

FILED
SUPREME COURT
STATE OF WASHINGTON
3/4/2019 4:35 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
3/13/2019
BY SUSAN L. CARLSON
CLERK

No 91615-2

**SUPREME COURT
OF THE STATE OF WASHINGTON**

State of Washington,

Plaintiff and Appellee,

v.

Arlene's Flowers, Inc., d/b/a/ Arlene's Flowers and Gifts, and
Barronelle Stutzman,

Defendants and Appellants.

Robert Ingersoll and Curt Freed,

Complainants and Real Parties in Interest

AMICUS CURIAE BRIEF OF RYAN T. ANDERSON, Ph.D.
AND PRO-LIFE ADVOCATES FROM THE CHRISTIAN AND
AFRICAN-AMERICAN COMMUNITIES IN SUPPORT OF
ARLENE'S FLOWERS, INC.

Keith A. Kemper
Ellis | Li | McKinstry
2025 First Avenue, Penthouse A
Seattle, WA 98121-3125
(206) 682-0565
www.elmlaw.com

Charles S. LiMandri, Esq.
B. Dean Wilson
Freedom of Conscience
Defense Fund
P.O. Box 9520
Rancho Santa Fe, CA 92067
(858) 759-9948
www.fcdflegal.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CASES	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	v
SUMMARY OF ARGUMENT	1
ARGUMENT	4
The Context of Race-Based Refusals	4
Opposition to Interracial Marriage Was Part of a Racist System; Support for Conjugal Marriage Is Not Anti-Anything	8
The Social Costs of Protections for Conjugal Marriage Supporters	12
A Better Comparison: Pro-Life Medicine and Sex Discrimination	14
CONCLUSION	17
APPENDIX	
DESCRIPTION OF AMICI	A1

TABLE OF CASES

Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993)..... 17
Obergefell v. Hodges, 135 S. Ct. 2584 (2015)..... 1, 3, 13, 18
Loving v. Virginia, 388 U.S. 1 (1967)..... 4

TABLE OF AUTHORITIES

Civil Rights Act of 1964..... 6

* * *

Ryan T. Anderson, Disagreement is Not Always Discrimination:
On Masterpiece Cakeshop and the Analogy to Interracial Marriage
16 GEORGETOWN J.L. & PUB. POL’Y, 123 (2018)..... 1, 11

Ryan T. Anderson, HOW TO THINK ABOUT SEXUAL ORIENTATION
AND GENDER IDENTITY (SOGI) POLICIES AND RELIGIOUS FREEDOM
(Heritage Found. 2017)..... 13

Francis Beckwith, *Interracial Marriage and Same-Sex Marriage*,
PUBLIC DISCOURSE (May 21, 2010)..... 8

*Professors of History George Chauncey, Nancy F. Cott et al.,
as Amici Curiae Supporting Petitioners*, LAWRENCE V. TEXAS,
539 U.S. 558 (2003) (No. 02102)..... 12

George Chauncey, GAY NEW YORK: GENDER, URBAN
CULTURE, AND THE MAKING OF THE GAY MALE WORLD,
1890–1940 173, 337 (1994)..... 12

John Corvino, Ryan T. Anderson & Sherif Girgis, DEBATING
RELIGIOUS LIBERTY AND DISCRIMINATION (2017) 7, 13

NAACP Legal Defense & Educational Fund, Inc.,
as Amici Curiae Supporting Appellees, Charlie Craig v.
Masterpiece Cakeshop, Inc. et al, No. 2014CA135
(Colo. App. Ct. Feb. 17, 2015)..... 6, 7

Nancy F. Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND
THE NATION 483 (2000)..... 9

John Finnis, HUMAN RIGHTS AND COMMON GOOD: COLLECTED
ESSAYS 315–388 (2011)..... 4

Sherif Girgis, Ryan T. Anderson & Robert P. George, WHAT IS
MARRIAGE? MAN AND WOMAN: A DEFENSE (2012)..... 11

Andrew Koppelman, A ZOMBIE IN THE SUPREME COURT:
THE ELANE PHOTOGRAPHY CERT DENIAL, 7 Ala. C.R. & C.L.
L. Rev. 77, 77–95 (2016)..... 13

Doug Laycock, <i>What Arizona SB1062 Actually Said</i> , THE WASH. POST (Feb. 27, 2014).....	14
Plato, THE DIALOGUES OF PLATO 407 (Benjamin Jowett Trans. & Ed., Oxford Univ. 1953)	10
Plutarch, <i>Life of Solon</i> , in 20 PLUTARCH’S LIVES 4 (Loeb Ed. 1961).....	10
Plutarch, <i>Erotikas</i> , in 20 PLUTARCH’S LIVES 769 (Loeb Ed. 1961).....	10
G. Robina Quale, A HISTORY OF MARRIAGE SYSTEMS 2 (1988)	9, 10
Musonius Rufus, <i>Discourses XIII</i> A, in Cora E. Lutz, MUSONIUS RUFUS “THE ROMAN SOCRATES” (Yale Univ. Press 1947).....	10
Irving G. Tragen, <i>Statutory Prohibitions against Interracial Marriage</i> , 32 CAL. L. REV. 269 (1944).....	8
Robin Fretwell Wilson, <i>Matters of Conscience: Lessons for Same-Sex Marriage From the Healthcare Context</i> , SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 101 (Douglas Laycock et al. eds., 2008).....	14
John Witte Jr., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2d ed. 2012).....	4
Scott Yenor, FAMILY POLITICS: THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT (2011).....	4

