

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND
GIFTS, AND BARRONELLE STUTZMAN,
Appellants.

INGERSOLL AND FREED,
Respondents,

v.

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND
GIFTS, AND BARRONELLE STUTZMAN,
Appellants.

**BRIEF FOR LAW AND RELIGION PRACTITIONERS
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS**

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INTEREST OF AMICUS¹

Amici are academics and practitioners who write and work in the field of law and religion. Our interest is providing a balanced and principled way forward in this case, and in similar cases that also involve competing claims of religious liberty and equality.

James Abernathy practices at a nonprofit organization in Washington and focuses primarily on litigation in both federal and state courts. He works to protect the First Amendment rights of public sector workers as well as the rights of religious objectors. He earned his law degree from Regent University School of Law in Virginia Beach, Virginia.

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¹ The parties in this case have consented to the filing of this brief.

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SUMMARY OF ARGUMENT

The freedom of association is a fundamental right embedded within the First Amendment. It provides added protection for individuals and groups to pursue a common, even unpopular, message as an expressive act. While Mrs. Stutzman does not harbor anti-LGBTQ+ sentiments, she does hold to a theological position on traditional marriage that forbids her from participating in certain celebrations that have religious significance to her and her community. For these reasons, we ask the Court to consider the competing First Amendment claims and recognize that the absence of invidious discrimination undermines the Superior Court's decision below. This brief also provides a response to the State's question regarding the implications of the freedom of association to this case. *Attorney General's Response Brief*, State of Washington v. Arlene's Flowers, No. 91615-2, at 47 (Dec. 24, 2015) ("Brief of Respondent").

ARGUMENT

Amici support same-sex marriage and feel that the false dichotomy

between “equality” and “religion” is dangerous for our country. Instead of focusing on religion, this Court should decide this case on the basis of the First Amendment guarantee of the freedom of association as a corollary to the compelled speech doctrine advocated by others. *See, e.g. Brief for the Cato Institute as Amici Curiae Supporting Appellants*, State of Washington v. Arlene’s Flowers, Inc., Case No. 91615 (2016).

I. BASIC BACKGROUND

The Appellant (“Mrs. Stutzman”) owns and operates Arlene’s Flowers, where her work revolves around “creating floral arrangement for special occasions, including weddings.” *Brief of Appellants*, State of Washington v. Arlene’s Flowers; Ingersoll and Freed v. Arlene’s Flowers, No. 91615-2, at 4 (Oct. 16, 2015) (“Brief of Appellants”). She considers this an artistic service, representing her unique talents and creativity. *Id.* at 7; *see also* Brief for the Cato Institute, at 5–7 (offering proof that florists engage in artistic services). She has never expressed, nor harbored any animus towards the Respondents, nor any member of the LGBTQ+ community. *Brief of Appellants* at 9, 32. Mrs. Stutzman has actually served the Respondents “on nearly 30 previous occasions and referred them

[elsewhere] for only one event due to her sincere religious beliefs.” *Id.* at 2. As a Christian, Mrs. Stutzman believes that endorsing a same-sex wedding goes against the teaching of Scripture, and believes that lending her artistic talents to such a celebration would amount to an act of endorsement. *Id.* at 7–8, 13. In her words: “[I]t’s never about the person who walks into the shop, but about the message I’m communicating[.]”²

After Mrs. Stutzman refused to provide her artistic services, a lawsuit was filed against Arlene’s Flowers and Mrs. Stutzman.³ The State of Washington—having heard through the media about Mrs. Stutzman’s withholding of service—filed a consumer protection suit against her. *Id.* at 1. The Respondents only joined this lawsuit afterwards. *Id.* at 14.

II. THE NARROW ISSUES BEFORE THIS COURT

Amici are not advocating for the State to reconsider the merits of

² Barronelle Stutzman, *I’m a florist, but I refused to do flowers for my gay friend’s wedding*, Washington Post (May 12, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/12/im-a-florist-but-i-refused-to-do-flowers-for-my-gay-friends-wedding/>. Christianity’s notion on marriage between one man and one woman is part of its core teachings on sexual ethics and remains an inseparable part of Christian humanism. *Matthew J. Franck, Introduction, in RELIGIOUS FREEDOM AND GAY RIGHTS* (Timothy S. Shah, Thomas F. Farr, Jack Friedman eds. 2016)

³ Lornet Turnbull, *State’s case against florist fires up gay-marriage critics*, The Seattle Times (April 17, 2013), <http://www.seattletimes.com/seattle-news/statersquos-case-against-florist-fires-up-gay-marriage-critics/>.

