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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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Barronelle Stutzman is a floral design artist. The Washington Supreme Court held that she engaged in sexual orientation discrimination under the Washington Law Against Discrimination ("WLAD") by respectfully declining to create custom floral arrangements celebrating the same-sex marriage of a longtime customer based on a conflict with her sincerely held religious beliefs. As a result, it affirmed the trial court's award of civil penalties, damages, and attorneys' fees and costs against Barronelle's business and against her personally.

The Washington Supreme Court found no violation of the First Amendment because it deemed Barronelle's creation of artistic expression to be conduct that is not "inherently expressive," and thus incapable of implicating the freedom of speech or the free exercise of religion. This reasoning conflicts with the precedent of this Court and the Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

The questions presented are:

1. Whether the creation and sale of custom floral arrangements to celebrate a wedding ceremony is artistic expression, and if so, whether compelling their creation violates the Free Speech Clause.

2. Whether the compelled creation and sale of custom floral arrangements to celebrate a wedding and attendance of that wedding against one's religious beliefs violates the Free Exercise Clause.

PARTIES TO THE PROCEEDING

Petitioner Arlene's Flowers, Inc. is a small Washington for-profit business owned by Petitioner Barronelle Stutzman, an individual and citizen of Washington.

Respondent State of Washington is a government entity. Respondents Robert Ingersoll and Curt Freed are individuals and citizens of Washington.

CORPORATE DISCLOSURE STATEMENT

Petitioner Arlene's Flowers, Inc. is a for-profit Washington corporation wholly owned by Barronelle Stutzman. It does not have any parent companies, and no entity or other person has any ownership interest in it.

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[1] CP stands for the Clerk's Papers transmitted by the trial court as the record on appeal to the Washington Supreme Court.

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INTRODUCTION

Barronelle Stutzman—a seventy-two-year-old grandmother—has been a floral design artist for over forty years. Her Christian faith teaches her to love and serve everyone, and she practices that faith in the floral business she owns.

For more than nine years, Barronelle designed original works of floral art for Robert Ingersoll and his partner Curt Freed to mark anniversaries, birthdays, Valentine's Days, and other important events. App.318-19a; 384-85a; 404-05a. But when Robert asked Barronelle to design the flowers for his same-sex wedding ceremony, Barronelle took him to a private place, took his hand, and respectfully declined "because of [her] relationship with Jesus Christ." App.321a. Robert said he understood, they talked about his wedding, and Barronelle referred him to three nearby florists. App.322a. Before he left, they hugged. *Id.* The Attorney General of the State of Washington responded to this respectful conversation between friends by suing Barronelle under the WLAD and the Washington Consumer Protection Act ("WCPA"). The ACLU also filed suit on behalf of Robert and Curt.

The trial court granted summary judgment for the state and the couple by broadly holding that there can never be "a free speech exception (be it creative, artistic, or otherwise) to anti-discrimination laws applied to public accommodations." App.125a. The Washington Supreme Court accepted direct review and affirmed. App.2a. Despite the state's admission that Barronelle's artistic floral designs are "a form of

expression," App.292a, the court held that Barronelle's design and sale of original floral arrangements constituted mere unexpressive conduct, not artistic expression. In so doing, the Washington Supreme Court held that artistic expression which does not incorporate words is subject to expressive conduct analysis, and stated that all speech creators—including publishers and printers—who offer their services to the public can be compelled to speak against their will.

The Washington Supreme Court's ruling is not the first to disavow the First Amendment's protection of artistic expression and those who create it. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied* 134 S. Ct. 1787 (2014). But the breadth of the court's reasoning, which extends to nearly all speech created for profit, is particularly hazardous, as is the extreme nature of Barronelle's punishment, which threatens to shutter her business and personally bankrupt her. This Court's review is needed to prevent the state from silencing professional speech creators with dissenting religious views.

Contrary to Respondents' claims, Barronelle does not engage in sexual orientation discrimination. Barronelle hires LGBT employees and serves LGBT clients on a regular basis, App.306-07a, 312-13a, and she had a "warm and friendly" relationship with Robert for over nine years, designing dozens of arrangements for him and Curt. App.404-05a; 416a. But part of Barronelle's wedding business involves attending and facilitating the ceremony itself and Barronelle simply could not reconcile her faith with

celebrating and participating in a same-sex wedding. App.307a; 314-21a.

Nor does this case concern mere unexpressive conduct. Floral design's place as a visual art form is well-recognized and longstanding. *Ikebana* or *kadō*, one of the three classical Japanese arts of refinement, is the disciplined art of flower arranging.[1] In the West, the phrase "flowers speak what words never can" reflects the popular recognition of flower arrangements' expressive nature, which has been documented since at least Ancient Greece and Rome. App.332-33a; Wash. S. Ct. Clerk's Papers ("CP") CP871-886. The expressive quality of flower arrangements is why renowned artists like Renoir, Van Gogh, and Monet painted them with an almost obsessive passion. CP1411-20. And modern floral design artists have returned the favor by creating innovative floral arrangements inspired by the paintings of French Impressionists, Cubists, and even Whistler.[2]

Barronelle intends all of her custom floral designs to convey a message, but none more so than her original wedding arrangements. Part of her creative process involves meeting with the couple several times—often for hours—to learn about them, their story, their tastes, and desired aesthetic. App.315a; 434-35a. Inspired by such factors as the season and location of the wedding, and colors and themes the

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[1] *See* Ikebana Int'l, *What is Ikebana?*, http://www.ikebanahq.org/whatis.php.

[2] *See* Lindsey Taylor, The Wall Street Journal, Flower Sch., https://www.wsj.com/news/types/flower-school.

couple have chosen, Barronelle creates original floral arrangements using artistic principles that range from proportion, color, space, and line to texture, harmony, and even fragrance. App.315-16a; 331-33a. These custom floral designs communicate Barronelle's vision of the couple's personalities and the mood or feeling they want their wedding ceremony to reflect. App.315-16a; 332-33a. Through her distinctive floral designs, Barronelle celebrates the couple's particular union, which requires not only that she invest herself creatively and emotionally in their wedding ceremony, but also that she dedicate herself artistically to memorializing and formalizing it in three-dimensional form. App.314-16a; 333-34a.