INTEREST OF AMICI

Ryan T. Anderson, Ph.D. (A.B., Princeton University, M.A., Ph.D. University of Notre Dame) is a researcher who has published extensively on marriage and religious liberty. With Sherif Girgis and Robert P. George, he is co-author of “What Is Marriage?” (*Harvard Journal of Law and Public Policy*, 2011), and of *What Is Marriage? Man and Woman: A Defense* (Encounter Books, 2012). He is author of *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery, 2015), and of “Marriage, the Court, and the Future” (*Harvard Journal of Law and Public Policy*, 2017). With Sherif Girgis, in counterpoint to John Corvino, he is co-author of *Debating Religious Liberty and Discrimination* (Oxford University Press, 2017), from which portions of this brief are drawn. His dissertation was entitled *Neither Liberal Nor Libertarian: A Natural Law Approach to Social Justice and Economic Rights*.

The Pro-Life Advocates from the Christian and African-American Communities are a diverse group of civil rights leaders, churches, pastors, religious organizations, community groups and individuals. The 22 Amici, listed in the appendix, include organizations that serve Americans who believe in conjugal marriage and the right of citizens to operate their businesses in accordance with this belief. Many of the people amici serve own businesses and work in the wedding industry. Amici offer this brief to provide the Court historical context on marriage, the scourge of racism, and how First Amendment protections in the racism and conjugal marriage

contexts differ. Amici believe it is vital for the Court to review this brief in support of the views of millions of citizens who have worked against racism and reject the proposition that support for conjugal marriage is similar to racism.

SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, the Supreme Court correctly noted that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”¹ At stake in this case is whether these people and their decent and honorable beliefs may, consistent with the protections of the U.S. Constitution, be so disparaged by state governments. Can a state force citizens to express support for same-sex marriage through artistic products?²

Advocates argue that, if this Court finds a First Amendment right to decline to use one’s talents to create artistic floral arrangements for the celebration of a same-sex wedding, then the Court would also have to protect a florist’s choice to refuse to prepare an arrangement for an interracial wedding.

But no such conclusion follows.

Opposition to interracial marriage developed as one aspect of a larger system of racism and white supremacy. Such opposition is an outlier from the historic understanding and practice of marriage, founded not on decent and honorable premises but on bigotry. By contrast, support for marriage as the conjugal union of husband and wife has been a human universal until just recently, regardless of views about sexual orientation.

¹ 135 S. Ct. 2584, 2602 (2015).

² This brief is drawn from Ryan T. Anderson, *Disagreement is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage* 16 GEORGETOWN J.L. & PUB. POL’Y, 123 (2018).

That view of marriage is based on the capacity that a man and a woman possess to unite in a conjugal act, create new life, and unite that new life with both a mother and a father. Whether ultimately sound or not, this understanding of marriage is reasonable, is based on decent and honorable premises, and disparages no one.

To grant an exemption from laws banning discrimination on the basis of race would risk undermining the valid purpose of those laws and perpetuate the myth that blacks are inferior to whites. This myth—a modern one—contributed to a culture where the badges and incidents of slavery persisted long after abolition, as African-Americans continued to confront a host of disadvantages. By contrast, First Amendment protections for people who act in accordance with the conjugal understanding of marriage need not undermine the valid purposes of laws that ban discrimination on the basis of sexual orientation because, unlike racist opposition to interracial marriage, support for conjugal marriage isn't inherently anti-gay.

A ruling in favor of Barronelle Stutzman sends no message about the supposed inferiority of people who identify as gay—indeed, it sends no message about them or their sexual orientations at all. It would simply say that citizens who support the historic understanding of marriage are not bigots and that the state may not drive them out of business or civic life. Such a ruling doesn't threaten the social status of people who identify as gay or their community's profound and still-growing political influence.

The more appropriate legislative comparison to the present case is with laws that ban discrimination on the basis of sex. If a state applied such

a law in a way that forced a Catholic hospital to perform abortions or forced a crisis pregnancy center to advertise abortion, a ruling by a court in favor of a right to not perform or promote abortion would not undermine the valid purposes of a sex nondiscrimination policy because pro-life medicine isn't, by its nature, sexist. A ruling in favor of a pro-life citizen sends no message about patriarchy or female subordination; it says simply that pro-life citizens are not bigots and that the state may not exclude them from public life. A ruling to protect the liberties of citizens who support a conjugal understanding of marriage would do the same.