Obergefell or to ignore its own compelling interest in ending invidious discrimination. We simply ask this Court to recognize that there remain competing constitutional claims of speech and association when the demand involves *artistic* services. We also ask the Court to be mindful of the distinction⁴ between “invidious discrimination” and legitimate First Amendment defenses. In making this distinction, we ask the Court to look at examples of discrimination based on identity (exemplified in cases dealing with, e.g., race or gender)⁵ and those based on ideological disagreements—the latter of which is protected by the First Amendment guarantees against compelled speech and association.

III. THE FREEDOM OF ASSOCIATION IS AN IMPORTANT LIBERTY AND RIPE FOR REVIEW GIVEN THE CULTURE

The First Amendment guarantees the freedom of (expressive)⁶

⁴ The lower court erred in claiming this distinction was not “meaningful,” *Brief of Respondents Ingersoll & Freed*, State of Washington v. Arlene’s Flowers, No. 91615-2 (Dec. 23, 2015), or simply asserting that this was “invidious discrimination.” *Brief of Appellants* at 43–44. As the Appellants asserted in their brief, “reasoned religious distinctions are not invidious.” *Id.* at 42.

⁵ See, e.g. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

⁶ This freedom comes in two forms, namely, “freedom of intimate association” and “freedom of expressive association.” *Roberts*, 468 U.S. at 618. The artistic nature of Mrs.

association as part of a historical tradition of protecting the right to hold unpopular views (like those espoused by Mrs. Stutzman),⁷ and to associate with other likeminded individuals. These rights, which were upheld in the past for minority religious traditions and the LGBTQ+ community itself, are equally applicable in this instance.

A. The Freedom of Association Is Crucial to Constitutional Liberty

The freedom of association is an indispensable constitutional right. *See Roberts v. Jaycees*, 468 U.S. 609, 618 (1984) (“freedom of association receives protection as a fundamental element of personal liberty”); *Bedford v. Sugarman*, 112 Wash. 2d 500, 516, 772 P.2d 486, 494 (1989) (“right of free association is an implied right under the constitution”). It extends First Amendment solicitude for free speech to include the liberty of individuals to gather together to advance a common purpose, declare a common belief, engage in common worship, or petition the government for common relief, without state interference. *See, e.g. Roberts*, 468 U.S. at 622; *Knox v. Serv.*

Stutzman’s business and its “open to the whole world” character make expressive association analysis the best choice. *See Bd. of Directors of Rotary Int’l*, 481 U.S. at 544.

⁷ Views towards sexual morality are changing, particularly with the younger generation. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 Oxford J. L. & Religion 373 (October 2015).

Emps. Int'l Union, 132 S. Ct. 2277, 2288 (2012); *N.Y. State Club Ass'n v. New York*, 487 U.S. 1, 13 (1988); *City of Bremerton v. Widell*, 146 Wash. 2d 561, 575, 51 P.3d 733, 740 (2002). These values reflect the sensible recognition of the Supreme Court that there remains “certain kinds of personal bonds” that play “a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs” and provide for “critical buffers between the individual and the power of the State.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984). Protecting these relationships from unwarranted state interference provides not only the means to form bonds of association, but also the very air for self-identification. *Id.* at 619–620.

Today, the right to associate remains a crucial bulwark from forced conformity with the majoritarian viewpoint, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000), and provides the much needed shelter to “prevent the evolution of that identity in a direction the state demands.” Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1557 (2001). This means that the freedom to associate also comes with a right not to do so.

See, e.g. *Jaycees*, 468 U.S. at 623 ("plainly presupposes a freedom not to associate"); *Cal. Dem. Party v. Jones*, 530 U.S. 567, 574 (2000) ("corollary of the right to associate is the right not to associate").