Thus, the state rightly acknowledged below that Barronelle's custom wedding designs are "a form of expression." App.292a. Uncontradicted expert testimony confirms that Barronelle approaches her work as an art form and incorporates creativity, originality, and custom tailoring into her floral designs, which lend splendor to the ceremony and serve no utilitarian purpose. App.331-32a. Robert and Curt themselves testified to Barronelle's artistic skill by praising her "exceptional creativity," App.429-30a, "creative and thoughtful" designs, and "amazing work," App.411-12a.

In sum, Barronelle is an artist with a conscience who cannot separate her artistic creativity from her soul. Her objection is not to any person or group with a particular sexual orientation but to creating expression that celebrates a view of marriage that directly contradicts her faith. App.318-21a. That is why she sought to explain her religious beliefs about

marriage to Robert privately in a kind and gentle way. App.321-22a. Such philosophical disagreements among friends are commonplace in our pluralistic society. Yet the Washington Supreme Court found Barronelle guilty of violating the WLAD and WCPA, rejected her constitutional defenses wholesale, and imposed civil penalties, damages, and attorneys' fees and costs for roughly four years of litigation against not only Barronelle's business, but against her personally. App.1-57a. The First Amendment does not permit this oppressive result.

DECISIONS BELOW

The Supreme Court of Washington's decision affirming the judgments for Respondents is reported at 389 P.3d 543, and reprinted at App.1-57a.

The Superior Court of Benton County's decisions granting summary judgment in favor of Respondents are unreported and reprinted at App.58-203a.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its opinion on February 16, 2017. On April 11, 2017, Justice Kennedy extended the time to file a petition for a writ of certiorari to July 16, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution are found at App.204a. The relevant portions of the Washington

Law Against Discrimination are set forth at App.205-09a.

STATEMENT OF THE CASE

I. Factual Background

The material facts of this case are not in dispute. App.94-95a. Two generations of Barronelle's family have owned and operated Arlene's Flowers. App.310a. She learned the art of floral design at the family business, took over managing Arlene's Flowers in 1982, purchased it from her mother in 2000, and has honed her talents there ever since.[3] App.367-76a. Although Barronelle also sells gift items and raw flowers, the bulk of her business is designing floral arrangements to celebrate special occasions, including weddings.[4] App.312-13a. Designing custom floral arrangements to mark one of life's milestones is a form of visual art; indeed, it is one of the few types of original art accessible to rich and poor alike. App.331-34a; *see* Am. Inst. of Floral Designers, About Us, http://aifd.org/about-us/ (describing an

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[3] For brevity's sake, Barronelle Stutzman and Arlene's Flowers are referred to collectively as "Barronelle."

[4] Custom wedding arrangements are a small part of Barronelle's business, App.7a, but that fact is irrelevant to whether a constitutional violation exists. Moreover, weddings not only generate life-long customers and lucrative referrals, they also present unique artistic challenges and opportunities for her to connect faith and work, which is why Barronelle participates in the ceremony when she provides full-wedding support. App.314-15a; 351-56.

organization dedicated to "the art of professional floral design").

Floral design is an art form dating back to antiquity. App.123a; CP1083-1240 (showing the trial court never questioned this proposition and recognized that Barronelle "attached … materials in support of" it). Beautiful arrangements captured in paintings, engravings, and tapestries centuries ago still inspire floral design artists today. App.332a; CP696-97; 871-72. Departments of Ornamental Horticulture at colleges and universities study and teach the art of floral design,[5] resulting in a number of textbooks on the subject, CP675; *see, e.g.*, Norah Hunter, The Art of Floral Design 30 (2d ed. 2000) (describing "[f]lower arranging [as] an art form."). Floral designers, like other artists, turn to fabrics, images, and emotions, as well as objective data points like the language of flowers and established Asian, European, American and other stylistic schools, for inspiration in designing innovative arrangements that express their vision of color, movement, beauty, and form in a signature style that is developed over decades of practice. App.332-33a; CP704-22; 875-86. The height of the floral designer's art is custom wedding arrangements. App.314a, 373a; CP214.

Barronelle designs custom wedding arrangements to communicate a mood or feeling, consistent with the personalities of the couple and the

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[5] *See, e.g.*, Cuyamaca Coll., Ornamental Horticulture, https://www.cuyamaca.edu/academics/catalog/degrees/oh-degrees.pdf; Utah State Univ., Ornamental Horticulture, https://www.usu.edu/degrees/index.cfm?id=135.

wedding ceremony they envision, that celebrates their marriage and expresses her own artistic style and creativity. App.332-34a; *see Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1095 (7th Cir. 1990), *rev'd on other grounds by Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Posner, J., concurring) (explaining that "the artist's business is emotion"). To accomplish this, Barronelle learns about the couple's history, desires, dreams, and wedding details. App.315a; 434-35a. She then brings to bear her own artistic intention, passion, and creativity to design floral arrangements that communicate her vision of their story, while lending formality and a celebratory atmosphere to the wedding ceremony itself. App.315-17a; 332-33a.

Barronelle's design of custom floral arrangements, which serves no utilitarian or non-artistic purpose, involves hundreds of choices as to shape, shade, geometry, product availability, location, and the positioning of every vase, flower, ornament, and filler. App.333-34a. Her creative process entails the use of traditional artistic principles, such as focal point, depth, harmony, and scale. App.331a. Unchallenged expert testimony establishes that Barronelle utilizes a high level of talent, emotional and intellectual investment, and skill in creating boutonnieres, centerpieces, pew markers, and bouquets that bring together a unique and cohesive wedding story. App.331-32a. To achieve a successful artistic design, Barronelle must become emotionally invested not just in the floral creations themselves but in the wedding ceremony they are intended to celebrate. App.314-15a; 332-33a. All of Arlene's Flowers' original designs reflect Barronelle's

signature style, which is predominantly "botanical, European, and traditional in nature." App.439-42a.

