews, Muslims, and dissenting Christians were often pressured to profess orthodox Christian creeds with which they did not agree.[5] Still later, in England, acceptance of the prevailing creed became a condition for public office, or for the right to inherit or to attend Oxford or Cambridge.[6]

The offensiveness of such practices lay not so much in preventing people from openly expressing their beliefs; rather, it consisted of the even more oppressive practice of *forcing people to affirm what they did not believe*. Thus, an early monument to freedom of expression and conscience in the Anglo-American tradition was the martyrdom of Sir Thomas More, formerly Lord Chancellor to King

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[4] *See* Edward Gibbon, 1 *The Decline and Fall of the Roman Empire*, 537-538 (Penguin Classics 1994, first published 1776); Robin Lane Fox, *The Classical World* 548 (Basic Books 2006).

[5] *See* Brian Tierney, *Religious Rights: A Historical Perspective,* RELIG. LIBERTY IN W. THOUGHT 29 (Noel B. Reynolds & W. Cole Durham, Jr. eds. 1996); Norman F. Cantor, *The Civilization of the Middle Ages* 512-13 (Harper Perennial rev. ed. 1993).

[6] *See* Alexandra Walsham, *Charitable Hatred: Tolerance and Intolerance in England 1500-1700* at 86-87 (Manchester Univ. Pr. 2006); Alec R. Vidler, *The Church in An Age of Revolution* 40-41 (Penguin Books 1961).

Henry VIII. (The events are commemorated in Thomas Bolt's *A Man for All Seasons*.) With regard to the fraught issue of Henry's divorce and remarriage to Anne Boleyn, More resolved to remain silent, declining to disclose his opinions even to his own family. Despite his silence on the matter, More was imprisoned, condemned, and beheaded because he would not affirm, contrary to his beliefs, the validity of the divorce and succession.[7]

The American founders rebelled against the oppression inherent in such compulsion. It is "sinful and tyrannical," Thomas Jefferson insisted in opposing a tax for the support of Christian ministers, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."[8] But if it is "sinful and tyrannical" to compel people indirectly to *subsidize* opinions they disbelieve, it is surely even more oppressive to compel them actually to *affirm* opinions they do not believe.

This Court has accordingly recognized, over and over again, the constitutional prohibition against compelled expression, whether "by word or act." *See, e.g., Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (forbidding government from requiring a business to include a third party's expression in its billing envelope); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (forbidding government from requiring citizens to

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[7] *See* Richard Marius, *Thomas More: A Biography* 461-514 (Harvard Univ. Pr. 1984).

[8] Virginia Statute for Religious Freedom, Preamble.

display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (forbidding government from requiring a newspaper to include an article).

Just last year, this Court repeatedly reaffirmed *Barnette*'s principle prohibiting compelled expression. In *Masterpiece Cakeshop* itself, the Court cited *Barnette* and quoted with approval its "no prescribed orthodoxy" passage, although the case was ultimately resolved on other grounds. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731 (2018). In *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Court struck down a California law requiring pregnancy care centers to inform patients that the state provides free or low-cost abortion services. The Court reasoned that by "[b]y compelling individuals to speak a particular message," the requirement amounted to "a content-based regulation of speech." *Id.* at 2371.

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Court underscored and elaborated on the principle. Quoting the "fixed star" passage from *Barnette*, the Court explained:

> When speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason one of our landmark free speech cases [*Barnette*] said that a law commanding

> "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Id. at 2464. The Court applied this principle even though the measure at issue in the case did not require any personal verbal expression but rather involved indirect union "agency fee" subsidies of expression that the objecting employee opposed.

The wisdom of the Court's position is corroborated by modern constitutional theorizing. Theorists offer diverse rationales for the constitutional commitment to free expression. Prominent among these are the ideas of a truth-seeking "marketplace of ideas," or of the communication of information as essential to democratic processes, or of the essential and intimate connection of expression to individual autonomy and integrity.[9] By any of these rationales, compelling a person explicitly or symbolically to affirm ideas that he or she does not agree with is a flagrant offense against the commitment to expressive freedom. Thus, forcing people publicly to affirm what they do not believe distorts the marketplace of ideas and obstructs the pursuit of truth; it undermines the politically necessary flow of accurate information; and it assaults the integrity and conscience of those who are forced to affirm what they do not believe.