This Court's refusal to grant First Amendment protections to Stutzman would teach society that her reasonable convictions and associated conduct are so gravely unjust that they cannot be tolerated in a pluralistic society. No doubt many people oppose Stutzman's beliefs. But, as the United States Supreme Court noted in *Obergefell*, when that "personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the state itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." This Court should not allow the State of Washington to so demean and stigmatize supporters of conjugal marriage.

ARGUMENT

The Context of Race-Based Refusals

Invidious discrimination is rooted in unfair, socially debilitating attitudes or ideas about individuals' worth, proper social status, abilities, or actions. Bans on interracial marriage were paradigms of invidious discrimination.³ They were based on beliefs about African Americans, especially their supposed incompetence and threat to whites, particularly white women. A florist refusing to arrange flowers for an interracial wedding discriminates invidiously on the basis of race—invidious because marriage by its nature has nothing to do with race. Such behavior would perpetuate racist myths that are unfair and socially debilitating.

Barronelle Stutzman, by contrast, didn't discriminate, nor did she even distinguish, on the basis of sexual *orientation*. Rather, she refused to create artistic floral arrangements to celebrate a same-sex wedding because she objects to same-sex marriage, based on her common Christian belief that a same-sex wedding isn't marital.⁴ A person espousing the conjugal understanding of marriage need not hold any idea or attitude about gay people, whether good or bad, explicit or implicit. The conjugal view of marriage would accept as valid a union between a man identifying as gay

³ See *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴ See John Finnis, HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS 315–388 (2011); John Witte Jr., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2d ed. 2012); Scott Yenor, FAMILY POLITICS: THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT (2011).

and a woman identifying as lesbian, if the other criteria were met, since those orientations are not the basis on which a marriage is determined.

Stutzman's reason for refusing to artistically arrange flowers for a same-sex wedding is manifestly *not* to avoid contact with gay people on equal terms. She gladly served this couple, knowing they identified as gay, for almost a decade. Stutzman wasn't trying to avoid people who identify as gay, she was simply trying to avoid complicity in what she considers one distortion of marriage among others. While some may refuse for malicious or bigoted reasons, it's unfair to assume that actions based on the conjugal understanding of marriage are actually premised on ideas hostile to people who identify as gay. Indeed, refusals to create floral arrangements for same-sex wedding celebrations needn't be based on beliefs or attitudes about people who identify as gay at all.

Therefore, affirming Stutzman's First Amendment rights here would not undermine any of the valid purposes of the state's sexual orientation nondiscrimination law. By contrast, an exemption for Stutzman had she refused any and all transactions with customers who identify as gay would undermine the valid purpose of such a law. When the underlying act discriminates on the basis of sexual orientation *per se* and has no root in "decent and honorable" beliefs, an exemption could, like exemptions in the cases of racism, send the signal that citizens who identify as gay count as less than other citizens. But acting in accordance with the conviction that marriage is the union of husband and wife sends no such message.

By contrast, professionals who declined to serve interracial weddings also declined to treat African Americans equally in a host of other circumstances. Frequently they refused to serve them at all. Racists did not simply object to interracial marriage; they objected to contact with African Americans on an equal footing.

History makes this fact clear. Before the Civil War, a dehumanizing regime of race-based chattel slavery existed in many states. After abolition, Jim Crow laws enforced race-based segregation. Those laws mandated the separation of blacks from whites, preventing them from associating or contracting with one another. Even after the United States Supreme Court began striking down Jim Crow laws, integration did not come easily or willingly in many instances. Public policy, therefore, sought to eliminate racial discrimination even when committed by private actors on private property.

Before the enactment of the Civil Rights Act of 1964, racial segregation was rampant and entrenched in American society, and African Americans were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social harms without justification, without market forces acting as a corrective, and with the government's tacit and often explicit backing. As the NAACP points out:

African Americans were relegated to second-class citizenship by a system of laws, ordinances, and customs that segregated white and African-American people in every possible area of life, including places of public accommodation. This system of segregation was

designed to prevent African Americans from breaking the racial hierarchy established during slavery.⁵

African Americans were denied loans, kept out of decent homes, and denied job opportunities—except as servants, janitors, and manual laborers. These material harms both built on and fortified the social harms of a culture corrupted by views of white supremacy that treated blacks as less intelligent, less skilled, and in some respects less human. Making it harder for blacks and whites to mingle on equal terms was not just incidental, it was the whole point. Discrimination was so pervasive that the risks of lost economic opportunities or sullied reputation were nonexistent to those who engaged in it. Social and market forces, instead of punishing discrimination, rewarded it through the collusion of many whites, with a heavy assist from the state. Given the irrelevance of race to almost any transaction, and given the widespread and flagrant racial animus of the time, no claims of benign motives are plausible.⁶

The context of Stutzman’s case could not be more different. There is no heterosexual-supremacist movement akin to the movement for white supremacy. There has never been an equivalent of Jim Crow for people who identify as gay. There are no denials of their right to vote, no lynching campaigns, no signs over water fountains saying “Gay” and “Straight.” This is not to deny that those identify as gay have experienced bigotry or that

⁵ *Brief of NAACP Legal Defense & Educational Fund, Inc., as Amici Curiae Supporting Appellees, Charlie Craig v. Masterpiece Cakeshop, Inc. et al*, No. 2014CA135 (Colo. App. Ct. Feb. 17, 2015), https://www.aclu.org/sites/default/files/field_document/0007-2015-02-17_09-05-34_2015.02.13_ldf_amicus_brief_as_filed.pdf.

