No. 17-108

IN THE
Supreme Court of the United States

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN, *Petitioners*,
v.
STATE OF WASHINGTON, *Respondent*.

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

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF AMICUS CURIAE OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation is greatly concerned that certain state governments, as in this case, and also in No. 16-111, *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, are seeking to coerce behavior offensive to religious conscience by imposing crippling financial sanctions. In contrast to the cleansing of religious expression from the public sphere, this case represents the government reaching out beyond its own domain to obliterate the sphere of private religious conscience.

SUMMARY OF ARGUMENT

In its petition-stage amicus brief in *Masterpiece Cakeshop*, the Foundation discussed the potential conflict between free speech rights and anti-discrimination statutes:

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[1] Counsel for both petitioners and respondents have filed blanket consents. Counsel of record have received timely notice of the intent to file. Rule 37.2(a). No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief. Rule 37.6.

> [O]ne scholar has observed, '[t]he rise of equal access rights nevertheless does not mandate the fall of individual liberties.' Consequently, it appears that this dichotomy between two classes of liberties is in serious need of direction. In fact, the free speech rights that come into conflict with anti-discrimination statutes are exactly the kind of rights this Court has sought to protect in its precedent.

Foundation for Moral Law Amicus Brief, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111, at 4 (Aug. 22, 2016) (footnote omitted). *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

In this case, the Washington Supreme Court has restricted an individual's ability, both personally and in her business, to exercise her religion according to the dictates of her own conscience. Instead, that court has affirmed the imposition of draconian financial penalties on a principled refusal, grounded in religious faith, to take part in a wedding ceremony that celebrates what the Bible identifies as an abomination. *Leviticus* 18:22. The State commands: "Conform to the new view of marriage or be sanctioned to the point of bankruptcy!" The State tolerates many forms of untoward behavior, but no room can be found in the judicial inn for conscientious refusal to ratify behavior that the Bible condemns.

Like *Masterpiece Cakeshop*, this case illustrates vividly the clash between anti-discrimination statutes and First Amendment rights of speech and religion.

ARGUMENT

I. Washington's anti-discrimination law violates petitioners' First Amendment rights to speech and religion.

The Washington Supreme Court's ruling in this case conflicts with basic Supreme Court precedent regarding the right to free exercise of religion, thereby creating a conflict appropriate for this Court to resolve.

The Washington Supreme Court fundamentally erred in elevating and expanding a right not found in the Constitution, same-sex marriage, above the most basic rights expressly set forth therein: speech and religious conscience.

The Washington Supreme Court's ruling compels petitioners to violate their most basic beliefs or face ruinous economic penalties. The ruling strikes at the heart of free exercise, and like *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, if upheld by this Court, heralds a new era of First Amendment jurisprudence in which those with sincere religious objections to certain "government approved" activities "will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and

schools." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting).

Religion is "the duty which we owe to our Creator and the Manner of discharging it" and "can be directed only by reason and conviction not by force or violence." *Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (1947) (Rutledge, J., dissenting) (App'x), quoting from Madison's *Memorial and Remonstrance*, quoting in turn the *Virginia Declaration of Rights*, Art. 16. Escaping religious persecution was a central motivation of many of the original settlers of this country.

The Washington Supreme Court concluded that compelling petitioners to furnish a floral arrangement for a same-sex wedding was not a significant enough infringement of their free exercise of religion to require balancing the interests in conflict. The court reasoned that "the legislature has provided no indication in the text of the WLAD [Washington Law Against Discrimination] that it intended to import a fact-specific, case-by-case, constitutional balancing test into the statute." *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 555 (Wash. 2017).

Relying on the legislature's failure to import a balancing test into the statute and the business context of the speech at issue, the Washington Supreme Court essentially revoked petitioner's constitutional rights. First Amendment rights, however, do not depend for their efficacy on legislative approval.

II. Petitioners' floral arrangements are expressive activity protected by the free speech clause of the First Amendment.

Petitioners' floral arrangements qualify as expressive activity. Supported by the record, their petition explains:

> 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.

Petition for a Writ of Certiorari, *Arlene's Flowers, Inc. v. Washington*, No. 17-108 (July 14, 2017), at 8. Barronelle puts her heart and soul into creating a unique floral arrangement for a wedding. By doing so, she intentionally glorifies God who has invested the marriage ceremony with its beauty and dignity.