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[9] *See*, *e.g.,* Toni M. Masaro, *Tread On Me!* 17 U. PENN. J. CONST. L. 365, 386 (2014).

II. In Both Its Purpose and Its Effect, Washington's Effort to Compel Stutzman to Use Her Floral Artistry to Celebrate Same-Sex Weddings Violates the Principle Prohibiting Compelled Affirmations.

This Court has recognized that the applicability of free speech protections depends crucially on whether a governmental restriction or requirement is aimed at the expressive or communicative content of the object of the restriction or requirement. In *Reed*, the Court explained that a law will be subject to strict scrutiny either if it discriminates on its face on the basis of communicative content or if, although facially neutral, it was adopted "*because of disagreement with the message* [conveyed]." *Id.* at 2227 (quoting *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989)) (emphasis added). Free speech scholars have elaborated on the logic of this understanding.[10] On this understanding, regulations that have a purpose unrelated to expression are presumptively permissible, even if they incidentally affect expression; conversely, regulations targeting expression or expressive conduct because of it communicative content or message are presumptively viewed as transgressions of the First Amendment.

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[10] *See, e.g.,* Larry Alexander, *Is There a Right of Freedom of Expression?* (Cambridge Univ. Pr. 2005); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

Antidiscrimination laws, and actions brought under those laws, have typically not triggered heightened First Amendment scrutiny because they have been primarily calculated not to regulate or punish disfavored expression or messages, but rather to protect people from being deprived of goods, services, employment, or other opportunities because of their race, sex, or other designated characteristics. As this Court made clear in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964), for example, the protections of the federal Civil Rights Act of 1964 sought to eliminate widespread refusals of service that made it nearly impossible for African-Americans to find food or lodging when traveling in various regions of the country. Similarly, laws or constitutional doctrines forbidding discrimination against women have sought to redress the denial of employment or other opportunities on the basis of sex. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (explaining importance of "skeptical scrutiny of official action denying rights or opportunities based on sex"). Lawsuits under such statutes have commonly sought remedies for such deprivations–damages for the loss or denial of goods or services or employment, for example, or reinstatement into employment positions.

By contrast, this lawsuit (along with some others of its kind, such as that in *Masterpiece Cakeshop*) is different. The injury asserted in this category of cases is not primarily—or not at all—a deprivation of goods or services: in most of these cases, other merchants have been eager to supply the product or service—sometimes (as in this case, and also in

Masterpiece Cakeshop) for free. The injury complained of, rather, has been the psychological offense caused by the perceived insult implicit in a merchant's objection to assisting in the celebration of a same-sex marriage. And the relief sought has consisted of the imposition of heavy sanctions on a merchant because of the expression of that disfavored message together with injunctive relief compelling the merchant to act so as symbolically to affirm the position favored by the state.

The offense asserted in such cases may be real enough. It is easy to understand why individuals like Ingersoll and Freed might be genuinely offended or hurt by the manifestation of disapproval on the part of others, particular when as in this case the disapproving person is a friend with whom they have enjoyed cordial business relations in the past. But however real, that injury results from the *communicative content* or *message* perceived in the refusal of services. Under the reasoning of *Reed* and many other decisions, therefore, the cases directly implicate First Amendment principles, including the *Barnette* principle against compelled affirmations.

A. This is a case about *messages*, not about the deprivation of goods, services, or opportunities.

That this case is about message-based offense, and not about a discriminatory deprivation of goods or services, is evident whether one considers the case from the standpoint of the plaintiffs or of the defendant. Start with the plaintiffs. After Stutzman explained that she could not do the floral

arrangements because she believed same-sex marriage to be contrary to God's will, plaintiff Ingersoll indicated on social media that he was "deeply offended," and that he had suffered an "emotional toll." *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 484 (June 6, 2019). Conversely, any deprivation of goods or services was *de minimis*: plaintiffs eventually claimed a meager $7.91 in actual or pecuniary damages—for the cost of driving to another florist.

Once again, the offense of which plaintiffs complain may be both real and sincere; but such offense is exactly the sort of injury that the Free Speech Clause rules out as a basis for legal sanctions. After all, much of the expression or expressive conduct that governments have sought or currently seek to regulate or suppress will be painful to particular people or groups; that is often precisely why governments attempt to regulate such expression. But it is elementary—and a "fixed star in our constitutional constellation"—that governments may not regulate or censor or compel for the purpose of preventing such offense.