As a Christian who refers to her shop as "God's business" and forgoes profit to keep the shop closed on Sundays because it is "God's day," App.349a, Barronelle's faith influences every part of her life, including her work and how she treats others. App. 312a. One of Barronelle's LGBT employees described her as "one of the nicest women [he] ever met." App.347-50a. Robert similarly testified to his "warm and friendly relationship" with her. App.416a. Barronelle's faith teaches her to love and respect all people regardless of their sexual orientation. App.313a. It also teaches that God ordained marriage as a spiritual union between one man and one woman and that celebrating a different definition of marriage is contrary to God's will. App.321a; 340-343a.

Not long after same-sex marriage was authorized in Washington, Robert—a client and friend of over nine years—told an employee that he wanted Barronelle to design the flowers for his wedding. App.319a. Over the course of their relationship, Robert commissioned Barronelle to create dozens of arrangements. App.384a; 404a. All of them were original floral designs of an avant-garde nature. App.388-89a. Barronelle concluded that, although she would gladly sell pre-made arrangements and raw materials for use at a same-sex ceremony, the substantial participation and intricacy involved in designing custom arrangements to celebrate a marriage that is not between a man and a woman would damage her relationship with God. App.319-22a; *see also* App.432a; CP1752 (reflecting Robert's

and Curt's admission that custom wedding arrangements convey a "celebratory atmosphere," "beautify the ceremony," and "add a mood" and certain "elegance").

Barronelle also regularly provides full wedding support to large weddings and long-time clients, which involves attending and facilitating the ceremony and reception, ensuring the flowers remain pristine throughout, and assisting with clean-up and removal thereafter. App.316-18a; 351-356a. That service is what Barronelle believed Robert would expect. App.319-20a. Barronelle determined that she could not attend and participate in a same-sex wedding ceremony without seriously violating her religious beliefs. App.319-21a.

When Robert returned to Arlene's Flowers to speak with Barronelle, she met him in a quiet corner, took his hand, expressed her personal regard for him, but explained that she could not design the flowers for his weddings because of her relationship with Jesus Christ. App.321a; 429a. Robert said that he understood and later testified that Barronelle was "considerate" in addressing him and took no "joy or satisfaction" in making this decision but was merely "sincere in her beliefs." App.322a; 420-21a. Barronelle and Robert spoke briefly about his wedding plans, including who would walk him down the aisle; she gave him the names of three other local florists and they hugged before he left. App.322a; 397a; 401a. She believed they would remain friends despite their philosophical differences. App.322a.

Barronelle's referral of Robert's request hurt his feelings. App.419-20a. Curt gave voice to the couple's disappointment on Facebook in a post. App.409-10a. Robert and Curt later gave interviews to news outlets and received what they described as "overwhelming" public support. App.418-19a. Curt characterized the support from other florists, in particular, as including enough offers of free arrangements to hold twenty weddings. App.357-58a.

Robert and Curt were ultimately married in a religious ceremony at their home. App.422-23a. For that ceremony, which was conducted by an ordained minister, they readily obtained a floral arrangement from one of the local floral designers to whom Barronelle referred them and boutonnieres and corsages from a friend. App.423-26a. Their only claim for damages relates to $7.91 they spent in gas to drive to another local florist. App.81a.

Meanwhile, Barronelle has been boycotted, cursed at, and even received death threats. App.359-65a. She has spent approximately the last four years defending against litigation instituted both by the state and Robert and Curt. The outcome will determine the fate of her family business and likely everything she owns. App.54-56a.

II. Procedural Background

When the Attorney General of the State of Washington learned of these events through media reports, he sent a letter to Barronelle demanding that she agree to design custom arrangements for same-sex weddings if she designs custom arrangements for

opposite-sex weddings. App.273-78a. Barronelle declined and the Attorney General filed suit alleging that she committed sexual-orientation discrimination under the WLAD and WCPA. App.258-264a. Shortly thereafter, Robert and Curt filed their own suit against Barronelle under the same statutes. App.265-272a. Barronelle raised the Free Speech and Free Exercise Clauses of the First Amendment as affirmative defenses in her answers to both complaints and in her third-party complaint against the Washington State Attorney General. App.234a; 245-47a; 255a.

The two cases were consolidated for purposes of summary judgment. Barronelle argued that because her religious objection to designing custom floral arrangements for same-sex wedding ceremonies is based on their celebratory message, she did not discriminate based on sexual orientation in violation of the WLAD. CP499-502. Barronelle maintained that she gladly serves all customers regardless of their sexual orientation, as exemplified by her over nine-year service of Robert and Curt. CP499. She merely objects to creating artistic expression that celebrates a particular event—same-sex weddings—because her faith teaches that only marriage between a man and a woman should be celebrated. *Id.* Thus, Barronelle argued that the court should construe the WLAD not to apply to protected expression because requiring her to design custom floral arrangements for same-sex weddings would violate her right to free speech and her right to the free exercise of religion under the First and Fourteenth Amendments. CP512-528.

Not only did the trial court refuse to interpret the WLAD narrowly, it held that even if Barronelle did not engage in direct sexual-orientation discrimination, "[t]he indirect discriminatory result flowing from Stutzman's actions satisfies the WLAD and constitutes a violation." App.117a. It then rejected Barronelle's defense under the Free Speech Clause on the basis that there can never be "a free speech exception (be it creative, artistic, or otherwise) to anti-discrimination laws applied to public accommodations." App.125a. The trial court also rejected Barronelle's defense under the Free Exercise Clause because it viewed the WLAD as a neutral and generally applicable law, Barronelle's hybrid-rights free speech claim as unsubstantiated, and strict scrutiny as satisfied regardless. App.125a; 126-333a.

Finding summary judgment appropriate, the trial court issued a permanent injunction requiring Barronelle to design and create custom floral arrangements and provide full-wedding support for same-sex weddings if she provides those services for opposite-sex weddings. App.61-62a; 66a. It also issued final judgments requiring not only Arlene's Flowers, but Barronelle personally to pay an undetermined amounts of actual damages and attorneys' fees and costs for approximately four years of litigation—expected to total hundreds of thousands of dollars—to Ingersoll and Freed and $1,000 in fines and $1.00 in attorney's fees and costs to the state. App.62a; 67a.