⁶ See John Corvino, Ryan T. Anderson & Sherif Girgis, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 162–184 (2017).

they still do. Anti-gay bigotry exists and, as with all forms of bigotry, must be exposed and opposed. Actual instances of anti-gay bigotry that persist to the present day simply cannot be compared to the systematic material and social harms wrought by racism. That said, Stutzman's informed and conscientious conduct does not qualify as an instance of bigotry—I refer again to her history of cordial commerce with the complainants—and the result of enforcing Stutzman's First Amendment rights would neither undermine the social standing of people who identify as gay nor the valid purposes of a sexual orientation nondiscrimination policy.

**Opposition to Interracial Marriage Was Part of a Racist System;
Support for Conjugal Marriage Is Not Anti-Anything**

In addition to the categorical difference between a racist refusing to serve African American customers and Stutzman declining to participate in a wedding for those she is otherwise happy to serve, there is also a difference in the historical wrongs which the legislation is attempting to set right. Bans on interracial marriage were a startling exception in world history.

English common law, which the U.S. inherited, imposed no barriers to interracial marriage.⁷ Anti-miscegenation statutes first appeared in Maryland in 1661 as the result of African slavery.⁸ Since then, they have

⁷ Irving G. Tragen, *Statutory Prohibitions Against Interracial Marriage*, 32 CAL. L. REV. 269 (1944).

⁸ Francis Beckwith, *Interracial Marriage and Same-Sex Marriage*, PUB. DISCOURSE (May 21, 2010), <http://www.thepublicdiscourse.com/2010/05/1324/>.
[<https://perma.cc/F9C7-PTCX>].

existed *only* in societies with a racial caste system, in connection with race-based slavery. Thus, Harvard historian Nancy Cott observes:

It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class. . . . But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations.⁹

This history shows that anti-miscegenation laws were part of an effort to hold a race of people in a condition of economic and political inferiority and servitude. They were openly premised on the idea that contact with African Americans on an equal plane was wrong. That idea, and its basic premises in the supposed inferiority of African Americans, is the essence of bigotry. Actions based on such bigotry contribute to the wider culture of dehumanization and subordination that antidiscrimination law is justly aimed to combat.

The convictions behind Stutzman's conscience claims could not form a sharper contrast with the rationale of racism. While anti-miscegenation laws were a modern anomaly contrasted with a more tolerant view throughout Western history, it is the conjugal version of marriage which is the historical norm and the life-companion model a modern aberration. As one historian observes: "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be

⁹ Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 483 (2000).

found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature.”¹⁰

Great thinkers, too, affirm the special value of male-female unions as the foundations of family life. Plato wrote favorably of legislating to have people “couple[], male and female, and lovingly pair together, and live the rest of their lives” together.¹¹ Plutarch wrote of marriage as “a union of life between man and woman for the delights of love and the begetting of children.”¹² He considered marriage a distinct form of friendship embodied in the “physical union” of intercourse.¹³ For Musonius Rufus, the first-century Roman Stoic, a “husband and wife” should “come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them . . . even their own bodies.”¹⁴

Not one of these thinkers was Jewish or Christian or in contact with Abrahamic religion. Nor were they ignorant of same-sex sexual relations, which were common in their societies. These thinkers were not motivated by sectarian religious concerns, ignorance, or hostility of any type toward anyone. They and other great thinkers—of both East and West, from

¹⁰ G. Robina Quale, *A HISTORY OF MARRIAGE SYSTEMS* 2 (1988).

¹¹ 4 Plato, *THE DIALOGUES OF PLATO* 407 (Benjamin Jowett trans. & ed., Oxford Univ. 1953) (c. 360 B.C.).

¹² Plutarch, *Life of Solon*, in 20 *PLUTARCH’S LIVES* 4 (Loeb ed. 1961) (c. 100 A.D.).

¹³ Plutarch, *Erotikas*, in 20 *PLUTARCH’S LIVES* 769 (Loeb ed. 1961) (c. 100 A.D.).

¹⁴ Musonius Rufus, *Discourses XIII*A, in Cora E. Lutz, *MUSONIUS RUFUS “THE ROMAN SOCRATES”* (Yale Univ. Press 1947), available at https://sites.google.com/site/thestoiclife/the_teachers/musonius-rufus/lectures/13-0.

Augustine and Aquinas, Maimonides and al-Farabi, and Luther and Calvin, to Locke and Kant, Confucius, Gandhi and Martin Luther King—held the honest and reasoned conviction that male-female sexual bonds had distinctive value for individuals and society.