Advocates sometimes attempt to disguise the threat to constitutional principles by describing the injury asserted in such cases as "dignitary harm."[11]

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[11] *See, e.g.,* Louise Melling, *Religious Refusals to Public Accommodation: Four Reasons to Say No*, 38 HARV. J. L. & GENDER, 177, 189-91 (2015). Of course, if Stutzman caused "dignitary injury" by manifesting her disapproval of same-sex marriage, the State of Washington surely could be described as inflicting a "dignitary injury" on Stutzman by officially disapproving of her fundamental convictions and graphically

The terms "dignitary harm" or "dignitary injury" can carry various meanings in American law.[12] Some kinds of dignitary injury can be a basis for legal remedies. In this context, however, the label cannot alter the fact that the injury asserted is offense or insult caused by the perceived message of disapproval in Stutzman's explanation that she could not assist in celebrating a marriage that she believed to be contrary to God's will. And however labeled, that injury directly implicates the constitutional commitment to freedom of expression.

Plaintiffs are primarily concerned with the message expressed by Stutzman's conduct and explanation, and the same is true for Stutzman herself. As the Washington Supreme Court itself acknowledged, Stutzman has demonstrated by both her words and her conduct that she has no objection to working with or serving people on the basis of their sexual orientation. *Arlene's Flowers,* 193 Wn.2d at 485-486. Her only reason for declining to use her floral artistry in celebrating a complainants' wedding is her objection to expressing a message that she does not believe—namely, the affirmation of same-sex marriage.

In sum, this case is not about deprivation of goods or services, but about messages—about a message that plaintiffs found offensive, and about a message the State would compel Stutzman to

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communicating that disapproval by attempting to force her to act contrary to those convictions.

[12] *See* Kenneth S. Abraham & C. Edward White, *The Puzzle of Dignitary Torts*, 104 CORNELL L. REV. 317, 323-35 (2019).

communicate. Its concern with messages brings the case squarely within the purview of the constitutional commitment to freedom of expression.

B. There is no justification for limiting free speech protection to cases involving purely verbal expression.

Despite *Barnette*'s plain pronouncement that the Constitution prohibits compelled affirmations "by word or act," advocates and courts in this and similar cases (including *Masterpiece Cakeshop*) attempt to deflect First Amendment concerns by arguing that the defendants in such cases have not been required explicitly to support same-sex marriage in actual words. They may concede that if a baker or florist or other merchant were asked to prepare a product giving explicit or verbal endorsement of same-sex marriage, the Free Speech Clause and the *Barnette* principle would protect the merchant's right to refuse. But they argue that where no explicit or verbal expression is required, objecting merchants have no constitutional defense.[13]

This attempt to truncate expressive freedom amounts to an effort to roll back, in behalf of a particular legal or political agenda, decades of constitutional decisions and reflections. Thus, theorists have repeatedly rejected—even

[13] *See, e.g., Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 288 (Colo. App. 2015); Andrew Koppelman, *The Gay Wedding Case Isn't About Free Speech*, The American Prospect (Nov. 27, 2017), https://prospect.org/article/gay-wedding-cake-case-isn't-about-free-speech

ridiculed—the idea that free speech protection can be limited to explicit verbal expression.[14] And this Court's decisions have long and emphatically recognized that the freedom of expression is not limited to explicit verbal expression. Gregory Lee Johnson's free speech rights were not rendered irrelevant because he wanted to express himself not in words but rather by burning an American flag. *Tex. v. Johnson*, 491 U.S. 397 (1989). And in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995)—a case in many respects similar to this one—the Massachusetts Supreme Court had rejected parade organizers' First Amendment defense against being forced to be associated with a message they did not want to affirm, reasoning that the parade had no "specific expressive purpose" and that "any infringement on the . . . right of expressive association was only 'incidental' and 'no greater than necessary to accomplish the statute's legitimate purpose' of eradicating discrimination." *Id.* at 563-64. But this Court unanimously reversed. The Court's opinion, written by Justice David Souter, quoted *Barnette* and declared that "[s]ymbolism is a primitive but effective way of communicating ideas." *Id.* at 568-69.