The Washington Supreme Court said that petitioners did not have the protection of the First Amendment because the production of floral arrangements for weddings amounts to conduct that is not inherently expressive. But Barronelle's prior history of a friendly business relationship with respondents Ingersoll and Freed is undeniable evidence that her declining to create a wedding arrangement for them derived not from personal animus but from deeply held religious beliefs.

In a case construing the conscientious objection provision of the Selective Service Act, the Court stated that the statute "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace" if they were to act contrary to their convictions. *Welsh v. United States*, 398 U.S. 333, 344 (1970). Welsh's beliefs, though not religious per se, were held to be as strong for him as traditional religious convictions. *Id.* at 343.

In *Welsh* the Court subordinated the interest in providing for the common defense to an individual's deeply-held but nonreligious beliefs. *A fortiori*, a state public accommodations law, whose importance is certainly far less compelling than that of national defense,[2] should have to give way before deeply held religious beliefs that are specifically shielded by the First Amendment from government prohibition.

The Washington Supreme Court concluded that the petitioners' situation was similar to that of the law schools in *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR),* 547 U.S. 47 (2006). The Court's conclusion is simply incorrect, for the *FAIR* case is entirely distinguishable from this one. The law schools were not compelled to engage in expressive or religious speech but only to provide a meeting room for military recruiters.

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[2] *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation.").

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), gay rights groups sought the protection of a Massachusetts public accommodation law to march in the Boston St. Patrick's Day parade under their own banner. The Court held that forcing the parade organizers to include the gay rights group "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The Court explained that, "like a composer, the Council selects the expressive units of the parade from potential participants." *Id.* at 574. And the choices of what messages to include and to exclude "is enough to invoke [the Council's] right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.*

This case is the inverse of *Hurley*. Instead of the organizer of the same-sex wedding excluding petitioners from participating in the event, they are using state anti-discrimination law to *force their participation*. If the organizers of a gay pride parade invited Barronelle to use her unique floral art to decorate floats celebrating their lifestyle and she declined, could the State force her to participate without offending *Hurley*? Can someone who does not want to participate in a parade be forced to march in it?

Wedding ceremonies are expressive conduct. In our culture, even the most private wedding ceremonies traditionally have conveyed a message of an enduring covenant of love blessed by God.

Contrary to the Washington Supreme Court's opinion, it is likely that an "outside observer" would see a decision by Arlene's Flowers to participate at Ingersoll and Freed's wedding ceremony as a particularized message of approval. But Barronelle cannot participate in conveying that message without violating her religious conscience. And the State of Washington may not compel her to do so. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.[3]

Barronelle has no animus against homosexual status per se, but does not wish to be forced to affirmatively approve that behavior. In other words, she has no objection to other people saluting the flag but does not wish to be compelled to make that affirmative statement herself. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Two examples will illustrate this distinction.

Suppose a strict Jewish couple owns a kosher restaurant which complies with public

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[3] Petitioners might well be concerned that acquiescing to state pressure in this instance might preclude them from objecting to further ungodly demands in the future. James Madison advised in 1785 that "it is proper to take alarm at the first experiment on our liberties. ... The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents." A Memorial and Remonstrance, in 1 *Letters and Other Writings of James Madison* 163 (1865).

accommodation laws by serving all customers, whether those customers are of the Jewish faith or not. In other words, the restaurant does not discriminate based on the status of its customers. However, forcing the restaurant to cater an affair requiring it to serve pork involves affirmative conduct that would be a violation of the religious conscience of the restaurant owners.

Or suppose a religious university complies with anti-discrimination laws by allowing mixed race dating, a status issue. However, requiring all students to date someone of another race (or religion) would involve the forcing of conduct on those who may have a religious conviction against such.

In the same way, petitioners have no issue with selling flowers to those of a certain status, but requiring them to lend their artistic skills to create floral arrangements for a same-sex wedding compels participation, a "forced march" in *Hurley* terms, in violation of religious conscience.

III. The Washington Supreme Court's ruling conflicts with this Court's jurisprudence on the level of scrutiny to apply in hybrid rights cases.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), this Court held that strict scrutiny need not be applied to laws of general application that incidentally infringe the free exercise of religion. But the Court made an exception for "hybrid" situations, namely "the Free Exercise Clause in conjunction with other constitutional

protections, such as freedom of speech and of the press." *Id.* at 881. The Court specifically identified as one of those exceptions "cases prohibiting compelled expression, decided exclusively upon free speech grounds, [that] have also involved freedom of religion." *Id.* at 882 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia Bd. of Education v. Barnette*, 319 U. S. 624 (1943)). The WLAD, as applied in this case to compel *religious* speech, qualifies as a hybrid exception under *Smith* and must therefore satisfy strict scrutiny.