While the freedom of association is not absolute, a state regulation that overrides it must be shown to serve a compelling interest "unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms." *Jaycees*, 468 U.S. at 623; *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 262, 59 P.3d 655, 674 (2002); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) ("the effect of curtailing the freedom to associate is subject to the closest scrutiny"). While anti-discrimination laws may not be drafted with the intent to force wholesale conformity with a certain message, unintended state infringement may still follow from various forms of governmental action.⁸

B. *Non-expressive acts may sometimes be imbued with expressive association.*

⁸ *Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958); see also *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006) (laws that do not directly interfere with organization's composition may still raise First Amendment concerns if they make group membership less attractive).

Depending on the context, non-expressive acts may be imbued with expressive association. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 304-05 (1984) (Marshall, J., dissenting). Justice Marshall explained, while sleeping or sitting is usually deemed a non-expressive act, they can become a “novel mode of communication” if done in a given context. *Id.* at 306; *Brown v. Louisiana*, 383 U.S. 131, 139 (1966).

While Respondents frame the issue in terms of denying basic “goods and services” to gay couples—ignoring the artistic significance of the act—Mrs. Stutzman’s refusal bears elements of expression that are readily identifiable considering the wider cultural context. *See generally* Caroline Mala Corbin, *Speech of Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 265–74 (2015); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1556 (2001) (under a message-based approach, with the backdrop of “loud, continuous, and insistent demands to discuss and take sides on gay-rights claims, a steadfast refusal to talk at all about the issue is hardly neutral”).

In today’s culture, the freedom of association has provided a vehicle

for public figures like Bruce Springsteen and Bryan Adams to stand together against perceived discrimination towards the LGBTQ+ community by cancelling shows. On the other hand, small businesses that refuse to cater same-sex weddings are often associated with the message of the “religious right,” see Leslie Dorrough Smith, *Beyond Religious Right and Secular Left Rhetoric: The Road to Compromise*, JOURNAL OF CHURCH AND STATE 57.4, at 801–03 (2015), and branded as being “anti-gay” for their alleged discrimination.⁹ In compelling Mrs. Stutzman to provide artistic services for a same-sex wedding, Washington not only forces her to fully adopt the State’s message, but also to associate with the State’s preferred messengers.

IV. THE SUPREME COURT HAS ALREADY EXTENDED THE RIGHT TO ASSOCIATION TO CHRISTIAN GROUPS FACING DISCRIMINATION CLAIMS FROM THE LGBTQ+ COMMUNITY.

This Court should consider the ramifications of forcing religious adherents to essentially choose between their fundamental religious beliefs and their livelihood.¹⁰ The Supreme Court has dealt with the issue of

⁹ Respondents note that the actions of Mrs. Stutzman triggered in them a fear of being denied by other wedding vendors. *Brief of Respondent* at 5.

¹⁰ *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). The Supreme Court noted in *Burwell*, that “a law that ‘operates so as to make the practice

freedom of association and perceived LGBTQ+ discrimination in three applicable cases.

A. *Hurley v. GLIB*

In *Hurley*, the Court considered whether Massachusetts can allow a private parade organizer to exclude a group of marchers who sought to walk beneath a banner celebrating the Irish gay, lesbian, and bisexual community. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 570, 572 (1995). The marchers cited a statute that prohibited discrimination in a “place of public accommodation” aimed at ensuring every person has access to “publicly available goods . . . and services.” *Id.* at 572. The Court, however, refused to classify the private parade as a form of public accommodation, noting that a contrary decision would force the “communication produced by the private organizers [to] be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own.” *Id.* at 573. While the law may strive to prohibit

of . . . religious beliefs more expensive’ in the context of business activities imposes a burden on the exercise of religion.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (citing *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). The fact that the harm came from private actors is irrelevant if state pressure is the proximate cause leading to diminished capacity for association. See *Alabama*, 357 U.S. at 463.

acts of discrimination and rid society of biases, it is not “free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Id.* at 579.

Like Mrs. Stutzman, the parade organizers had no intention of excluding members of the LGBTQ+ community on the basis of their sexual orientation. *Id.* at 572. The disagreement revolved around allowing them to march beneath a banner that advocated a message at odds with the intended “expressive content” of the organizers. *Id.* at 572–73. While amici are sympathetic to the States’ desire to avoid anti-LGBTQ+ bias, Mrs. Stutzman has no interest in discriminating against anyone. She simply refuses to participate in one particular celebration that is of religious significance to her and her community (even if the ceremony itself is not a “religious ceremony”). We ask this Court to consider the link between speech and association, *Christian Legal Society v. Martinez*, 561 U.S. 661, 680 (2012), as a First Amendment alternative defense in light of Mrs. Stutzman’s desire to proverbially “walk beneath a banner” alongside others who reflect her own particular viewpoints on marriage.