Barronelle filed a petition for direct review with the Washington Supreme Court, which argued that she did not discriminate based on sexual orientation

and that applying state law to require her to design custom floral arrangements for, and participate in, same-sex wedding ceremonies would violate the Free Speech and Free Exercise Clauses of the First Amendment. App.218-225a. The Washington Supreme Court accepted directed review and affirmed the trial court's judgments. App.2a. In so doing, it ruled that any "[d]iscrimination based on same-sex marriage constitutes discrimination on the basis of sexual orientation" under the WLAD, App. 56a, based in part on this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), App.16a.

The court then rejected Barronelle's defense under the Free Speech Clause. It reasoned that Barronelle's custom floral arrangements are "not 'speech' in a literal sense" and are thus "properly characterized as conduct." App.25a. Hence, the court applied the *Spence v. Washington*, 418 U.S. 405 (1974), test for expressive conduct, which it reframed as an inquiry into "whether the conduct at issue [is] 'inherently expressive.'" App.26a (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 64 (2006)) ("*FAIR*"). The court held that Barronelle's custom floral designs for wedding ceremonies "do not satisfy this standard." App.26a. It refused to apply this Court's decision in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995), "because Arlene's Flowers is a paradigmatic public accommodation" or for-profit business, App.28a n.11, and "'[c]ourts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws,'" App.33a.

The Washington Supreme Court also held that forcing Barronelle to design custom floral arrangements to celebrate a same-sex wedding—and to attend the ceremony to provide full wedding support—does not violate the Free Exercise Clause. App.34-40a. It ruled that the WLAD "is a neutral, generally applicable law that serves [the] state government's compelling interest in eradicating discrimination in public accommodations." App.57a. As to Barronelle's hybrid-rights claim, the court recognized that "a law triggers strict scrutiny if it burdens *both* religious free exercise *and* another fundamental right." App.53-54a. But it concluded that Barronelle's right to free speech was not burdened and that "even if the WLAD does trigger strict scrutiny …, it satisfies that standard." App.54a.

REASONS FOR GRANTING THE WRIT

Because Barronelle refused to forsake her religious view of marriage and agree to design custom floral arrangements celebrating same-sex weddings, the state imposed fines, damages, and massive attorneys' fees awards on her personally and professionally, potentially stripping away everything she owns. The First Amendment prohibits this result because Barronelle's original floral designs are artistic expression that communicates a celebratory message, which makes them pure speech safeguarded by the First Amendment. The state may neither compel Barronelle to celebrate a definition of marriage that "is not in [her] mind," *W. Va. State Bd. of Educ. v. Barnett*e, 319 U.S. 624, 634 (1943), nor prescribe an "orthodox" view of marriage and force

Barronelle "to confess by word or act [her] faith therein," *id.* at 642.

The Washington Supreme Court's contrary ruling applied the wrong test. It proceeds straight to an expressive-conduct inquiry even though this Court's opinion in *FAIR* and decisions by the Second, Ninth, and Tenth Circuits demonstrate that pure-speech analysis comes first. Subsequently, the court wrongly held that Barronelle's artistic expression is not protected as pure speech, which conflicts with this Court's ruling in *Hurley* and decisions by the Second, Sixth, Ninth, Tenth, and Eleventh Circuits. The *Spence* test does not apply to the creation of visual art as evidenced by *Hurley* and decisions by the Second, Ninth, and Eleventh Circuits. Rather, the process of speech creation enjoys the same constitutional protection as speech itself. Although the Washington Supreme Court cited Barronelle's operation of an expressive business to avoid this result, this Court's holdings and those of the Second, Sixth, Ninth, and Eleventh Circuits establish that speech in a form that is sold for profit receives full First Amendment protection.

What is more, the Washington Supreme Court's ruling severely distorts and misapplies this Court's decisions in *Hurley* and *FAIR*. It limits *Hurley* to its facts and holds that citizens forfeit their free-speech rights—including the essential right to control their own speech—by operating a for-profit family business. The court justified this result by radically expanding *FAIR* to justify the state forcing Barronelle to create original works of artistic expression against her will based on the implausible notion that

Barronelle's creation of floral designs to celebrate a couple's marriage is not "inherently expressive." But that decision merely approved financial incentives for law schools to allow military recruiters to speak on campus.

The Washington Supreme Court's free-exercise ruling also expands a longstanding circuit conflict on whether the hybrid-rights doctrine exists—and, if so, how it applies—that implicates rulings by the First, Second, Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits. In this case, the Washington Supreme Court recognized the hybrid-rights doctrine's vitality but refused to apply it because the court wrongly held that Barronelle's free speech rights were not implicated. However, the Free Exercise Clause prohibits the government from penalizing Barronelle for refusing to abandon a millennia-old religious view of marriage deemed abhorrent by the state.

I. The Washington Supreme Court's Ruling that Barronelle's Artistic Expression is Not Protected as Pure Speech Conflicts with the Rulings of this Court and that of the Second, Sixth, Ninth, Tenth, and Eleventh Circuits.

The Washington Supreme Court strictly limited the scope of pure speech protection to "'speech' in a literal sense," *i.e.*, words. App.25a. *But see Hurley*, 515 U.S. at 569 ("[T]he Constitution looks beyond written or spoken words as mediums of expression."). It rejected the myriad "cases protecting various forms of [visual] art" as pure speech by stating that they "do not expand the definition of 'expressive conduct.'" App.31-32a n.13; *see, e.g.*, *Hurley*, 515 U.S. at 568-69

("painting[s] of Jackson Pollock, music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll"); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (pictures, paintings, drawings, and engravings); *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (tattoos and tattooing); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (tattoos and tattooing); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (sale of original artwork); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 96 (2d Cir. 2006) (custom-painted clothing); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924-25 (6th Cir. 2003) (sale of original artwork); *Bery v. City of N.Y.*, 97 F.3d 689, 694-96 (2d Cir. 1996) (sale of original artwork); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (stained-glass windows).

Yet the Washington Supreme Court's definition of "conduct" extended to many forms of pure speech, including "distributing leaflets," "wearing [a] jacket emblazoned with … words," "giving [a] speech and leading [others] in song and prayer," and "saying [the] pledge of allegiance." App.30-31a. This cramped view of the Free Speech Clause cannot be reconciled with this Court's precedent or that of the Second, Sixth, Ninth, Tenth, and Eleventh Circuits.