Indeed, this Court has expressly acknowledged the importance of respecting the expressive rights of individuals who object to same-sex marriage on religious grounds. Justice Kennedy stated for the majority in *Obergefell v. Hodges*:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

135 S. Ct. 2584, 2607 (2015),

If people of faith may continue to express with utmost conviction their opposition to same-sex marriage, then Barronelle Stutzman must likewise be free to reject an order to create a floral arrangement for a same-sex wedding that offends her core religious beliefs. The Washington Supreme Court's ruling conflicts with *Obergefell's* declaration that those with religious objections to same-sex marriage would be free to advocate that message. But the State of Washington requires petitioners to affirmatively endorse such ceremonies.

IV. The Washington Supreme Court, contrary to this Court's precedent, gave insufficient weight to religious conscience.

In *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1981), a Jehovah's Witness quit his employment when forced to work directly on weapons production in violation of his religious beliefs. Even though other members of his faith felt such employment was acceptable, Thomas did not. This Court did not question his decision, stating that "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. Similarly, in this case, Barronelle's religious reasons for declining to provide a flower arrangement for a same-sex wedding are not "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715. Further, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714.

In *Thomas* the conscience of the petitioner perceived a difference between producing the raw materials that went into weapons production and working directly on manufacturing tank turrets. *Id.* at 715. In the same way, the petitioners in this case readily agree that it would be acceptable to serve the homosexual community and the community at large in nearly any other circumstance (including non-Christian wedding ceremonies), but not in the celebration of a same-sex wedding. As Thomas drew a line his conscience would not allow him to cross, so have petitioners in this case.

> We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

Id. at 715.

One person who holds religious objections to same-sex marriage may see no conflict between her beliefs and creating a floral arrangement for a same-sex wedding. Another equally sincere believer might not object to such as long as she is not required to attend the wedding. Still another might find all of these scenarios offensive.

The record shows that Barronelle is a believer in Christian marriage. She considered the use of her

talents for Ingersoll and Freed's wedding ceremony to be incompatible with her religious beliefs and that she would sin against God if she were to create a floral arrangement for a same-sex wedding. Courts may not question her conscience on that point.

The Bible teaches that fearful consequences may attend violating one's conscience. Paul the Apostle, conveying advice and warnings to his young protégé, Timothy, stated:

> Holding faith, and a good conscience; which some having put away concerning faith have made shipwreck: Of whom is Hymenaeus and Alexander; whom I have delivered unto Satan, that they may learn not to blaspheme.

I *Timothy* 1:19-20. Such words are strange to modern ears. What does it mean to be "delivered unto Satan, that they may learn not to blaspheme?" And just what is the "shipwreck" of one's faith and how serious is it? We need not understand all the wording of this passage to understand that the Apostle Paul considers the violation of one's conscience, doing what one knows is wrong, as an extremely dangerous act.

The dictates of conscience vary with individuals. Paul warned that those who understood that eating food sacrificed to idols did not constitute worship of idols should not look down on those who thought otherwise. I *Corinthians* 8:4-7. "And through thy knowledge shall the weak brother perish, for whom Christ died? But when ye sin so against the brethren,

and wound their weak conscience, ye sin against Christ." I *Corinthians* 8:11-2.

How much greater a sin would it be for a strong believer to *command* the weaker to act directly against conscience? Because conscience is unique to the individual, the Justices of the Washington Supreme Court should not have compelled Barronelle to substitute their implicit moral belief that participation in a same-sex wedding is harmless to the soul for the contrary direction provided by her own conscience. Will they be able to answer to God for her? How can the State force Barronelle to violate her conscience and not at the same time offend the Free Exercise Clause?

Having established that Barronelle's religious scruples about providing artistic support for a same-sex wedding are cognizable under the First Amendment, the State's burden on that right is obvious. "Where the state ... put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 718.

The Washington Supreme Court, contrary to the First Amendment, has sought to commandeer Barronelle's conscience in support of actions she finds abhorrent to her faith.

CONCLUSION

The Washington Supreme Court's decision is incompatible with the First Amendment principles expressed in *Barnette*, *Hurley*, *Thomas*, and *Welsh*.

The judgments below should be reversed.

Respectfully submitted,

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