To note this history is not merely to say something about the past but to shed light on the present. Today’s beliefs about conjugal marriage aren’t isolated. They grew organically out of millennia-old religious and moral traditions that taught the distinct value of male-female union; of mothers and fathers; of joining man and woman as one flesh, and generations as one family.¹⁵ Whether those principles are ultimately sound or unsound, they continue to provide intelligible reasons to affirm conjugal marriage that have nothing to do with animus.

Barronnelle Stutzman and many other citizens today are shaped by, and find guidance and motivation in, those traditions—be it the classical Western legal-philosophical traditions stretching from Plato to our day, or the Jewish or Christian or Muslim traditions. History demonstrates that these intellectual streams do not have bigotry as their source. It is therefore unfair to assume that the citizens they nourish are bigots. Thus, a ruling in favor of believers in conjugal marriage need not send any negative social message about anyone. The only message sent in protections for such citizens is that Americans of good will reasonably disagree about marriage,

¹⁵ See Sherif Girgis, Ryan T. Anderson & Robert P. George, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012); Anderson, *supra*.

whereas the message sent in opposition to interracial marriage is that one group of citizens is inferior to another.

Whether or not bigotry motivates other opponents of same sex marriage, the facts show that this is not Stutzman's reason. It would be unfair to punish her and similar professionals who believe in conjugal marriage. After all, as George Chauncey and other historians of the LGBT movement, who submitted their research to advance gay rights litigation, noted, "widespread discrimination" based on "homosexual status developed only in the twentieth century . . . and peaked from the 1930s to the 1960s."¹⁶ Bigotry is not the reasonable, much less the most natural, motive to read into Stutzman's decision to decline to do wedding flowers for a couple she served for nearly a decade. And a ruling in her favor would not have negative social costs, as the next sections explain.

The Social Costs of Protections for Conjugal Marriage Supporters

A ruling in favor of Barronelle Stutzman sends no message about the supposed inferiority of people who identify as gay—indeed, it sends no message about them or their sexual orientations at all. It says that citizens who support the historic understanding of marriage are not bigots and that the state may not exclude them from civic life.

¹⁶ *Brief for Professors of History George Chauncey, Nancy F. Cott et al., as Amici Curiae Supporting Petitioners, Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), <http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll2/id/23>; [<https://perma.cc/3QKF-MN6E>]; see also George Chauncey, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940* 173, 337 (1994).

Nor would such a ruling create the deleterious social effects which would accompany, for instance, an exemption granted to a racist florist refusing to serve African Americans. Conjugal marriage conscience protections do not undermine *Obergefell v. Hodges* or gay equality. A favorable ruling for Stutzman reflects the reality that, as the United States Supreme Court noted in *Obergefell*, citizens of good will reasonably disagree about marriage.

First Amendment protections for people who act according to the conjugal understanding of marriage need not undermine laws that ban discrimination on the basis of sexual orientation—with the stated purpose of eliminating the public effects of anti-gay bigotry—because support for conjugal marriage is not anti-gay.¹⁷ Professor Andrew Koppelman, a longtime LGBT advocate, acknowledges as much:

Hardly any of these cases have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. There have been no claims of a right to simply refuse to deal with gay people.¹⁸

Those three sentences shatter the strongest argument for denying a First Amendment protection in cases like these. There is no incipient movement ready to deny people who identify as gay access to markets, goods, and

¹⁷ See Corvino, Anderson & Girgis, *supra*; see also Ryan T. Anderson, HOW TO THINK ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI) POLICIES AND RELIGIOUS FREEDOM, (The Heritage Found. 2017), <http://www.heritage.org/sites/default/files/2017-03/BG3194.pdf>.

¹⁸ Andrew Koppelman, A ZOMBIE IN THE SUPREME COURT: THE ELANE PHOTOGRAPHY CERT DENIAL, 7 ALA. C.R. & C.L. L. REV. 77, 77–95 (2016).

services. Indeed, there is a reason why there have been “no claims of a right to simply refuse to deal with gay people”: no faith teaches it. As law professor and religious liberty expert Douglas Laycock, a same-sex marriage supporter, notes:

I know of no American religious group that teaches discrimination against gays as such, and few judges would be persuaded of the sincerity of such a claim. The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling.¹⁹

As a result, Robin Fretwell Wilson, another law and religion expert, explains, “[t]he religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.”²⁰

The refusals of bakers, caterers, or florists like Stutzman, have nothing like the sweep or shape of historical racist practices. They do not span every domain but focus on sex and marriage. Within that domain, they are refusing to communicate certain messages about marriage and weddings as a public, social, and—to them—religious *event* and *activity*, not avoiding contact with certain *people*. As Professor Koppelman writes, “[t]hese people are not homophobic bigots who want to hurt gay people.”²¹

A Better Comparison: Pro-Life Medicine and Sex Discrimination

Instead of comparing Stutzman’s case to an opponent of interracial

¹⁹ Doug Laycock, *What Arizona SB1062 Actually Said*, THE WASH. POST (Feb. 27, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/>.

