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 A Writ Of Certiorari To The Supreme Court Of Washington**

## BRIEF FOR THE STATES OF ARKANSAS, TEXAS, ALABAMA, ALASKA, ARIZONA, IDAHO, KANSAS, LOUISIANA, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AS AMICI CURIAE IN SUPPORT OF PETITIONERS


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## INTEREST OF AMICI CURIAE

Amici are the States of Arkansas, Texas, Alabama, Alaska, Arizona, Idaho, Kansas, Louisiana, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.

The Amici States have an important interest in ensuring that people are not denied equal access to publicly available goods and services. They have an equally compelling interest in ensuring that the persons providing such goods and services are not compelled to forgo their constitutionally protected rights to freedom of speech and religion. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727, 1732 (2018). Indeed, our federal Constitution protects the providers of goods and services—like anyone else—from being required to express a particular viewpoint. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Amici States also have an interest in ensuring a consistent interpretation of federal constitutional provisions.



## SUMMARY OF ARGUMENT

This case is about an artist's right not to speak and not to be compelled to violate her core religious convictions. Respondents the State of Washington, Robert Ingersoll, and Curt Freed seek to compel Petitioner Barronelle Stutzman—and other artists who wish to

earn a living through their art—to adhere to the government's view of contested social and political issues. "[S]uch compulsion . . . plainly violates the Constitution" because it would force Stutzman and other artists "to endorse ideas they find objectionable." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018). In fact, "[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.

To conclude the opposite, the Washington Supreme Court simply declared that Stutzman's custom floral wedding creations are not protected speech, expressive conduct, or religious exercise. On that basis, it then concluded that Stutzman could be required under the Washington Law Against Discrimination to create customized floral arrangements for weddings.

Yet there is no real dispute that Stutzman's custom floral wedding creations are art. Nor is there any dispute that to create those artistic works, Stutzman exercises the same artistic control and judgment that any other artist would to create a painting, a poem, or a song. That means that just like other works of art, Stutzman's custom wedding floral arrangements are inherently expressive. And in contrast to the court below, other courts have concluded similar artistic expressions enjoy First Amendment protections and that the government may not compel their creation under the guise of a generally applicable anti-discrimination

law. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, ___ P.3d ___, 2019 WL 4400328 (Ariz. Sup. Ct. September 16, 2019).

Consequently, Stutzman's custom wedding floral arrangements are entitled to at least the same protection that this Court and lower courts have long afforded music, video games, nonsensical poetry, dancing, and abstract painting. It likewise means that—just as Washington could not compel Stutzman to speak against her conscience—it cannot compel her to create custom wedding floral arrangements against her conscience absent a compelling governmental interest and narrow tailoring. And Washington has not made any such showing.

To the contrary, the record here establishes that like the governmental entities in *Masterpiece Cakeshop*, the governmental entity here has pursued this case solely because it objects to Stutzman's religious beliefs. That is hardly consistent with the principles of "open discourse," "a tolerant citizenry," and "mutuality of obligation" that underpin our republican system of government. *Lee v. Weisman*, 505 U.S. 577, 590, 591 (1992). Nor is it consistent with this Court's recognition in *Obergefell v. Hodges* that people of "good faith" have deeply held objections to same-sex marriage and that their right to express their views must be "given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." 135 S. Ct. 2584, 2594, 2607 (2015). Thus, as the

Petition thoroughly explains, review, reversal and a judgment for Petitioners is required here.

## ARGUMENT

### I. Commissioned floral wedding arrangements are artistic works protected by the First Amendment's freedom of expression, and the government may not compel their creation.