A. Pure Speech Analysis Differs From, and Precedes, the Expressive Conduct Test.

Barronelle's custom wedding designs are artistic expression protected by the First Amendment as pure speech. App.331-34a. At a highly simplistic level, red roses communicate love and red poinsettias

Christmas. So it should come as no surprise that flowers may speak messages; indeed, the Victorians took this "language of flowers" to a new level by popularizing dozens of books on the coded meanings of flowers and crafting bouquets to send simple messages to one another.[6] CP933-81. Barronelle's custom wedding designs do far more by expressing, in abstract form, her vision of the couple's unique personalities, style, and what they want their ceremony to be, thereby setting the tone for the wedding celebration. App.314-16a. Intricate floral arrangements are, after all, one of the classic features that set weddings apart from other events. App.431a.

Despite this long history of using flower arrangements for expressive purposes, the Washington Supreme Court refused to consider whether Barronelle's custom wedding arrangements are pure speech and proceeded straight to expressive-conduct analysis. App.24a (stating that Barronelle "must first demonstrate that the conduct at issue here—her commercial sale of floral wedding arrangements—amounts to 'expression'").

This Court's opinion in *FAIR*, which the Washington Supreme Court repeatedly cited, makes clear that pure speech analysis is different from—and precedes—the *Spence* test. In *FAIR*, 547 U.S. at 64, law schools' claims of compelled speech failed because they were "not speaking when they hoste[d]

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[6] *See, e.g.*, Romie Stott, *How Flower-Obsessed Victorians Encoded Messages in Bouquets*, Atlas Obscura, http://www.atlasobscura.com/articles/how-flowerobsessed-victorians-encoded-messages-in-bouquets.

interviews and recruiting receptions." Thus, no pure speech was directly at issue. This Court initially rejected the schools' "view that the Solomon Amendment impermissibly regulates *speech*." *Id.* at 65. Only after reaching this conclusion did the Court proceeded to determine "whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection." *Id.*

The Second, Ninth, and Tenth Circuits have applied this two-step free-speech inquiry in cases involving visual art. *See, e.g.*, *Bery*, 97 F.3d at 695-96 (rejecting the argument "that the sale of art is conduct" and holding that two visual artists' work for sale was "entitled to full First Amendment protection"); *Anderson*, 621 F.3d at 1059 (framing the court's free speech inquiry as whether tattooing for profit "is (1) *purely expressive activity* or (2) *conduct* that merely contains an expressive component"); *Cressman v. Thompson*, 798 F.3d 938, 954 (10th Cir. 2015) (determining whether bearing the image of a statue on a license plate was entitled to "[p]ure-speech treatment" before applying the *Spence* test for "symbolic speech").

The Washington Supreme Court's error in refusing to conduct a pure-speech analysis undermined Barronelle's free-speech defense because "the burden a compelled-speech plaintiff bears in an allegedly symbolic-speech case differs from the burden such a plaintiff bears in an allegedly pure-speech case." *Id.* at 961. As the Tenth Circuit has explained, "a court will only find symbolic speech where a plaintiff can identify a message that a

reasonable onlooker would perceive." *Id.* But "the First Amendment protection accorded to pure speech is not tethered to whether it conveys any particular message—i.e., the speech at issue could mean different things to different people." *Id.* at 961-62.

Here, the court rejected Barronelle's free speech defense because it found that her art did not "actually communicate[] something to the public at large." App.26a. Barronelle's custom wedding arrangements inherently communicate a celebratory message to the public and play a key role in defining a marriage ceremony that "convey[s] important messages about the couple, their beliefs, and their relationship." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). Yet this consideration is wholly irrelevant if Barronelle's artistic expression is pure speech. *See Hurley*, 515 U.S. at 569 (rejecting a "'particularized message'" requirement for abstract art (quoting *Spence*, 418 U.S. at 411)).

B. Barronelle's Artistic Expression is Constitutionally Protected as Pure Speech.

The Washington Supreme Court's holding that Barronelle's artistic expression is not "protected by the First Amendment" directly conflicts with this Court's precedent and that of the Second, Sixth, Ninth, Tenth, and Eleventh Circuits. In *Hurley*, 515 U.S. at 569, this Court recognized that abstract works of visual art, like the "paintings of Jackson Pollock," are "unquestionably shielded" by the Free Speech Clause, regardless of whether they convey "a narrow, succinctly articulable message." *See also Kaplan*, 413

U.S. at 119-20 (declaring that all "pictures, films, paintings, drawings, and engravings" are protected as pure speech).

Barronelle's custom floral arrangements, like abstract paintings universally recognized as visual art, reflect her vision of "pattern, design, harmony, and color" in a way that "evoke[s] pleasure and other emotions in an appreciative viewer." *Miller*, 904 F.2d at 1094 (Posner, J., concurring). Her original designs may convey "no articulable idea, no verbal meaning" to the public. *Id.* But as *Hurley* recognized, abstract artistic expression is protected by the First Amendment nonetheless.

Following this Court's lead, the Second, Sixth, Ninth, Tenth, and Eleventh Circuits have recognized that visual art—abstract or not—receives the First Amendment's full protection. *See, e.g.*, *Bery*, 97 F.3d at 695 ("Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."); *ETW Corp.*, 332 F.3d at 924 ("The protection of the First Amendment is not limited to written or spoken words, but includes … music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."); *White*, 500 F.3d at 955 ("[T]he arts and entertainment constitute protected forms of expression under the First Amendment."); *Cressman*, 798 F.3d at 952 (noting that "[t]he concept of pure speech is fairly capacious" and listing various forms of visual art federal courts have protected); *Buehrle*, 813 F.3d at 976 (explaining that First Amendment protection "extends to various forms of artistic expression").

These courts would likely deem Barronelle's original works of floral art protected by the First Amendment as pure speech.

The Washington Supreme Court, however, stated—without explanation—that only visual art "composed of words, realistic or abstract images, symbols, or a combination of these" is protected as pure speech and that "Stutzman's floral arrangements do not implicate any similar concerns." App.32a n.13. Stutzman's custom floral designs, however, are abstract botanical sculptures and flowers are well-known symbols, as the language of flowers attests. CP934-81. The only missing element is words. *See* App.25a (characterizing as conduct anything that "is not 'speech' in a literal sense"). But this Court established long ago that "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569.