²⁰ Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 101 (Douglas Laycock et al. eds., 2008).

²¹ Koppelman, *supra*, at 13.

marriage, a more instructive comparison would be pro-life citizens punished under a state's prohibition of discrimination on the basis of sex. Even those who argue that abortion access gives women equal opportunities in the market and public life will recognize that pro-life medicine and messages are not inspired by, nor do they contribute to, a culture of sexism or patriarchy

If a state were to apply a prohibition of discrimination on the basis of sex in a way that attempted to compel a Catholic hospital to perform abortions or a crisis pregnancy center to advertise abortion, no one should suggest that a ruling recognizing a right to refuse to perform or promote abortion would undermine the valid purposes of a sex nondiscrimination policy.

Pro-life objection to abortion is built on no premises about women, let alone discriminatory premises. Objection to abortion is based on a belief about the equal dignity of all human beings, including unborn babies. True or untrue, it has nothing to do with sexism. Just so, a First Amendment protection for pro-life citizens would not undermine any of the valid purposes of a sex nondiscrimination statute. Citizens who object to abortion do not do so out of hostility to women. A ruling in their favor would send no message about patriarchy or female subordination. Instead, it would simply affirm that pro-life citizens are not bigots and that the state may not exclude them from public life.

The same is true in the case of Stutzman. Her beliefs about marriage are built on no premises about sexual orientation or people who identify as

gay—let alone discriminatory premises. She distinguishes based on whether the relationship is, in her religious understanding, a marital one, which turns on whether it involves a man and woman. This understanding does not rely on sexual *orientation*, but does rely on the *sex* of the partners, a distinction which is not invidious.

Therefore, while First Amendment protections for Stutzman would not undermine any of the legitimate purposes of sex *or* sexual orientation nondiscrimination statutes, a ruling against her would undermine her equal status in civil society just as a ruling against pro-life citizens would. Feminists for Life certainly do not think their convictions are sexist, and pro-choice people might agree for now. But the more that academia, the media, and government officials declare—and operate on the assumption—that opposing abortion is sexist, the more it will take on that meaning by the general public.

So, too, if this Court were to rule against Stutzman it would tar citizens who support the conjugal understanding of marriage with the charge of bigotry. And in doing so, it would teach everyone else in America that Stutzman and people like her are bigots, and that the only reason one could support conjugal marriage is because one is anti-gay. This would inflict dignitary harm on Stutzman and millions of citizens like her that would result in serious material harm—loss of businesses, professional vocations, and livelihoods.

This Court should respect the full and equal status of those who support conjugal marriage. Ruling against Stutzman would be to

institutionalize the policy that citizens can be forced to violate their beliefs or be excluded from public life in various ways for their support of a traditional view which even its opponents recognize is not the result of bigotry and is unlike historical racism. Such exclusion would begin in this case with the commercial sphere, but in future cases perhaps it will be social services, education, and professional licensure. This reasoning would eventually lead to stripping those who support the conjugal understanding of marriage of their rights as full and equal citizens.

CONCLUSION

The United States has reached compromises on similarly difficult moral and cultural issues before. Following *Roe*, Americans refused to use sex antidiscrimination law as a sword to punish pro-lifers. In 1993, in *Bray v. Alexandria Women's Health Clinic*, the Supreme Court resolutely rejected the argument that pro-lifers are inherently discriminatory: “[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women.”

The same is true when it comes to marriage as the union of husband and wife: there are common and respectable reasons for supporting it that have nothing to do with hatred or condescension. But this is not true when it comes to opposition to interracial marriage—and this is where the analogies to racism break down. When the Supreme Court struck down bans on interracial marriage, it did not say that opposition to interracial marriage was based on “decent and honorable premises” and held “in good faith by

reasonable and sincere people here and throughout the world.”²² It did not say it, because it could not say it, because anti-miscegenation laws were malicious in intent, scientifically erroneous, and historically aberrant.

Marriage as the union of a male husband and female wife has been a universal human practice, regardless of views about sexual orientation. The view of marriage based on the capacity possessed by a man and a woman to unite as one-flesh, create new life, and care for that new life as both a mother and a father. This belief is reasonable, based on decent and honorable premises, and disparaging of no one.

When instances of anti-gay bigotry happen, they should certainly be condemned. But support for marriage as the union of husband and wife is not anti-gay. Just as we have combated sexism without treating pro-life medicine as sexist, we can combat anti-gay bigotry without treating Orthodox Jews, Roman Catholics, Muslims, Evangelicals, and Latter-day Saints as bigots. Professor Koppelman says that he has “worked very hard to create a regime in which it’s safe to be gay” and for similar reasons “would also like that regime to be one that’s safe for religious dissenters.”²³

²² *Obergefell*, 135 S. Ct. at 2594.

²³ Andrew Koppelman, *supra*, at 621.

