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SUPREME COURT
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SUPREME COURT
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No. 91615-2

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.

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

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Identity and Interest of Amici

Amici are the States of Arkansas, Texas, Alabama, Arizona, Idaho, Louisiana, Missouri, Nebraska, Oklahoma, South Carolina, South Dakota, and West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin (the "Amici States").

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, 201 L. Ed. 35 (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, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). The Amici States likewise have an interest in ensuring consistent interpretations of federal constitutional provisions.

Introduction

The federal Constitution protects individual liberty and recognizes that "a tolerant citizenry" hinges on a "mutuality of obligation" between citizens. *Lee v. Weisman*, 505 U.S. 577, 590–91, 112 S. Ct. 2649, 120 L.

Ed. 2d 467 (1992). Consistent with that principle, in recognizing a right to same-sex marriage, *Obergefell v. Hodges* likewise acknowledged 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." 135 S. Ct. 2584, 2594, 2607, 192 L. Ed. 2d 609 (2015). Indeed, just last year *Masterpiece Cakeshop* reaffirmed that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." 138 S. Ct. at 1727.

Respondent the State of Washington disagrees with those well-established principles. It seeks to compel Petitioner Barronelle Stutzman—and other artists who wish to earn a living through their art—to adhere to its view of contested social and political issues. But "such compulsion . . . plainly violates the Constitution" and would "demean[]" artists by forcing them "to endorse ideas they find objectionable." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464, 201 L. Ed. 2d 924 (2018). Indeed, contrary to Washington's argument, allowing the free exchange of ideas is valuable in and of itself because "it furthers the search for truth." *Id.* at 2464; *see also Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) (Free Speech Clause exists "to assure unfettered interchange of ideas"). Reversal is warranted.

Argument

"If 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. Yet Washington seeks to do exactly that—compel Stutzman to create works of artistic expression that violate her deeply held convictions. Washington's public-accommodation defense is misplaced because this is not a case about public accommodation. Rather, it is about whether Washington can compel speech. Washington's attempt to do so plainly violates both Stutzman's right to free speech and the Free Exercise Clause. This Court should reverse the Superior Court's judgment to remedy Washington's "undue disrespect to [Stutzman's] sincere religious beliefs." *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

I. The First Amendment protects commissioned floral arrangements.

This case is about an artist's right not to speak. Artistic works—even those lacking an apparent message—have always received full First Amendment protection. Using flowers or any other medium to create custom designs to celebrate a wedding is an art, and contrary to Washington's view, such artistic endeavors are not subject to less protection than other speech. Moreover, regardless of whether the

decreased scrutiny for mere conduct with some expressive component applies, Washington's application of the Washington Law Against Discrimination (WLAD) would still violate the First Amendment because it amounts to unlawful "content-based" targeting. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010). Further, reversal is particularly warranted here because Washington's action does not merely prevent Stutzman from speaking, but seeks to "[f]orc[e]" her "to endorse ideas [she] find[s] objectionable." *Janus*, 138 S. Ct. at 2464. Therefore, reversal is warranted.

A. The freedom of expression protects commissioned artistic works, including floral arrangements.

Courts have long recognized that art is inherently expressive. Consistent with that principle, the First Amendment has long protected artistic works, even works that some might find offensive. *See, e.g.*, *Kois v. Wisconsin*, 408 U.S. 229, 231, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972). Thus, with very limited exceptions not present here, *see United States v. Stevens*, 559 U.S. 460, 468–69, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010), artistic works presumptively fall within the First Amendment's broad protections, *see, e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected" by the First Amendment).

Because Stutzman's floral arrangements are art, they are entitled to First Amendment protection.

1. Because artistic works are inherently expressive, they receive full protection under the freedom of expression.

The Supreme Court's precedents broadly define what qualifies as art. If a work has "artistic . . . value," *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), or merely "bears some of the earmarks of an attempt at serious art," *Kois*, 408 U.S. at 231, then the First Amendment's strong free-expression protection applies. The wide constitutional berth given to artistic expression is most evident with sexually explicit material: If it "has literary or scientific or artistic value," then it "may not be . . . denied constitutional protection." *Jacobellis v. Ohio*, 378 U.S. 184, 191, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

The First Amendment's protections apply equally to artistic expression that may not be literal speech. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."). Unlike with the more general category of "expressive conduct," *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 406, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), a "succinctly articulable message is not a condition" for an artistic work to be protected, *Hurley v. Irish-Am.*

Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); *see Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring in part and concurring in the judgment).