In effect, the Washington Supreme Court's holding means that Van Gogh's "Vase With Red Poppies," which depicts a simple arrangement of red flowers in oil paint, is protected by the First Amendment but Barronelle's intricate floral designs tailored to celebrate the martial union of a particular couple are not. That perplexing result cannot be the law. The Washington Supreme Court erred in refusing to accord pure-speech treatment to Barronelle's original works of visual art.

Remarkably, the Washington Supreme Court rejected the very possibility that Barronelle's art could be safeguarded as pure speech. It broadly held that "[c]ourts cannot be in the business of deciding

which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." App.33a (quotation omitted). Yet that logic embraces the trial court's extreme view that there is no such thing as a free speech exception to a public accommodations law, which effectively abrogates the court's "constitutional duty" to protect free speech. *Hurley*, 515 U.S. at 567.

It also directly conflicts with the approach to artistic expression taken by the Second and Tenth Circuits. As the Second Circuit has explained, "[c]ourts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times, but that difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment's protective arm." *Bery*, 97 F.3d at 696; *see also Cressman*, 798 F.3d at 953 n.13 (establishing a "context-specific inquiry" for determining whether visual art is protected that "would 'prove difficult at times'" (quoting *Bery*, 798 F.3d at 696)).

C. The *Spence* Test Does Not Apply to Barronelle's Design of Custom Floral Arrangements.

The Washington Supreme Court's application of the expressive conduct test to Barronelle's artistic expression conflicts with rulings by this Court and the Second, Ninth, and Eleventh Circuits. Applying the *Spence* test, the Washington Supreme Court described Barronelle's purported "conduct" in numerous ways. *See, e.g.*, App.31a ("creating floral arrangements, providing floral arrangement services for opposite-sex weddings, or denying those services

for same-sex weddings"). It then held that Barronelle's conduct, regardless of how it is framed, was not "inherently expressive" and thus lacked protection under the First Amendment. App.25-26a.

Yet this Court has never subjected visual or other forms of art to the *Spence* test. Instead, it has carefully explained that

> a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' *cf. Spence v. Washington*, 418 U.S. 405, 411 (1974) (*per curiam*), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.

Hurley, 515 U.S. at 569. This Court's precedent thus explains why *Spence* does not apply to Barronelle's original floral designs.

Heeding this Court's instruction, the Second, Ninth, and Eleventh Circuits have held that visual art is protected by the First Amendment without any reference to the expressive-conduct test. *See, e.g.*, *Mastrovincenzo*, 435 F.3d at 91 n.9 (declining to apply "the doctrine of expressive conduct" because two artists who created custom-painted clothing were not arguing "that the act of distributing their artistic objects itself conveys a separate 'particularized message'" but that "they are engaging in protected speech"); *Anderson,* 621 F.3d at 1059 ("[W]e hold that tattooing is purely expressive activity rather than

conduct expressive of an idea, and is thus entitled to full First Amendment protection without any need to resort to *Spence*'s 'sufficiently imbued' test."); *Buehrle*, 813 F.3d at 977 (rejecting the argument that "engaging in conduct involving tattooing does not rise to the level of displaying the actual image").

It is impossible to reconcile the Washington Supreme Court's use of the *Spence* test with these holdings, and its error in doing so is plain. For as Judge Easterbrook has explained, "[r]ock music, *Penthouse* magazine, and 'slasher' movies are speech; we needn't ask whether they are conduct *plus* expression. One need not divine the message of a painting to separate the conduct from the speech; there is no 'conduct' in it." *Miller*, 904 F.2d at 1124 (Easterbrook, J., dissenting). Likewise, Barronelle's custom wedding designs are inherently celebratory works of art, not some form of functional behavior that may or may not be expressive. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 296 (5th Cir. 2001) (Barksdale, J., concurring) (explaining that *Spence* was intended for "speech that is less than pure: namely, expression of an idea through activity").

The only "activity" that could be implicated here is Barronelle's design and creation of custom floral arrangements. But this Court has never regarded the process of speech creation as separate from—and subject to lesser protection than—the speech that results. It has always regarded them as one and the same, and equally protected by the First Amendment. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation

applies to *creating*, distributing, or consuming speech makes no difference.") (emphasis added); *United States v. Stevens*, 559 U.S. 460, 464 (2010) (striking down a federal statute on free-speech grounds that "criminalize[d] the commercial *creation*, sale, or possession of certain [video] depictions of animal cruelty") (emphasis added); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (invalidating "[t]he Son of Sam law" because it "establishe[d] a financial disincentive to *create* or publish [written] works") (emphasis added).

Accordingly, the Ninth and Eleventh Circuits have ruled that the process of creating visual art enjoys the same free-speech protection as the final product. *See, e.g.*, *Anderson*, 621 F.3d at 1061-62 ("Although writing and painting can be reduced to their constituent acts and thus described as conduct, we have not attempted to disconnect the end product from the act of creation."); *Buehrle*, 813 F.3d at 977 ("[T]he Supreme Court has never 'drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded.'" (quoting *Anderson*, 621 F.3d at 977)).

Just as when an author puts pen to paper, an artist puts brush to canvas, and a tattooist puts a needle to skin, Barronelle's design and creation of custom floral arrangements "is not intended to 'symbolize' anything." *Anderson*, 621 F.3d at 1062. The *only* purpose of her "conduct" is to produce an original piece of art. *Id.* Because Barronelle's

creative process "is inextricably intertwined" with her expressive product, that process is "itself entitled to full First Amendment protection." *Id.* Otherwise, the government could outlaw the creation of all artistic expression by proceeding upstream and banning its inception. *See Buehrle*, 813 F.3d at 978; *cf. Brown*, 564 U.S. at 792 n.1 (declining to adopt an inverse rule that would allow the government to prohibit "printing or selling books—though not the writing of them").