APPENDIX

DESCRIPTION OF AMICI

1. Coalition of African American Pastors (Rev. William Owens, Sr., President) is a grass-roots movement of Christians who believe in traditional family values, such as supporting the role of religion in American public life, protecting the lives of the unborn, and defending the sacred institution of marriage. CAAP welcomes believers of all races and backgrounds and works to encourage Christians everywhere to take a stand for their beliefs and convictions.

2. Civil Rights for The Unborn (“CRTU”) (Evangelist Alveda King, President): Dr. Alveda King is the niece of Reverend Martin Luther King, Jr., and the daughter of civil rights leader A.D. King. She is a committed guardian of her family’s civil rights legacy. Throughout her upbringing, she saw firsthand the ills and evils of racism. She persevered through those difficulties, eventually becoming a college professor, an author, a stage and screen actress, and a Georgia State Legislator. CRTU’s mission is to inform African-Americans and the general public about the harmful impact of abortion and artificial family planning and educate the community about the sanctity of life.

3. Douglass Leadership Institute (Rev. Dean Nelson, Chairman): Social and economic crises are shaking black communities, and DLI is working with leaders to prevent these flashpoints. Today a generation of DLI leaders are being trained to lead and advocate for faith-based solutions. DLI exists to educate, equip and empower faith-based leaders to embrace and apply biblical principles to life and in the marketplace.

4. Traditional Values Coalition Education and Legal Institute (Rev. Louis P. Sheldon, Chairman): For almost 40 years, Rev. Lou and Beverly Sheldon have been the voice of traditional family values within the halls of government. The Sheldon's have worked consistently in an effort to maintain the Biblical principles that have been the cornerstone of America and its foundation. Traditional Values Coalition-Education

and Legal Institute represents tens of thousands of churches to educate and inform voters on how to take action and make their voices heard.

5. The Radiance Foundation (Ryan Bomberger, Founder) is an educational, life-affirming, non-profit organization. Through creative ad campaigns, powerful multimedia presentations, fearless journalism, and compassionate community outreaches, it illuminates the intrinsic value each person possesses. It educates audiences about pressing societal issues and how they impact the understanding of God-given purpose. It motivates people to peacefully and positively put awareness into action.

6. The Restoration Project (Catherine Davis, Founder and President) is dedicated to rebuilding families, promoting the sanctity of life, and providing related educational materials, in order to transform American public policy and culture's impact on black life into a restored culture of uprightness, evenhandedness, and virtue.

7. Urban Family Communications (Wilbert Addison, Jr., Director) has a mission to inform and empower families to grow into mature disciples by wisely applying Biblical truth to its issues and interests. UFC is committed to the goal of spiritual revitalization of urban communities.

8. Freedom's Journal Institute For The Study of Faith and Public Policy (Eric M. Wallace, Ph.D and Jennifer Wallace, Founders) seeks to advance the Kingdom of God through sociopolitical education and engagement rooted in a Biblical worldview and envisions a day when all Bible believing Christians, regardless of ethnicity, stand for what they say and believe, and actively engage in the political process that represents them.

9. Salt and Light Council (Dran Reese, President) is a ministry that mobilizes groups of like-minded, concerned Christians to pray, become educated, and take action on issues that undermine our biblical values and constitutional liberties.

10. STAND: Staying True to America's National Destiny (E.W. Jackson, Founder) seeks to unite Americans as one nation under God for the preservation and defense of our Judeo-Christian heritage and

values, Constitution, free market economy, national security and the freedom of every citizen.

11. Urban Red, Inc. (Rev. Ralph J. Chittams, Sr., Executive Director) is a 501(c)(4) non-profit organization whose mission is to educate American citizens on the electoral process with an eye towards recruiting and equipping them to run for elected office.

12. National Black Pro-Life Coalition seeks, through education and awareness media campaigns, public events, private events, political action, lobbying and the coalition building of pro-life and pro-family advocacy groups, to restore life, family and hope in the black community.

13. Gator PAC (Colonel Rob Maness, Chairman) seeks to inspire and recruit conservative activists and citizen leaders, who are committed to accountability in governing and constitutional principles, promote and advocate for policies of liberty, limited government, and prosperity, and support constitutionally conservative candidates.

14. TECN-TV (Kenneth McClenton, President): TECN-TV is an urban conservative TV network whose mission is to spread the good news of Christianity, conservatism, capitalism, constitutionalism, and individual sovereignty throughout the world.

15. Rich in Mercy Ministries (Rev. Brian Walker, Pastor Denise Walker, Co-Founders): The Rich in Mercy Abortion and Miscarriage Recovery program is a safe, non-judgmental place for participants to be healed and made whole again through the merciful love and power of Jesus Christ. It is a Biblically-saturated 8-week program where participants are introduced to a grace-filled, merciful God who loves them so much that He died to reconcile humanity back to Him and set us free from sin.

16. Black Conservative Federation (Dianté Johnson, President) is a network of activists who seek to expand the black conservative movement through political advocacy, community

engagement, economic stability, opportunities in education, and empowering black communities.