Art in its various forms is "unquestionably shielded" by the First Amendment—including nonsensical poetry, awkward instrumentals, or abstract paintings. *Hurley*, 515 U.S. at 569. Thus, the First Amendment protects even silent art, which "communicate[s] . . . by stripping away the [artwork's] content"—like the *White Paintings* by Robert Rauschenberg ("five paneled works painted on canvas in a smooth, unmodulated white") or John Cage's *4'33"* ("a soundless score," performed by an instrumentalist sitting silently onstage with her instrument). Enrique Armijo, *The Freedom of Non-Speech*, 33 Const. Comment 291, 291–93 (2018) (book review) (quotation marks omitted). 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 John Cage's decision to express himself through *4'33"*'s deliberate absence of sound." *Id.* at 318.

At the same time, not every "expressive" action a person takes qualifies as art. *Cf. United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). But at bottom, expression is protected when it has "serious" artistic value, *Miller*, 413 U.S. at 23–25, or "bears some of the earmarks of *an attempt* at serious art," *Kois*, 408 U.S. at 231

(emphasis added). Consequently, whenever an objective observer would recognize the speaker's subjective, genuine attempt to create art, the expression is entitled to First Amendment protection. The observer need not appreciate the message, beauty, technique, or anything else. *Cf. Cohen v. California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) ("[O]ne man's vulgarity is another's lyric.").

2. Commissioned floral arrangements are artistic works.

All art is expressive, "[t]he disposition or modification of things *by human skill*, to answer *the purpose intended*." *Art*, Noah Webster, *An American Dictionary of the English Language* (1828 ed.) (emphasis added), https://archive.org/details/americandictiona01websrich/page/190. When Stutzman agrees to create a custom floral arrangement for a wedding, she undoubtedly modifies "things by human skill" to express "the purpose intended"—the celebration of a wedding. Thus, Stutzman's creation of commissioned floral arrangements for weddings undoubtedly qualifies as protected artistic expression.

This is not a unique or novel view. Decades ago, the Department of Labor found 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). Indeed, for millennia 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. In recognition of this art's "prehistoric" lineage, the Governor of Massachusetts also proclaimed February 28 to be Floral Design Day, describing "[f]loral design [as] a unique art form," through which people can "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.

Moreover, floral-art events are common throughout the country. One of the largest is the annual Rose Parade in Pasadena, California, where "[e]very inch of every float must be covered with flowers or other natural materials." Pasadena Tournament of Roses, Rose Parade Participants (2017), https://perma.cc/G568-TE8P. And a number of museums 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. 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.

Like visual artists in other media, the floral-arrangement artist combines color, shape, and design to create moods or themes. Grace Rymer, *The Art of Floral Design* 6 (1963), https://hdl.handle.net/2027/coo.31924002821407. And like any other field of artistic endeavor, a body of theory governs artistic floral expression. *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"). Around the world, different schools of floral design have arisen with their own theoretical approaches. *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 *Ikebana*, from which other schools arose, with their own design philosophies). Indeed, a complex set of "rules" marks the artistic boundaries for floral-arrangement art. *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. And "harmony" and "unity" play a role as the artist must take care that the design matches the occasion. *Id.* at 12. By following such complex rules, artists create "good floral arrangement[s]" that "express[] . . . a theme or idea." *Id.* at 8. Even the choice of what kind of flower to use will express "a mood, feeling or idea." *Id.* at 12.

It is undisputed that—like other floral artists—Stutzman implements such artistic characteristics in her custom designs. *See* Appellants' Br. 4–8. Thus, like other floral artists, Stutzman creates art and her artistic expressions are entitled to full First Amendment protections.

B. The expressive-conduct test does not apply, but even if it did, the First Amendment protects commissioned floral arrangements.