In interpreting the principle against compelled affirmations to cover symbolic affirmations and not

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[14] *See, e.g.,* Thomas I. Emerson, *The System of Freedom of Expression* 292-93 (Random House 1970); *see also* Rick Hills, *Who Cares Whether Cake Baking is Expressive?* PrawfsBlawg, September 11, 2017 (describing expression/conduct distinction as "metaphysical silliness"). https://prawfsblawg.blogs.com/prawfsblawg/2017/09/who-cares-whether-cake-baking-is-expressive-the-doctrinal-costs-of-focusing-on-private-bu.html.

merely explicit verbal expressions, the Court has been properly cognizant of the history of such compulsion. Many of the historic instances of compelled affirmation have not involved explicit expression; they have involved symbolic or expressive conduct, such as bowing before a golden statute, casting incense on a pagan altar, paying taxes to support a religious establishment, or saluting a flag. Their non-verbal character did not negate their expressive meaning, nor did it prevent compulsion to engage in such conduct from being "sinful and tyrannical," as Jefferson put it. In *Lee v. Weisman*, 505 U.S. 577 (1992), although the case was decided under the Establishment Clause and not the Free Speech Clause, this Court deemed even the informal social pressure to stand in silence during a prayer at a graduation ceremony to be a form of unconstitutional coercion to participate in the prayer. And could anyone suppose that *Barnette* itself would have been decided differently if West Virginia had required Jehovah's Witness school children only to stand and salute the flag but not actually to utter the words of the Pledge of Allegiance?

If anything, the "no explicit message" argument underscores the important free speech dimension of this and similar cases. The argument concedes that if a merchant were asked to prepare a product with words saying something like "God Bless this Same-Sex Marriage," the First Amendment would prohibit the state from compelling compliance. (This is true even though other common arguments—for example, that an objecting merchant would be perceived as merely complying with the law, or that the

expression would be attributed to the customer not the merchant—would be equally applicable in such a case.) But if the First Amendment protects a merchant against explicit compelled messages, there is no justification for withdrawing that protection in cases, like this one, in which it is indisputably *the perceived message* (even though nonverbal) that everyone in the case is primarily concerned with. Indeed, demanding that a person use his or her artistic abilities to create a celebratory message—and a florist like Stutzman would simply not be doing her job unless she did her best to fashion a floral arrangement that was celebratory in character and effect—is an even greater invasion of expressive integrity than merely requiring recitation of a pre-established script.

III. A Proper Respect for Constitutional Commitments to Both Free Expression and Equality Supports Reaffirmation of the *Barnette* Principle in This Case.

In *Masterpiece Cakeshop*, this Court recognized that constitutional commitments both to expressive freedom and to equality are important and must be accommodated. In this case, such accommodation supports affirmation of the *Barnette* principle—first, because it is imperative to reaffirm vital and longstanding constitutional principles in times of heightened stress and conflict and, second, because affirmation of the *Barnette* principle in a case such as this one is fully compatible with statutory and constitutional commitments to equality.

A. The principle prohibiting compelled affirmations is vulnerable but especially vital during periods of heightened stress and conflict.

Although the proclivity of governments or dominant factions to compel conformity and assent is close to being a historical constant, that proclivity can be especially powerful in times of trouble or conflict. The historian Edward Gibbon noted that Roman authorities were severe in persecuting Christians for nonconformity during periods of heightened challenge or disaster.[15] Henry VIII required a loyalty oath of British citizens—the oath that Thomas More was executed for refusing—during the tense period in which England was casting off its centuries-old allegiance to the Roman Catholic Church. *Barnette* itself was decided in the midst of World War II, during a period in which the desperate global struggle against fascism made pressures for loyalty and conformity especially intense.

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[15]Gibbon observed that

> [i]f the empire had been afflicted by any recent calamity, by a plague, a famine, or an unsuccessful war; if the Tiber had, or if the Nile had not, risen beyond its banks; if the earth had shaken, or if the temperate order of the season had been interrupted, the superstitious Pagans were convinced that the crimes and the impiety of the Christians . . . had at length provoked the Divine Justice.

Gibbon, *supra*, at 537.