B. *Boy Scouts of America v. Dale*

In *Dale*, the Court reviewed the Boy Scouts' policy that sought to distance itself from any approval of homosexual *conduct* deemed inconsistent with the values of the organization. *Dale*, 530 U.S. at 644. Dale, whose membership was revoked when his sexual orientation and gay rights activism was discovered, sued under "New Jersey's public accommodations statute" that prohibits "discrimination on the basis of sexual orientation in places of public accommodation." *Id.* at 644, 645. After determining that the Boy Scouts are "a private, nonprofit organization" that engages in "expressive activity," the Court went on to consider whether the "forced inclusion of Dale . . . would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Id.* at 649, 650.

Having accepted the Boy Scouts' position that the issue involved promoting a "form of behavior" instead of the individual's identity, *see id.* at 651–54, the Court built on *Hurley* by noting that "associations do not have to associate for the 'purpose' of disseminating a certain message" to warrant First Amendment protection, but may simply "engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at

654-55 (citing *Hurley*, 515 U.S. at 575).¹¹ While claimants may not necessarily be disseminating a message through the work of their organization, they are still afforded a right to exclude certain participants in order to remain faithful to a larger associative purpose. *Id.*

Mrs. Stutzman's refusal is an act of expressive “disassociation” with a particular view on marriage, and at the same time an act of expressive association with the traditional beliefs of the “Christian-right” community. While the Court may feel that providing flowers for a wedding does not constitute approval of same-sex marriage, this is largely irrelevant, since courts are not fit to judge the sincerity of a claimant’s religious beliefs. *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981). While States have a compelling interest in eliminating invidious discrimination, the freedom of association expressly limits the State to interference that does “not materially interfere with the ideas that the organization sought to express.” *Id.* at 657. In this case, the forced

¹¹ “As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000).

association with a contrary view of same-sex marriage would violate Mrs. Stutzman's sincerely held view on marriage, an injury well-beyond the "slight infringement" alluded to by the Respondent. *See Brief of Respondent* at 47 (citing *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987)).

C. *CLS v. Martinez*

Finally, the Court in *Martinez* upheld a school's "Policy on Non-Discrimination," which required all approved groups to accept members regardless of, e.g., their sexual orientation. *Christian Legal Society*, 561 U.S. at 671. While the policy was upheld, there are key sections in the opinion that stand to reinforce the arguments advanced for allowing a defense of expressive association.

First, the Court found that CLS, in refusing to abide by the terms of the Policy, only suffered the loss of benefits associated with official recognition, *id.* at 669, rather than being compelled to include unwanted members that could distort the groups message. *Id.* at 682. This is simply not the issue in this case. By forcing Mrs. Stutzman with legal action to provide an artistic service, the State is compelling her towards the State's

own preferred expressive association, not simply withholding some benefit for failure to comply.

Second, the Court rejected the distinction between conduct and identity in that instance, citing relevant cases that suggest that state laws targeting conduct that is "closely correlated" to the individuals is in an attempt to target the identity of the person. *Id.* at 689. The Respondents allude to this argument by claiming that a "refus[al] to serve weddings of same-sex couples is to refuse to serve gay and lesbian customers for their weddings, because only gays and lesbians marry same-sex partners." *Brief of Respondent* at 12. Again, this is simply not the case. If, in theory, any group of people, married, single, straight, or gay, wanted to host an event of any kind endorsing same-sex marriage, Mrs. Stutzman would not want to provide her artistic services for that event. It is abundantly clear that a service for an event, or an event itself, may encapsulate an artistic expression meant to convey a particular message unrelated to the customer's identity.¹² If anyone in this case is being targeted for conduct

¹² Other courts have recognized this alternative in speech cases. See Cheryl Truman, *Fayette Circuit Court judge reverses finding in Hands On Originals discrimination case*, HERALD LEADER (April 27, 2015) [Kentucky court],

"closely related" to their identity, it is Mrs. Stutzman, whose theological views¹³ are made subservient to the State's interest.