This Court previously rejected Stutzman's free-speech claim based primarily on the "expressive conduct" test. *See State v. Arlene's Flowers*, 187 Wn. 2d 804, 831–38, 389 P.3d 543 (2017) (citing *Johnson*, 491 U.S. 397; *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (per curiam); and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)), *cert. granted, judgment vacated*, 138 S. Ct. 2671, 201 L. Ed. 2d 1067 (2018). But that test does not apply to art. Nor does it apply in cases, like this one, where a State has targeted artistic expression because of its content. Further, even if that test did apply, reversal would

still be warranted.

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 *Spence* test." Jed Rubenfield, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767, 773 (2001). Indeed, where the expressive medium is visual—whether it is painting, sculpture, or floral design—the "conduct" itself is art, 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.").

Visual art by its nature "always communicate[s] some idea or concept to those who view it," and therefore is "entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996). Speaking of painting, the Ninth Circuit has said, regardless of a message, "[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). As the Seventh Circuit put it, "the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace *purely artistic* as

well as political *expression*." *Piarowski v. Ill. Cmty. College Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (emphasis added). A piece of art that simply "express[es] the artist's vision of movement and color" receives no less First Amendment protection than "Picasso's condemnation of the horrors of war in *Guernica*." *White*, 500 F.3d at 956. "[A]rt for art's sake" receives constitutional protection. *Piarowski*, 759 F.2d at 628.

These principles have led the Courts of Appeals to apply the First Amendment's protections to art broadly defined. For example, in *Bery* the Second Circuit considered a law that "bar[red] visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license." *Id.* at 691. That court rejected the city's attempt to treat "visual art as mere 'merchandise' lacking in communicative concepts or ideas." *Id.* at 695. Without inquiring into whether any of the artists in that case communicated an articulable message through their work, it reversed the decision not to grant a preliminary injunction against that law. *See id.* at 698–99. The Ninth Circuit reached a similar conclusion when reviewing a similar law in *White*. 500 F.3d at 957.

The fact that Stutzman designs custom floral arrangements for weddings does not change the protection her art receives. In *Discount Inn, Inc. v. City of Chicago*, the Seventh Circuit rejected the "ridiculous" claim

that the First Amendment did not allow a city to prohibit property owners from allowing 11-inch weeds to overtake their land. 803 F.3d 317, 326 (2015). But that court made clear that a true floral designer would receive First Amendment protection for her work. If that plaintiff had "invented, planted, nurtured, dyed, clipped, or ha[d] otherwise beautified its weeds," or perhaps could show that "it exhibit[ed] or intend[ed] or aspire[d] to exhibit them," then the plants would have received constitutional protection. *Id.*

The connection of Stutzman's custom arrangements to weddings only heightens their inherent expressiveness. When the Ninth Circuit faced the issue, it had "no difficulty concluding that wedding ceremonies are protected expression under the First Amendment." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). That is 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." *Id.* Because the creation of custom floral arrangements for weddings is necessarily expressive, the expressive-conduct test does not apply.

Moreover, that Washington has targeted Stutzman's expression precisely because it disapproves of her message 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, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (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."). For instance, while Washington seeks to punish Stutzman for declining commissions to design floral arrangements that celebrate a message contrary to her faith-based view of marriage, Washington has declined to bring a similar action against the owner of Bedlam Coffee for refusing to serve Christians based on their religious beliefs. *See* Appellants' Br. 20–23 (describing his denial of service). Indeed, 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 sells and designs floral arrangements for same sex-couples; she simply declines to use her creative talents to celebrate a same-sex wedding. Appellants' Br. 8, 11. Thus, against that backdrop, Washington's actions amount to little more than unconstitutional viewpoint discrimination. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731.

Further, even if Stutzman's commissioned floral arranging were mere conduct—instead of art—her expression would still be entitled to First Amendment protection under the expressive-conduct test. Designing and creating a floral arrangements for weddings conveys messages of at least the same communicative quality as marching in a parade—and should be

equally protected by the First Amendment. *See Hurley*, 515 U.S. at 569–70; *cf. Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 505–06, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (treating pure symbolic act as "closely akin to pure speech . . . entitled to comprehensive protection under the First Amendment").