17. One Nation Back To God (Rev. C.L. Bryant, Founder):

A movement that captures the spirit of American exceptionalism with an emphasis on traditional morals and conservative political values.

18. Impact Ministry of The Triad (Ruth Mangiacapre, President) seeks to restore the foundations of America through intercession, mentoring, prophetic equipping, preaching, activation, teaching, and training.

19. Protect Life and Marriage Texas (Pastor Stephen Broden, Founder) believes that natural, traditional marriage is the union of one man and one woman.

20. Elijah List Ministries (Steve Shultz, Founder and President) exists to daily encourage God's people worldwide through God's prophetic voice.

21. Jesus Caucus (Rev. Clarence Mason Weaver, Founder): Believes in taking Bibles to the voting booth and reclaiming America's Judeo-Christian heritage.

22. Unhyphenated America (Christopher Harris, Executive Director) exists to fight against the destructive force of identity politics by promoting the unifying principles codified in the foundational documents of America.

ELLIS LI MCKINSTRY PLLC

March 04, 2019 - 4:35 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 91615-2
Appellate Court Case Title: Robert Ingersoll, et al. v. Arlene's Flowers, Inc., et al.
Superior Court Case Number: 13-2-00953-3

The following documents have been uploaded:

- 916152_Briefs_20190304163344SC184195_9382.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Amicus Curiae Brief.pdf
- 916152_Motion_20190304163344SC184195_6004.pdf
This File Contains:
Motion 1 - Other
The Original File Name was Motion for Leave.pdf

A copy of the uploaded files will be sent to:

- EGill@aclunc.org
- JAbernathy@FreedomFoundation.com
- Jamila.johnson@splcenter.org
- VLBabani@perkinscoie.com
- akeim@becketfund.org
- alanc@atg.wa.gov
- amici.cooper@outlook.com
- amit.ranade@hcmp.com
- anton.sorkin@emory.edu
- arossiter@adflegal.org
- attorneyappel@gmail.com
- bhandler@terrellmarshall.com
- beth@terrellmarshall.com
- bgould@kellerrohrback.com
- bmarvin@connelly-law.com
- caso@chapman.edu
- chelsdon@thehelsdonlawfirm.com
- chris.mammen@wbd-us.com
- csipos@perkinscoie.com
- cstoll@nclrights.org
- danhuntington@richter-wimberley.com
- daniel@fahzlaw.com
- daviddewhirst@gmail.com
- dlaycock@virginia.edu
- dperez@perkinscoie.com
- dshih@susmangodfrey.com
- dverm@becketfund.org
- echiang@aclu-wa.org
- feivey@3-cities.com

- feldman@pwrfl-law.com
- gahrend@ahrendlaw.com
- green@au.org
- hank@budgeandheipt.com
- hbalson@pilg.org
- iruiz@kellerrohrback.com
- ishapiro@cato.org
- jake.ewart@hcmp.com
- jcampbell@ADFlegal.org
- jconnelly@connelly-law.com
- jeastman@chapman.edu
- jessew@mhb.com
- jessica.ellsworth@hoganlovells.com
- jhelsdon@thehelsdonlawfirm.com
- jneedlel@wolfenet.com
- jpizer@lambdalegal.org
- jtedesco@ADFlegal.org
- judyg@atg.wa.gov
- jweber@cato.org
- kah@stokeslaw.com
- kaitlyn.golden@hoganlovells.com
- katskee@au.org
- kcolby@clsnet.org
- kim.gunning@columbialegal.org
- krista.stokes@hcmp.com
- kwaggoner@adflegal.org
- laura.szarmach@hoganlovells.com
- lawoffice@tomolmstead.com
- leccles@susmangodfrey.com
- lkhampradith@elmlaw.com
- lnowlin@aclu-wa.org
- map@pattersonbuchanan.com
- mark.aaron.goldfeder@emory.edu
- mark@holadylaw.com
- marshall@mcseylawfirm.com
- mcpartland.bryce@mcpartlandlaw.com
- mdeutschman@adl.org
- mpr@stokeslaw.com
- mrienzi@becketfund.org
- nicole.schiavo@hoganlovells.com
- noahp@atg.wa.gov
- noemiv@mhb.com
- pdolan@elmlaw.com
- pleadings@aclu-wa.org
- pmr@pattersonbuchanan.com
- rtucker@adflegal.org
- rzotti@maronmarvel.com
- scanet@ahrendlaw.com
- sfreeman@adl.org
- shendricks@klinedinstlaw.com
- smarnin@adl.org
- sminter@nclrights.org
- solson@klinedinstlaw.com
- tcborg@stthomas.edu

- toddb@atg.wa.gov
- valeriamcomie@gmail.com

Comments:

Sender Name: Linda Khampradith - Email: lkhampradith@elmlaw.com

Filing on Behalf of: Keith Allen Kemper - Email: kkemper@elmlaw.com (Alternate Email:)

Address:

2025 1st Avenue

PH A

SEATTLE, WA, 98121

Phone: (206) 682-0565

Note: The Filing Id is 20190304163344SC184195