D. That Barronelle's Visual Art is Sold for Profit Does Not Change the Free Speech Analysis.

Central to the Washington Supreme Court's holding that Barronelle's visual art is not protected by the First Amendment was the fact that she offers commissioned pieces for sale as part of her for-profit business. *See, e.g.*, App.24a (focusing on Barronelle's "commercial sale of floral wedding arrangements"). It held that this factor was determinative because while a form of visual art like "'photography may be expressive, the operation of a photography business is not.'" App.29a (quoting *Elane Photography*, 309 P.3d at 68). The court thus posited a clear "distinction between expressive conduct and commercial activity." App.29a. Other state courts have employed similarly faulty logic in cases where the forced creation of artistic expression is at issue. *See, e.g.*, *Elane Photography*, 309 P.3d at 68 ("[T]he NMHRA applies not to Elane Photography's photographs but to its business operation …."); *Masterpiece Cakeshop*, 370 P.3d at 287 ("[T]hat an entity charges for its goods and services reduces the likelihood that a reasonable

observer will believe that it supports the message expressed ….").

But this Court has held time and again that speech is "protected even though it is carried in a form that is 'sold' for profit." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976); *see also Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("[A] speaker is no less a speaker because he or she is paid to speak."); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge."). If the law were otherwise, most books, newspapers, and magazines would lose free speech protection. That cannot be a proper reading of the First Amendment. *See Times, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (explaining that just because these publications are "sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment").

The Second, Sixth, Ninth, and Eleventh Circuits have accordingly held that visual art sold for profit is entitled to full free-speech protection. *See, e.g.*, *Bery*, 97 F.3d at 695, 697 (ruling that "[t]he sale of protected materials is also protected" in a case brought by "visual artists"); *ETW Corp.*, 332 F.3d at 918, 924 (holding in a case about "art prints" that "[s]peech is protected even though it is carried in a form that is sold for profit"); *Anderson*, 621 F.3d at 1062 (recognizing that the First Amendment protects "painting by commission"); *White*, 500 F.3d at 957 ("[W]e … hold that an artist's sale of his original paintings is entitled to First Amendment

protection."); *Buehrle*, 813 F.3d at 978 ("The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it.").

In none of these cases did it matter that an artist was engaged in "commercial activity." App.29a n.12. Yet the Washington Supreme Court broadly held that "[c]ourts cannot be in the business of deciding which businesses are sufficiently artistic to warrant" First Amendment protection. App.33a. This logic denies free speech rights to all owners of businesses "traditionally subject to public accommodations laws," including not only broadcasters, newspapers, and printers, but also journalists, columnists, novelists, and other speech creators. App.29a. *But see Hurley*, 515 U.S. at 574 (explaining speaker autonomy is "enjoyed by business corporations generally," including "professional publishers"). Such a radical departure from federal free-speech precedent warrants this Court's review.

II. The Washington Supreme Court's Ruling Distorts and Misapplies this Court's Free Speech Rulings in *Hurley* and *FAIR*.

Throughout this case, Barronelle argued that *Hurley* foreclosed Respondents' use of a state public accommodation law to force her to create artistic expression. App.27a. Yet the trial court stated that *Hurley* was "distinguished by … *Rumsfeld*," App.132a, and the Washington Supreme Court followed suit by ruling that "*Hurley* is … unavailing to Stutzman" because "her store is the kind of public

accommodation that has traditionally been subject to antidiscrimination laws," App.29a. It too held that Barronelle's creation of artistic expression was "like the unprotected conduct in *FAIR*." App.31a. But similar to the parade organizers in *Hurley*, 515 U.S. at 574, Barronelle "decided to exclude a message [she] did not like from the communication" about marriage she "chose to make." This "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

Essential to this Court's decision in *Hurley* was the fact that Massachusetts—just like Washington in this case—declared "speech itself to be the public accommodation." *Id.* at 573. That the expressive medium at issue there—*i.e.*, a parade—was not "a paradigmatic public accommodation" played no role in this Court's decision. App.28a n.11. Yet state courts have frequently invoked that and other feeble grounds in refusing to apply *Hurley*'s rule that the state cannot override private "choices of content that in someone's eyes are misguided or even hurtful." 515 U.S. at 574; *see, e.g.*, *Masterpiece Cakeshop*, 370 P.3d at 287 (confining *Hurley*'s holding to parades where "spectators would likely attribute each marcher's message to the parade organizers").

State courts' sharp limiting of *Hurley*'s rule has been coupled with a wide expansion of *FAIR*'s holding that the government may generally regulate unexpressive conduct. 547 U.S. at 60; *see, e.g., Brush & Nib Studio v. City of Phoenix*, 2016-CV-052251, at 12 (Super. Ct. Maricopa Cty. Sept. 16, 2016), http://www.adfmedia.org/files/BrushNibPIdecision.p

df (citing *FAIR* to support the conclusion that "there is nothing about custom wedding invitations made for same-sex couples that is expressive"). But far from dealing with the creation of visual art, or any other protected expression, *FAIR* merely addressed financial incentives for law schools to grant military recruiters access to an empty room in which to meet with students. 547 U.S. at 60. No pure speech was directly at issue in that case because "the schools are not speaking when they host interviews and recruiting receptions."[7] *Id.* at 64.

That is a far cry from Barronelle's design and creation of original floral arrangements to memorialize and celebrate a wedding in artistic form. Indeed, the proper analogy to this case would be compelling the law schools in *FAIR* to draft and present the military's recruitment speech themselves, which would doubtless violate the First Amendment's prohibition on the "government … telling people what they must say." *Id.* at 61.

III. The Washington Supreme Court's Ruling Expands a Circuit Conflict Regarding the Scope of the Free Exercise Clause.

Since this Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), debate has raged in the lower

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[7] *FAIR* allowed the government to condition funding on law schools sending "scheduling e-mails" and "post[ing] notices" for military recruiters on an evenhanded basis but only because this speech was "plainly incidental" to unexpressive conduct, *i.e.*, furnishing recruiters with an empty room in which to meet with students. 547 U.S. at 61-62.

courts regarding the scope of the Free Exercise Clause. This Court held that "the Free Exercise Clause alone" does not bar the "application of a neutral, generally applicable law to religiously motivated action." *Id.* at 881. But "hybrid situation[s]," *id.* at 882, in which a free-exercise claim is associated with "other constitutional protections, such as freedom of speech," *id.* at 881, still receive strict scrutiny under *Smith*.