Barronelle Stutzman's custom wedding floral arrangements are artistic expressions. They are protected by the First Amendment, and the government cannot compel her to create them. *See Janus*, 138 S. Ct. at 2463 ("We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

#### A. The freedom of expression protects works of artistry.

Art is inherently expressive. As a result, this Court has long recognized that artistic works—even those that some find offensive—are protected by the First Amendment. *See, e.g.*, *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). Thus, with exceptions not relevant here, artistic works generally enjoy the broad protection of the First Amendment. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (the use of symbols broadly defined is protected

First Amendment activity). And the mere fact that such works may be prepared for sale does not detract from that protection. *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."); *Telescope Media Grp.*, 936 F.3d at 751 ("It also does not make any difference that the [videographers] . . . are expressing their views through a for-profit enterprise."); *cf. National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) (*NIFLA*) ("Speech is not unprotected merely because it is uttered by 'professionals.' ").

This Court's precedents broadly define what qualifies as art. If it has "artistic . . . value," *Miller v. California*, 413 U.S. 15, 24 (1973), or merely "bears some of the earmarks of an attempt at serious art," *Kois*, 408 U.S. at 231, then it is subject to the First Amendment's strong free-expression protections. Indeed, underscoring just how broad that standard is, even sexually explicit material "may not be branded as obscenity and denied the constitutional protection" if it "deal[s] with sex in a manner . . . that has literary or scientific or artistic value." *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964); *see also Kois*, 408 U.S. at 231 (a sexually explicit poem "bears some of the earmarks of an attempt at serious art" and is entitled to protection).

That standard likewise protects artistic expression that isn't literal speech. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011) ("[V]ideo games communicate ideas" and are First Amendment speech); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989)

("Music, as a form of expression and communication, is protected under the First Amendment."); *Joseph Burstyn*, 343 U.S. at 502 ("[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."). And a "succinctly articulable message is not a condition" for an artistic work to be protected, *Hurley*, 515 U.S. at 569; *see Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring in part and concurring in the judgment).

Rather, artistic expression is inherently expressive and "unquestionably shielded" by the First Amendment regardless of whether the observer understands the message. *Hurley*, 515 U.S. at 569; *see also* Art, Noah Webster, An American Dictionary of the English Language (1828 ed.), https://archive.org/details/americandictiona01websrich/page/190 (defining art as "[t]he disposition or modification of things *by human skill*, to answer *the purpose intended*." (emphasis added)).

That is why the First Amendment's protections apply to nonsensical poetry, awkward instrumentals, dancing, abstract paintings, and even *silent* art. *See Hurley*, 515 U.S. at 569. Indeed, "[i]f the First Amendment protects Woody Guthrie's decision to join lyrics to music in the service of social justice, it must also protect [a musician's] . . . decision to express himself through [a] . . . deliberate absence of sound" or an artist's decision to communicate by presenting a blank canvass. Enrique Armijo, *The Freedom of Non-Speech*, 33 Const. Comment 291, 318 (2018) (book review); *id.* at 291-93 (discussing the *White Paintings* by Robert

Rauschenberg that consisted of "five paneled works painted on canvas in a smooth, unmodulated white" and John Cage's *4′33″* which is "a soundless score," performed by an instrumentalist sitting silently onstage with her instrument).

So long as an observer would recognize the speaker's subjective, genuine attempt to create art, the expression is entitled to First Amendment protection—whether or not the observer appreciates the message, beauty, technique, or anything else. *Cf. Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric."). Stutzman's custom wedding floral arrangements easily meet that standard.

### B. Stutzman's custom wedding floral arrangements are works of artistry.

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 agrees to create a custom floral arrangement for a wedding, she unquestionably applies her creative skills and imagination to create a unique work designed to be appreciated for its beauty and the union it represents.

Until recently, this wasn't a controversial idea. Nearly half a century ago, the Department of Labor declared that "floral design" is "original and creative in character in a recognized field of artistic endeavor."

U.S. Dep't of Labor, Wage & Hour Div., Fair Labor Standards Act Op. Letter No. WH-73, 1970 WL 26442, at *1 (Sept. 4, 1970). Likewise, a quarter century ago, in proclaiming February 28 as Floral Design Day, the Governor of Massachusetts explained that, "[f]loral design is a unique art form" through which people "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.