There is reason to believe that our nation is currently in the midst of heightened conflict and stress. Observers on all sides notice the growing—and increasingly acrimonious—political and cultural polarization in the country. And issues involving sexuality (abortion, contraception, marriage, LGBT affirmation) have been at the center of these divisions. Such conditions can intensify the impulse to achieve an artificial and compelled conformity. But they also underscore the importance of courageously reaffirming the most essential constitutional principles, rather than sacrificing such principles to currently prevailing movements and orthodoxies. Indeed, one eminent First Amendment scholar has argued that the Free Speech Clause's most vital function is to protect expression during troubled periods such as this.[16]

Barnette, with its resounding affirmation of the "fixed star" of freedom of expression, manifested such courage, even in the midst of a horrific war, and at a time when Jehovah's Witnesses were being widely criticized and condemned for undermining the national solidarity required by the war.[17] Our present situation calls for similar resolution.

The principle against compelled expression is vital–especially so at times of cultural and political

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[16] *See* Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

[17] On the persecution of Jehovah's Witnesses, *see* Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Univ. Pr. of Kan. 2000).

polarization–because it protects the integrity of *all* citizens. In this particular case, the principle is invoked in behalf of a traditionalist Christian who cannot in good conscience celebrate same-sex marriage. But in other cases the same principle would protect a gay florist who might object to helping with an event *opposing* same-sex marriage, a Palestinian baker who declined to prepare flowers for an event celebrating Israeli Independence Day,[18] or a dress-maker who did not want to design a dress for the inauguration of a chief executive she opposed.[19]

In a pluralistic polity, and especially in volatile periods, all of us are likely at times to find ourselves to be part of an unpopular minority. Earnest beliefs that place someone securely in line with prevailing orthodoxies today may cause one to be a reviled outsider tomorrow—and hence in need of constitutional protection. It is precisely because it protects the integrity of all Americans against potential impositions that the commitment affirmed in *Barnette* is the "fixed star in our constitutional constellation."

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[18] A Palestinian who would create a floral arrangement for a Jewish family for most any reason, but simply declined to do so when asked to prepare flowers for a party celebrating Israeli Independence Day would, like Barronelle Stutzman, not be declining the job because of the family's ethnicity, but on account of a particular message.

[19] *See* Michael W. McConnell, *Dressmakers, Bakers, and the Equality of Rights,* Religious Freedom, LGBT Rights, and the Prospects for Common Ground (William N. Eskridge, Jr, & Robin Wilson eds. 2019).

B. Affirmation of the *Barnette* principle is fully compatible with the just claims of equality.

To be sure, freedom of expression is not our only vital constitutional commitment; we also embrace and cherish commitments to equality. Thus, Americans rightly take pride in the gains made in association with federal and state antidiscrimination statutes, and with judicial implementation of the Constitution's equality provisions. Some critics argue that respecting the freedom of expression of merchants like Barronelle Stutzman risks a reversal of these gains.

But this concern is misplaced. To see why, it is important to notice the essential ways in which this case is *not* like the classic cases of discrimination against which modern law has been directed.

1. Unlike in the typical case, Stutzman did not decline to serve Ingersoll "because of" his sexual orientation.

As a historical matter, antidiscrimination laws have been primarily concerned with individuals who refuse to serve or hire others "because of" (or "on account of," or "on the basis of") their race, sex, or (in laws like Washington's) sexual orientation. Barronelle Stutzman simply is not such an individual. On the contrary, she has demonstrated unmistakably, both in her explicit explanations and in her course of conduct over a period of years, that she does not object to serving or working with gays

or lesbians. She knowingly sold thousands of dollars worth of flowers to plaintiff Ingersoll, knowing that he was gay. In addition, in its most recent decision the Washington Supreme Court acknowledged that "[a]side from Ingersoll and Freed, she has served other gay and lesbian customers in the past for other non-wedding-related flower orders." *Arlene's Flowers*, 193 Wnd.2d at 485.

Indeed, a rigorous analysis would conclude that Stutzman did not violate the standard criterion of discrimination at all: she did not decline to do floral arrangements for Ingersoll's and Freed's marriage *because of* their sexual orientation. Her objection is neither to selling flowers to gays or lesbians, nor even to doing floral arrangements for *weddings involving gays or lesbians*. Precisely stated, rather, her objection is to doing floral arrangements for *same-sex weddings*. The distinction is a subtle one, to be sure, but it is nonetheless crucial. Thus, Stutzman would have no objection to helping with a wedding between a man and a woman even though one or both of them might self-identify as gay. Conversely, she could not in good conscience help to celebrate a same-sex wedding even if, as may occasionally happen, both of the partners happened to be heterosexual and were marrying for publicity or political reasons, or for purposes of immigration status, or perhaps to gain tax advantages.