In the previous iteration of this case, this Court relied on an erroneous reading of *FAIR* to reach a contrary conclusion. *See Arlene's Flowers*, 187 Wn. 2d at 833. Yet *FAIR* simply "rejected the argument that requiring [a] group[] to provide a forum for third-party speech also required them to endorse that speech." *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring in part and concurring in the judgment). Contrary to this Court's conclusion, *FAIR* did not "suggest that the government can force speakers to alter their *own* message." *Id.* As the *FAIR* Court itself noted, the law in that case "neither limit[ed] what [the] law schools may say nor require[d] them to say anything." 547 U.S. at 60.

Where the law in *FAIR* only "affect[ed] what law schools must *do*," *id.*, the parade in *Hurley* was expressive in and of itself, 515 U.S. at 569–70. Thus, in contrast to the conduct in *FAIR*, *Hurley* recognized that the parade itself was expressive and that consequently there was no room left to apply the nondiscrimination law. The same is true here. No less than in *Masterpiece Cakeshop*, "[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." 138 S. Ct. at 1744 (Thomas, J., concurring in part and concurring in the judgment).

Designing and creating custom floral arrangements for weddings is expressive in and of itself and is protected by the First Amendment. Thus, even if the expressive conduct test applies, reversal is warranted.

C. Washington fails to show that compelling Stutzman to speak survives strict scrutiny.

At a minimum, the State's compulsion of speech here fails strict scrutiny because it is not narrowly tailored. 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 wedding. Indeed, the facts of this case 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 and never pay a dime for flowers." Appellants' Br. 12.

Moreover, Washington 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. Stutzman sells floral arrangements to all customers, regardless of sexual orientation, and she only objects to creating commissioned expression for same-sex weddings. *See* Appellants' Br. 11. Thus, Washington's action fails the narrow tailoring test. *See Hurley*, 515 U.S. at 572–73 (finding compelled expression unconstitutional where law makes "speech itself" the "public accommodation"). For these reasons, Washington's application of the WLAD here is unconstitutional compelled speech.

II. Compelling artists to create customized art for events that they cannot celebrate consistent with their religious beliefs also violates the Free Exercise Clause.

Not only does the State's application of the WLAD here violate Stutzman's right to free speech, it also impermissibly burdens her free exercise of religion. This Court previously 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. *Arlene's Flowers*, 187 Wn. 2d at 843, 849–52. Both those conclusions conflict with *Masterpiece Cakeshop*.

First, *Masterpiece Cakeshop* makes clear that strict scrutiny applies where, as here, a law is selectively applied to target religious expression.

See 138 S. Ct. at 1729–32. Indeed, as noted above and explained in greater detail in Stutzman's briefing, Washington has engaged in selective enforcement, targeting religious objectors while leaving others free to discriminate against the religious. *See supra* pp. 13–14; Appellants' Br. 18–25. That targeting alone requires strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (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, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990); *see Arlene's Flowers*, 187 Wn. 2d at 853. 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 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).

This Court refused to apply that doctrine because it found that Stutzman's free-expression claim failed. *Arlene's Flowers*, 187 Wn. 2d at

853–54. 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.

This case illustrates the need for a properly understood hybrid-rights doctrine. 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, as applied here, the WLAD fails strict scrutiny. As already discussed, Washington has not shown that same-sex couples cannot find artists to create works for their wedding ceremonies. *See supra* pp. 16–17.

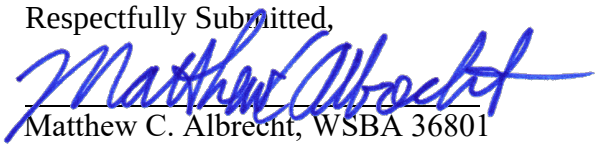
But Washington cannot satisfy strict scrutiny for still another reason. The same targeting of religion that triggers strict scrutiny makes Washington fail the compelling-interest analysis. *Lukumi Babalu Aye*, 508 U.S. at 547. By selectively enforcing the WLAD only against Stutzman, Washington demonstrates that it has no compelling interest in requiring her to comply with the WLAD. Appellant's Br. at 19. 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, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (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.

Conclusion

The Court should reverse the Superior Court's judgment and enter judgment in favor of Appellants.

March 5, 2019

Respectfully Submitted,



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March 5, 2019

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March 05, 2019 - 4:11 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Robert Ingersoll, et al. v. Arlene's Flowers, Inc., et al.
Superior Court Case Number:	13-2-00953-3

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