Those declarations rest on thousands of years of experience where civilizations from Egypt to China have practiced the art of floral design. *E.g.*, Tex. A&M Univ., Instructional Materials Serv., *History of Floral Design* 1-6 (2002), https://perma.cc/X3DJ-JK5S. Indeed, today, floral events and displays are common throughout the country. *See* Pasadena Tournament of Roses, Rose Parade Participants (2017), https://perma.cc/G568-TE8P (describing how during Pasadena, California's annual Rose Parade "[e]very inch of every float" is "covered with flowers or other natural materials").

Recognizing their artistic value, countless museums similarly host annual floral-art events. *See, e.g.*, Jane Ford, *Community Invited to Participate in Annual 'Flowers Interpret Art' Event at U. Va. Art Museum During Garden Week*, UVA Today (Apr. 14, 2008), https://perma.cc/6DN7-AYTP; Lois Ann Helgeson, *Art, Vases & Flowers*, Rose Arranger's Bulletin Summer 2008 at 6, https://perma.cc/A46X-W6YH. For instance, even the Smithsonian Institution offers classes aimed at "demystif[ying] the classical art of floral design."

*E.g.*, Smithsonian Associates, Studio Arts (Sept. 12-26, 2017), https://perma.cc/PR2Z-C9WN.

In the art of flower arranging, the artist combines color, shape, and design to express moods or themes just like visual artists using other media. Grace Rymer, *The Art of Floral Design* 6 (1963), https://hdl.handle.net/2027/coo.31924002821407. In creating unique works, the artist relies on a recognized body of theory governing floral artistry. *See* Norah T. Hunter, *The Art of Floral Design* 30 (2d ed. 2000) (introducing "the foundation on which the floral designer bases the expressions that are conveyed through the designs"). And like other artistic media, there are different schools of floral design, each employing its own theoretical approach. *See, e.g.*, The Garden Club of Virginia, *Floral Styles & Designs* 4-11 (2015), https://perma.cc/A6XF-6YMQ (summarizing historical schools); Mary Averill, *Japanese Flower Arrangement (Ike-bana) Applied to Western Needs* 17-18, 33 (1913) (discussing Japanese floral art of the Ikebana school, from which other schools arose, with their own design philosophies).

As with any other art form, floral artists also apply several recognizable artistic principles to create custom arrangements. *See* Baxter County Master Gardeners & Univ. of Ark. Div. of Agric., *Principles of Floral Arrangement* 8 (2005), https://perma.cc/8ZZ7-MA4B ("Good floral design is the result of a well thought-out plan, with two aims in mind—order and beauty."). Rhythm, for example, refers to the way colors, lines, and textures align to carry the viewer's eye through and around the arrangement. *Id.* at 15. 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 and ensure the artist's design will match the occasion. *Id.* at 12. By customizing the application of these artistic principles to a particular occasion, floral artists create "good floral arrangement[s]" that "express[ ] . . . a theme or idea." *Id.* at 8. Even an artist's choice of a particular flower is intended to express "a mood, feeling or idea." *Id.* at 12.

Stutzman's exercise of artistic control and judgment makes unmistakable the inherently expressive character of her custom wedding floral creations. In contrast to the decision below, other courts have previously concluded as much. For instance, the Eighth Circuit recently concluded that the exercise of substantial "editorial control and judgment" to prepare wedding videos meant the final product was "a form of speech that is entitled to First Amendment protection." *Telescope Media Grp.*, 936 F.3d at 750, 751. Similarly, the Arizona Supreme Court concluded that custom wedding invitations were entitled to First Amendment protections because the creators "retain[ed] artistic control over the ideas and messages contained in the invitations." *Brush & Nib Studio, LC*, 2019 WL 4400328, at *14.