This Court has never applied the hybrid-rights exception to *Smith*'s rule, which has led the Second, Third, and Sixth Circuits to conclude that its hybrid-rights language is dicta and no such exception exists. *See Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (characterizing this language as "dicta"); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 244, 247 (3d Cir. 2008) (same); *Kissinger v. Bd. of Trustees of Ohio State Univ., Coll. of Veterinary Med. et al.*, 5 F.3d 177, 180 (6th Cir. 1993) (stating the hybrid-rights exception is "completely illogical").

The D.C. and First Circuits recognize the hybrid-rights doctrine but require an independently viable constitutional violation, thus rendering the exception to *Smith*'s rule available but redundant. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) ("We have demonstrated that the EEOC's attempt to enforce Title VII would both burden Catholic University's right of free exercise and excessively entangle the Government in religion. As a consequence, this case presents the kind of 'hybrid situation' referred to in *Smith* …."); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 19 (1st Cir. 2004) (agreeing based on the reasoning of the district court

that no "hybrid" rights claim was available); *Gary S. v. Manchester Sch. Dist.*, 241 F. Supp. 2d 111, 121 (D.N.H. 2003) (requiring "another independently viable constitutional claim" for the hybrid-rights exception to apply).

More solicitous of *Smith*'s logic are the Fifth, Ninth, and Tenth Circuits, which apply the hybrid-rights exception when there is a colorable claim of infringement of a companion right. *See Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) ("[P]laintiffs do not have a colorable claim for a violation of either their free exercise or their due process rights; therefore, we need not consider whether any potential overlap … requires a heightened level of scrutiny."); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) ("[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated …." (quotation omitted)); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (requiring "a colorable showing of infringement of a companion constitutional right" to trigger the hybrid-rights exception (quotation omitted)).

This Court's precedent makes clear that the "colorable claim" standard controls the hybrid-rights inquiry, which the *Smith* Court used to explain a line of its free exercise cases that granted religious exemptions to neutral laws of general applicability. For instance, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which *Smith*, 494 U.S. at 881, approved, was a classic hybrid blend of free exercise and parental rights. But *Yoder*'s holding did not turn on the existence of an independently viable parental-rights claim. Rather,

the Court stated that "when the interests of parenthood are combined with a free exercise claim" strict scrutiny was required. *Id.* The "colorable claim" standard for hybrid rights claims must therefore be what the *Smith* majority intended.

Here, the Washington Supreme Court recognized the vitality of *Smith*'s hybrid-rights exception without identifying a controlling test, thus contributing to the existing conflict. *See* App.53a ("[A] law triggers strict scrutiny if it burdens *both* religious free exercise *and* another fundamental right such as speech or association."). But the court held that Barronelle's right to free speech was "not burdened" and that applying the WLAD to her would satisfy strict scrutiny regardless. App.54a. Neither holding comports with *Hurley*, which recognized that visual art is protected expression, 515 U.S. at 569, and that there is no legitimate—let alone compelling—interest in depriving Barronelle of "autonomy to control [her] own speech," *id.* at 574. This Court should grant review to clarify that the hybrid-rights doctrine exists and that it forecloses Respondents' attempt to force Barronelle to design custom floral arrangements celebrating same-sex weddings.

If the hybrid-rights doctrine does not bar this result, this Court should grant review to reconsider *Smith*'s dubious holding. *Smith* has long been criticized by Justices of this Court as unduly restrictive of the free exercise of religion. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-80 (1993) (Souter, J., concurring in part and

concurring in the judgment). A Free Exercise Clause that does not preclude the state from compelling Barronelle to attend, facilitate, and create art celebrating a religious wedding ceremony that her faith teaches is wrong "based on decent and honorable religious … premises" is not worth the paper it is written on. *Obergefell*, 135 S. Ct. at 2602. In short, if *Smith* allows the state to order Barronelle "to go to" and facilitate a sacred same-sex wedding service conducted by an ordained minister "against her will," it should be overruled. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947); App.423a.

Respecting Barronelle's conscientious objection to celebrating same-sex marriage is essential to her individual "dignity" and religious "self-definition." *Burwell v. Hobby Lobby*, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). Barronelle's custom floral arrangements play an iconic role in the wedding ceremony and the artistic process she uses to design them requires that she collaborate artistically with the couple to celebrate and solemnize their marital union. App.315-17a. Barronelle simply cannot promote same-sex marriage in that intimate manner and remain true to her faith. App.340-43a.

But rather than recognizing that "[t]olerance is a two-way street," *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012), the state has defamed Barronelle as a bigot, threatened to strip away everything she owns, and effectively excluded her and all like-minded people of faith from the state's "economic life." *Hobby Lobby*, 134 S. Ct. at 2783. This violates the spirit and letter of the Free Exercise Clause, which prohibits the government from penalizing citizens who "hold

religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

IV. Combining this Case with *Masterpiece Cakeshop* Would Aid the Court in Deciding the First Amendment Questions Presented.

On June 26, 2017, this Court granted a writ of certiorari in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111. This case overlaps with, and presents issues that are complimentary to, the question presented there. Indeed, the Washington Supreme Court cited the Colorado Court of Appeals' decision in *Masterpiece Cakeshop* in finding Barronelle guilty of sexual orientation discrimination. App.14a n.3. This ruling led the Washington Supreme Court to impose personal liability on a seventy-two-year-old grandmother, even though she served Robert and Curt for nearly a decade and would gladly do so again.

Reviewing the two cases together would aid this Court in deciding the important First Amendment questions presented. The record in this case is particularly well developed and comprehensive, including numerous depositions and declarations, as well as expert testimony. Such exhaustive evidence will facilitate the Court's "independent examination of the record as a whole" to determine whether artistic expression, like Barronelle's custom floral designs, are "protected speech." *Hurley*, 515 U.S. at 567. Moreover, Barronelle's longstanding practice of hiring LGBT employees and over nine years of service to Robert and Curt negate any concern that she discriminates against individuals based on their

sexual orientation. But if this Court declines to grant the petition, at the very least, it should hold this case pending the disposition of *Masterpiece Cakeshop*.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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