In this respect, the present case is similar to the British decision in *Ashers Baking*. Britain has hardly been shy in promoting LGBT interests, and it has shown less dedication to protecting freedom of expression than the courts of this country have done.

And yet in *Ashers Baking*, the Supreme Court of the United Kingdom reversed the decisions of the trial and appellate courts, which had ruled that Christian bakers violated British antidiscrimination law by refusing a gay man's request for a cake endorsing same-sex marriage. Writing for a unanimous court, Lady Hale explained that the bakers' "objection was to the message, not the messenger." *Ashers Baking Co.*, [2018] UKSC 49, at 7. And she elaborated:

> It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.

Id. at 10.

The *Ashers Baking* decision suggests one potentially promising way of achieving the accommodation called for in *Masterpiece Cakeshop*–namely, by enforcing antidiscrimination laws against merchants or others who refuse service or association because they do not want to serve or work with people of a particular race, gender, or sexual orientation, but protecting the expressive rights of those who object not to *the person*, but rather to *the particular message* endorsing same-sex marriage. By that approach, Barronelle Stutzman would clearly enjoy constitutional protection: even

the Washington Supreme Court acknowledged that she had no objection to serving LGBT customers, and that her objection was only to the message she believed she would send by doing floral arrangements for a same-sex wedding.

2. Stutzman's First Amendment defense does not depend on a potentially expansive objection to "complicity."

Characterizing First Amendment claims like Stutzman's in terms of "complicity," advocates also have made slippery slope arguments suggesting that if such claims were recognized, the scope of potential objectors would expand unacceptably—perhaps, as one imaginative advocate argues, to an auto mechanic who might refuse on religious grounds to repair a car carrying a same-sex couple to their wedding.[20] Such "complicity" scenarios might indeed pose difficult constitutional questions. On the one hand, morally serious persons often do conscientiously object to assisting or being complicit in activities they believe to be wrong—including exploitation, discrimination, environmental pollution, or injustice. A government that respects the integrity of its citizens will presumably prefer not to compel such compromises. On the other hand, the idea of complicity is potentially a far-reaching one. So the trade-offs, including the constitutional trade-offs, may be difficult, as this Court acknowledged in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1732.

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[20] *See,* Koppelman, *supra*.

But it is crucial to realize that this Court need not balance such trade-offs in this case: that is because *Stutzman's free speech defense is not dependent on any such claim of complicity*. Thus, Stutzman did not object to providing indirect assistance in the plaintiffs' wedding. She referred them to three other florists, and she has indicated a willingness to sell the "raw materials" or flowers that they or other couples could use for a wedding. The Washington Supreme Court acknowledged all of these facts. *Arlene's Flowers*, 193 Wn.2d at 485-486. Her only objection, once again, is to using her floral artistry to assist in expressing a message of celebration of a union that she believes to be contrary to God's will.

In sum, this case does not involve either classic "because of" invidious discrimination or an assertion of constitutional protection against mere complicity. Nor does it involve any meaningful deprivation of goods or services. This case is purely and simply about *expression*–about the conscientious determination not to express "by word or act" a message that Stutzman does not believe. The case thus falls squarely within the *Barnette* principle; nor will affirmation of that "fixed star" in this case in any way threaten the nation's important and historic commitments to equality and nondiscrimination.

CONCLUSION

Barronelle Stutzman has demonstrated, in word and action, that she has no objection to serving gays and lesbians; her only objection is to using her

artistic gifts to express a message affirming a conception of marriage that she believes to be contrary to God's law. In this lawsuit, Washington seeks to punish Stutzman for that refusal, and to force her to make that affirmation in violation of her sincere beliefs. This purpose directly contradicts the cherished constitutional principle, eloquently articulated in *Barnette*, that the government may not establish an orthodoxy and compel citizens to affirm that orthodoxy "by word or act." The present appeal provides this Court with an opportunity to reaffirm that historic principle and to strike a more measured and inclusive balance between the community's vital commitments both to equality and to expressive freedom.

Respectfully submitted,

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October 15, 2019

APPENDIX

APPENDIX[1]

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