At bottom, Stutzman creates unique artistic works that "serve as a 'medium for the communication of

ideas' about marriage." *Telescope Media Grp.*, 936 F.3d at 751 (quoting *Joseph Burstyn*, 343 U.S. at 501). Stutzman's communication is entitled to full First Amendment protection and the Washington Supreme Court erred in concluding otherwise. This Court's review is warranted.

### C. The expressive-conduct test does not apply, but even if it did, the First Amendment protects Stutzman's custom floral creations.

The Washington Supreme Court twice rejected Stutzman's free-speech claim primarily on the grounds that her custom floral wedding creations are not "expressive conduct." *See* Pet. App. 40a-49a (citing *Texas v. Johnson*, 491 U.S. 397 (1989); *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam); and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006)). But the expressive-conduct test was never intended to apply to art, which is inherently expressive. Rather, it is used to determine whether conduct that is *not* inherently expressive is nevertheless "sufficiently imbued with elements of communication" to enjoy First Amendment protection. *Johnson*, 491 U.S. at 403. And even if that test did apply, the Washington Supreme Court's opinion still could not stand.

Contrary to the Washington Supreme Court's conclusion, the expressive-conduct test does not apply here because creating art is not merely conduct with

some expressive content. Rather, it is inherently expressive, and its creation "defies the [expressive-conduct] test." Jed Rubenfield, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767, 773 (2001). Where the expressive medium is visual—whether it is painting, sculpture, or floral design—the "conduct" at issue is art itself, and there is no non-expressive element to regulate. *See Hurley*, 515 U.S. at 569 ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *cf.* Marshall McLuhan, *Understanding Media: The Extensions of Man* 9 (MIT Press ed. 1994) ("[I]t is the medium that shapes and controls the scale and form of human association and action."). Indeed, a contrary conclusion, as the Eighth Circuit recently explained, would render painting and parades unprotected. *See Telescope Media Grp.*, 936 F.3d at 752.

Visual art by its nature "always communicate[s] some idea or concept to those who view it," and it is therefore "entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996). That is because, as the Ninth Circuit explained in reaffirming the protection owed painting, "[s]o 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." *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007). And the First Amendment applies whether the expression is "purely artistic" or intended to be a form of "political expression." *Piarowski v. Ill. Cmty. College Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985). Thus, a piece of art that simply "express[es] the artist's vision of movement and color"

is entitled to the same protection as "Picasso's condemnation of the horrors of war in *Guernica*." *White*, 500 F.3d at 956.

Because "art for art's sake" is entitled to protection, *Piarowski*, 759 F.2d at 628, it does not matter whether the artistic creation is a silent painting, a piece of music, or—as here—a custom floral arrangement. For instance, as the Seventh Circuit concluded in rejecting a First Amendment challenge to a weed-regulation ordinance, "[t]hough plants do not speak, this need not exclude all gardens from the protection of the clause, for the clause has been expanded by judicial interpretation to embrace other silent expression, such as paintings." *Discount Inn, Inc. v. City of Chicago*, 803 F.3d 317, 326 (7th Cir. 2015). Indeed, the challenge in that case failed, not because gardens or plant arrangements are not entitled to First Amendment protections, but because there was no indication that the challenger had ever "exhibit[ed] or intend[ed] or aspire[d] to exhibit" the weeds at issue or had "invented, planted, nurtured, dyed, clipped, or ha[d] otherwise beautified [the] weeds" at issue. *Id.* The Washington Supreme Court, however, ignored that principle and simply declared that custom wedding floral arrangements—far from beautified weeds—are not entitled to protection. Both conclusions cannot be correct, and this Court's review is warranted to resolve that inconsistency.

That Stutzman's custom floral arrangements are prepared for weddings does not render them less protected. In fact, the Arizona Supreme Court recently

rejected a similar argument when it held that "custom wedding invitations," containing "hand-drawn words, images, and calligraphy, as well as [the artists'] hand-painted images and original artwork" are "protected by the First Amendment because they are pure speech." *Brush & Nib Studio*, 2019 WL 4400328, at *14; *cf. Joseph Burstyn*, 343 U.S. at 502 ("We fail to see why operation for profit should have any different effect in the case of motion pictures.").