Lastly, the Court summarily dismissed as “more hypothetical than real” the concern that non-discrimination policies would facilitate hostility towards religious groups. *Id.* at 692. In the past four years, however, changed public perception of homosexuality has frustrated attempts by some Christians to remain active members of society while still upholding their traditional religious convictions.¹⁴ *Dale*, 530 U.S. at 660. In multiple instances, religious people have suffered real harm for stating their sincere

<http://www.kentucky.com/news/business/article44596368.html>; Curtis M. Wong, *Colorado's Azucar Bakery Did Not Discriminate By Refusing To Bake Anti-Gay Cakes, Court Rules*, HUFFINGTON POST (April 6, 2015) [Colorado court], http://www.huffingtonpost.com/2015/04/06/azucar-bakery-anti-gay-message_n_7011202.html. But see *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) (“Constitution looks beyond written or spoken words as mediums of expression”).

¹³ This case implicates deep theological issues that can better explain this distinction, but are ultimately outside the competence of the court. See *Thomas*, 450 U.S. at 714. Respondents' brief, however, repeatedly invites such meddling by, e.g. taking liberties to distinguish prudential and prohibitive scriptures. See *Brief of Respondents* 5 (equating same-sex marriage with the concept of being “unequally yoked” in a religiously mixed marriage). The Court should either extend deference to Mrs. Stutzman's sincerely held belief or acknowledge that her profession involves artistic elements sufficient to trigger a compelled speech defense. *Brief for the Cato Institute*, at 5–7.

¹⁴ States where conflict has arisen within the last five years include: Colorado, Georgia, Hawaii, Indiana, Illinois, Idaho, Iowa, Kentucky, Louisiana, Missouri, New Jersey, New Mexico, New York, Oregon, Texas, Vermont, and Washington.

religious beliefs on marriage.¹⁵ These are not hypothetical problems; real people's lives are being disrupted.

D. The Freedom of Association should not only be a right for private organizations.

While the freedom of association doctrine is most commonly applied in cases that involve protecting private organizations in the advancement of a common message, there is no good reason to exclude this first amendment guarantee from private individuals operating a business open to the public.¹⁶ Applying it in this narrow area (i.e. protecting expressive association in instances where anti-discrimination laws may unduly interfere with people's First Amendment rights to not participate in certain events, as opposed to invidious discrimination) will not create results that would undermine the purpose of anti-discrimination laws correctly applied to prohibit an attack on an individual's status. Since Mrs. Stutzman is willingly serving the LGBT community and just requests that she not be forced to

¹⁵ *Brief of Amici Curiae Religious Organizations, Public Speakers, and Scholars Concerned About Free Speech in Support of Respondents*, at 18–26, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2016), available at http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Religious_Organizations_Public_Speakers_and_Scholars_Concerned_About_Free_Speech.pdf.

¹⁶ ANDREW KOPPELMAN, *A RIGHT TO DISCRIMINATE?* 28 n. 15 (2009).

convey a message in support of same-sex marriage, the issue is not about status, but rather speech and association.

CONCLUSION

Without proper resolution and a prospective workable framework, the false dichotomy between religion and equality will continue to exist. The LGBTQ+ community will continue to feel the stigmatizing injury created by the false perception that Christians are “anti-gay,” and the religious community will continue to face the religious and economic hardship that comes with the price of full citizenship. These are difficult and nuanced issues that need to be handled with sensitive care. This fact was well attested in a dissent by two members of the U.S. Commission on Civil Rights, responding to the majority’s condemnation of various state’s religious liberty bills:

There are many in this nation with sincere religious and moral objections to same-sex marriage. Denying that, as our colleagues do, is simply a way to pretend the issues that face us as a nation are easy. Toleration is all about leaving people alone to live their lives as they see fit; it is not about forcing people to take part in other people’s lives.¹⁷

¹⁷ *Statement of Commissioners Gail Heriot and Peter Kirsanow*, at 3–4 (2016), <http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/04/HeriotKirsanowFinalStatementwithAppendix.pdf>.

While we remain sympathetic to the marginalization of the LGBTQ+ community and acknowledge the compelling interest in eliminating invidious discrimination on the basis of sexual orientation, the solution must not come at the expense of First Amendment guarantees, and forcing people to participate in all aspects of other people's lives. The First Amendment has other, less contentious, ways of mediating these disputes.

Respectively submitted,

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