If anything, that Stutzman's custom arrangements are for weddings only heightens their inherent expressiveness because all weddings, whether religious or secular, "convey important messages about the couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) (finding "no difficulty concluding that wedding ceremonies are protected expression under the First Amendment"). As the creation of custom floral arrangements for weddings is necessarily expressive, the expressive-conduct test does not apply.

*FAIR* does not suggest the contrary, and the Washington Supreme Court's reliance on that case was misplaced. *See* Pet. App. 42a-43a. *FAIR* involved a law that *only* regulated the conduct of law schools—that is, hosting military recruiters. 547 U.S. at 60 (law only "affect[ed] what law schools must *do*" (emphasis added)). It "neither limit[ed] what [the] law schools may say nor require[d] them to say anything." *Id.*; *see also Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring in part and concurring in the judgment)

(explaining *FAIR* simply "rejected the argument that requiring [a] group[ ] to provide a forum for third-party speech also required them to endorse that speech"). Thus, as relevant here, *FAIR* does not "suggest that the government can force speakers to alter their own message." *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring in part and concurring in the judgment).

In stark contrast to the conduct at issue in *FAIR*, custom wedding floral arrangements—like other art—are by their nature, inherently expressive. Indeed, like the parade in *Hurley*, Stutzman's custom floral art is itself expressive and there is, consequently, no room left to apply the nondiscrimination law to any non-expressive conduct.

Further, even if as the Washington Supreme Court suggested, the expressive-conduct test applies, Stutzman's custom wedding floral arrangements are still entitled to First Amendment protection. That is because designing and creating floral arrangements for weddings conveys messages of at least the same communicative quality as marching in a parade—and is equally protected by the First Amendment. *See Hurley*, 515 U.S. at 569-70; *cf. Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (treating a pure symbolic act as "closely akin to pure speech . . . entitled to comprehensive protection under the First Amendment").

### D. Washington cannot compel Stutzman to deliver its preferred message.

At its core, the First Amendment prevents governments from "[c]ompelling individuals to mouth support for views that they find objectionable." *Janus*, 138 S. Ct. at 2463. Just last term, this Court reiterated that compelled expression would "violate[ ] . . . [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.*; *accord Telescope Media Grp.*, 936 F.3d at 752 ("As *Janus* recognized" the right to refrain from expression "is perhaps the more sacred" than the right to speak). Yet that is exactly what Washington seeks to do here: force Stutzman to engage in expression.

Recognizing that it had no response to that bedrock principle, the Washington Supreme Court simply ignored it. In fact, that court simply declared that it did not need to consider this Court's most recent decisions on compelled speech since "[b]oth of those opinions were issued after the Supreme Court remanded this case." Pet. App. 21a n. 5 (declaring that court would not consider *Janus* or *NIFLA*). This premise is incorrect—a court's duty on remand is to apply the law as it stands, not as it stood before. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (holding Supreme Court rulings "must be given full retroactive effect in all cases still open on direct review and as to all events"); *Johnson v. Bd. of Educ. of City of Chicago*, 457 U.S. 52, 53-54 (1982) (per curiam) (law-of-the-case doctrine does not constrain lower courts when the Supreme Court vacates a judgment); *see also*, *e.g.*, *Adams*

*v. Aiken*, 41 F.3d 175, 179 (4th Cir. 1994) (holding that, after a judgment is vacated, a lower court should reconsider issues in light of the Supreme Court's most current precedent). And in any event, this Court's decisions in *Janus* and *NIFLA* did not break new ground.

To the contrary, this Court's precedents have long made clear that "[t]he 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); *accord Wooley*, 430 U.S. at 714 (upholding "the right to refrain from speaking"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspapers have the right to publish political expression and the right not to be compelled to publish replies to such expression). Critically, those cases likewise underscore that "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. And against that background, it is unsurprising that this Court has never allowed a government entity to compel art or expressive conduct. *Cf. Telescope Media Grp.*, 936 F.3d at 752 ("[T]here is no question that the government cannot compel an artist to paint, demand that the editors of a newspaper publish a response piece, or require the organizers of a parade to allow everyone to participate.").

Washington has not shown a compelling interest that would justify departing from that consistent precedent because States need not compel conscientiously objecting private citizens to create artistic expression

to ensure that same-sex couples have access to artistic expression supporting their weddings. Indeed, the facts of this case uniquely illustrate that point: After Stutzman declined the request to create custom floral arrangements for the same-sex wedding at issue here, the same-sex couple received offers for enough flowers that they "could get married about 20 times." Pet. 12.

Washington likewise cannot avoid that conclusion by simply redefining its interest broadly as a generalized interest in preventing discrimination. The facts of this case would not implicate such a broadly defined interest. No individuals have been discriminated against because of their sexual orientation but only because of the message at stake. *See Hurley*, 515 U.S. at 572-73. Stutzman sells floral arrangements to all customers—regardless of sexual orientation—and she only objects to creating customized, commissioned expression for same-sex weddings. *See* Pet. 11-12.

Ultimately, "[f]orcing [Stutzman] to make custom [floral arrangements] for same-sex marriages requires [her] to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message [s]he believes [her] faith forbids." *Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and concurring in the judgment). The Washington Supreme Court erred in concluding the contrary, and this Court's review is warranted to correct that Court's misinterpretation of fundamental First Amendment precedents.

### E. Washington's selective enforcement of its anti-discrimination laws underscores that Stutzman's custom floral arrangements convey a message.

Washington has targeted Stutzman's expression precisely because it disapproves of her message, and that is illustrated all too well by its selective enforcement of the WLAD. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

In particular, Washington's selective approach to enforcement is underscored by its decision to pursue an action against Stutzman for declining to create custom floral arrangements that celebrate a message contrary to her faith-based view of marriage, while contemporaneously declining to bring a similar action against the owner of Bedlam Coffee for refusing to serve Christians based on their religious beliefs. *See* Pet. 17, 20 (describing his denial of service). The incongruity of Washington's enforcement is particularly shocking given that unlike Bedlam Coffee, Stutzman does not refuse to sell goods or services based on a customer's status. To the contrary, Stutzman designs and sells floral arrangements for same-sex couples; she simply declines to use her creative talents to celebrate a same-sex wedding. Pet. 11, 40. Washington's actions, then, amount to little more than unconstitutional viewpoint discrimination. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731.

The Washington Supreme Court also could not—as it claimed (Pet. App. 25a-26a)—avoid that conclusion by declaring viewpoint discrimination by a non-adjudicatory branch of government to be unproblematic. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("[I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."); *cf. Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011) ("In the past we have applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First Amendment." (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 383-86 (1992) (invalidating ordinance that discriminated among "fighting words" by imposing special prohibitions on views concerning race, color, creed, religion or gender))); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) (emphasizing the broad protection afforded speech because anything less "would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups"). "[T]he government, if it is to respect the Constitution's guarantee of free exercise, . . . cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. That is what the Attorney General did here in accusing Stutzman of using her religious beliefs as "a mechanism or a means to discriminate." *See* Pet. 37 (quotation marks omitted).

## II. Compelling Stutzman to create customized art for events that she cannot celebrate consistent with her religious beliefs violates the Free Exercise Clause.

Washington's application of the WLAD additionally impermissibly burdens Stutzman's free exercise of religion. The Washington Supreme Court rejected Stutzman's free-exercise claim because it believed, as applied to Stutzman, the WLAD (1) was a neutral, generally applicable law, and (2) if not, the WLAD would satisfy strict scrutiny. Pet. App. 56a, 63a-67a. Those conclusions conflict with *Masterpiece Cakeshop*.

*First*, *Masterpiece Cakeshop* makes clear that strict scrutiny applies where, like here, a law is selectively applied to target religious expression. *See* 138 S. Ct. at 1729-32. As noted above and explained in greater detail in Stutzman's petition, Washington has engaged in selective enforcement, targeting religious objectors while leaving others free to discriminate against the religious. *See supra* Part I.E; Pet. 17, 20. That targeting alone requires strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Moreover, under the hybrid-rights doctrine, even neutral, generally applicable laws must satisfy strict scrutiny where the law at issue burdens free-exercise rights along with other constitutionally protected rights. *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881-82 (1990); *see* Pet. App. 69a. Thus, for instance, where a free-exercise claim would be bolstered by a

free-speech claim, strict scrutiny applies. *Smith*, 494 U.S. at 881; *see id.* at 882 ("[A] challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."); *see also Telescope Media Grp.*, 936 F.3d at 758-60 (recognizing a hybrid-rights claim brought by a wedding videographer); *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999) (discussing standard for hybrid-rights claim); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (same).

The Washington Supreme Court refused to apply that doctrine because it believed that Stutzman's free-expression claim failed. Pet. App. 69a. But "it makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary." *Axson-Flynn*, 356 F.3d at 1296-97. The independently viable non-free-exercise claim would itself render the constitutional challenge successful. *Id.* at 1297. Indeed, the hybrid-rights doctrine only matters if a merely colorable non-free-exercise claim can qualify as a constitutional violation by virtue of an attendant free-exercise claim. *See Telescope Media Grp.*, 936 F.3d at 759-60 (explaining that dismissal of a standalone free-exercise claim does not bar a hybrid-rights claim based in part on free-exercise grounds).

This case illustrates the need for a properly understood hybrid-rights doctrine and is a particularly good vehicle for addressing that issue. Throughout history, weddings have been tied to religious ceremonies. *Obergefell*, 135 S. Ct. at 2594-95. Therefore, as relevant

here, Washington does not merely seek to compel speech, but more importantly, to compel what Stutzman argues is (and has long been viewed as) religious speech. *Cf. Letter from Thomas Jefferson to Richard Douglas*, National Archives, Rotunda, Founders Online (Feb. 4, 1809), https://perma.cc/Q3MW-7RLD ("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.").

*Second*, the WLAD fails strict scrutiny because, as noted above, Washington has not shown that same-sex couples cannot find artists to create works for their wedding ceremonies. *See supra* Part I.E.

Yet that is far from the only reason that Washington fails strict scrutiny. Rather, the same targeting of religion that triggers strict scrutiny also demonstrates that Washington's actions cannot survive that inquiry. *Lukumi Babalu Aye*, 508 U.S. at 547. By selectively enforcing the WLAD only against Stutzman, Washington has demonstrated that it has no compelling interest in requiring her to comply with the WLAD. Pet. 17, 20. Its selective enforcement "leaves appreciable damage to [its] supposedly vital interest unprohibited." *Lukumi Babalu Aye*, 508 U.S. at 547. Because Washington prohibits Stutzman from objecting on religious grounds to compliance but does not prohibit comparable secular objections, the WLAD as applied here fails the compelling-interest test. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-34 (2006) (holding that exemptions under the Controlled Substances Act for the use of peyote undermined

government's ability to demonstrate compelling interest in banning religious use of hallucinogenic tea). Thus, at a minimum, as applied here, Washington's enforcement actions cannot survive strict scrutiny. This Court's review—and, ultimately, reversal—is warranted.

## CONCLUSION

The Court should grant certiorari, reverse the judgment of the Washington Supreme Court, and enter judgment in Stutzman's favor.

Respectfully submitted,

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