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.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Free Speech Clause permits a business to discriminate in making sales to the public in violation of a regulation of commercial conduct that does not target speech.

2. Whether the Free Exercise Clause permits a business to discriminate in making sales to the public in violation of a state law that is neutral and generally applicable.

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Petitioners ask this Court to grant certiorari and adopt a rule that would allow every tattoo parlor, print shop, hair salon, photography studio, bakery, law firm, or other business whose work involves a degree of "expression" to discriminate against customers. Petitioners' own expert admitted that their rationale would allow discrimination based not only on sexual orientation, but also race and other characteristics. App. 12a. No Court has ever accepted Petitioners' view, which would set back our country's civil rights gains immeasurably. The Court should deny review, or should hold the case pending *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, and emphatically reject the identical arguments made by the petitioners there.

STATEMENT

Robert Ingersoll and Curt Freed have been in a committed, romantic relationship since 2004. Pet. App. 3a. In 2012, after the people of the State of Washington voted to recognize equal civil marriage rights for same-sex couples, they decided to marry. Pet. App. 3a, 78a. On February 28, 2013, Ingersoll went to Arlene's Flowers, where he had been purchasing flowers for several years, to talk about purchasing flowers for his wedding. Pet. App. 4a, 79a. An employee told Ingersoll he would have to speak with the owner, Barronelle Stutzman, who was not present. Pet. App. 4a, 79a.

The next day Ingersoll returned to Arlene's Flowers to talk with Stutzman. But before he could talk about what kind of flowers he might want, she told him she would be unable to provide flowers for his

wedding because of her religious beliefs. Pet. App. 4a, 79a-81a. There was no mention of custom floral arrangements, no discussion as to whether flowers would be delivered or picked up, and no suggestion that Ingersoll would invite Stutzman to attend or participate in the wedding. Pet. App. 4a, 80a.

Stutzman's refusal to serve Ingersoll led Freed and Ingersoll to change their wedding plans, from a large ceremony in a rented venue to a small ceremony in their home, and to hold their wedding earlier because of their fear of protest. Pet. App. 6a, 78a, 81a.

Though Stutzman refused Ingersoll's request before knowing what he wanted, she later testified that she would have sold bulk flowers or "raw materials" to Ingersoll and Freed, but not a floral arrangement—even if another employee arranged the flowers. Pet. App. 6a. She stated that allowing Arlene's Flowers to provide floral arrangements would be tantamount to endorsing marriage equality for same-sex couples. Pet. App. 6a. Yet she denied that any similar endorsement might result if Arlene's Flowers provided flower arrangements for a Muslim wedding or an atheistic wedding. Pet. App. 7a, 27a. After the exchange with Ingersoll, Stutzman instituted an unwritten policy at Arlene's Flowers that "we don't take same sex marriages." Pet. App. 81a. Stutzman and Arlene's Flowers admitted that the unwritten policy will result in a future denial should another gay or lesbian couple seek their services. Pet. App. 109a.

When the Washington State Attorney General's Office became aware of Stutzman's refusal to sell flowers to Ingersoll and Freed, it sent her a letter asking her to sign an "Assurance of Discontinuance" to agree, without admitting any violation, that she would not discriminate against customers based on their sexual orientation; the letter also advised that there would be no further formal action or costs against her if she agreed. Pet. App. 7a, 81a-82a. She refused to sign the letter. Pet. App. 7a, 82a.

As a result, on April 9, 2013, the State filed a complaint for injunctive and other relief for violations of Washington's Consumer Protection Act, Wash. Rev. Code 19.86, and the Washington Law Against Discrimination (WLAD), Wash. Rev. Code 49.60, against both Arlene's Flowers and Stutzman. Pet. App. 7a, 82a. Ingersoll and Freed filed a separate action against Arlene's Flowers and Stutzman. Pet. App. 8a, 82a. Stutzman and Arlene's Flowers defended against both actions by claiming that their refusal to serve Ingersoll is protected by the First Amendment's protections for free speech, free association, and free exercise of religion.[1] Pet. App. 7a-8a, 122a. The trial court consolidated the cases, rejected the defenses raised by Stutzman and Arlene's Flowers, and ultimately entered judgment for the plaintiffs and a permanent injunction. Pet. App. 8a-

[1] Stutzman and Arlene's Flowers also raised defenses under the Fourteenth Amendment, Pet. App. 143a, the Washington Constitution, Pet. App. 133a, 146a, and on various other state law grounds, Pet. App. 156a-57a. They argue only the First Amendment defenses in their Petition. Pet. i.

9a, 58a-63a, 64a-68a, 69a-153a, 154a-203a. The injunctions prohibit Arlene's Flowers and Stutzman from discriminating, based on sexual orientation, in the sale of any goods or services they offer the public. Pet. App. 66a. They do not require Arlene's Flowers or Stutzman to sell any particular goods or services, such as wedding flowers. Pet. App. 66a.

The Washington Supreme Court affirmed in a unanimous decision entered February 16, 2017. Pet. App. 1a-57a. The court carefully reviewed this Court's decisions according free speech protection for conduct and found that they all dealt with conduct that was clearly expressive in and of itself, without further explanation. Pet. App. 30a-31a. The court found that the sale of floral arrangements does not fall within this category. Pet. App. 25a-27a (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 64 (2006)).

The Washington Supreme Court rejected Stutzman's free exercise claim, holding that Washington's Law Against Discrimination is both neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Pet. App. 34a-40a. Relying on those decisions, the court applied rational basis review and held that the WLAD is rationally related to the government's legitimate interest in ensuring equal access to public accommodations. Pet. App. 40a. But the court also explained that the WLAD would survive

even if strict scrutiny applied. Pet. App. 47a-51a. It described the government's compelling interest in eliminating discrimination in public accommodations and found there is no less restrictive means available to achieve that goal than to prohibit such discrimination. Pet. App. 47a-51a. The court explained that public accommodations laws do not simply guarantee access to goods or services. "[T]hey serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination that purpose would be fatally undermined." Pet. App. 51a (footnote omitted).

In this context, the court also rejected Stutzman's argument that Ingersoll was not harmed by her refusal to serve him, since other florists were willing to serve him. Pet. App. 50a-51a. It agreed with Ingersoll and Freed that "[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches." Pet. App. 51a (quoting Br. of Resp'ts Ingersoll and Freed at 32).

The Washington Supreme Court found no authority to support Stutzman's free association claim. Pet. App. 52a-53a. She relied exclusively on cases addressing membership in private clubs, which the court found inapposite. Pet. App. 52a. The court rejected Stutzman's claim because it found no decision by this Court holding that a commercial enterprise, open to the general public, is an "expressive association" for purposes of First Amendment protections. Pet. App. 53a.

Finally, the court rejected Stutzman's attempt to invoke the "hybrid rights" doctrine because she had not demonstrated that her rights to speech and association were burdened by the WLAD. Pet. App. 53a-54a. The court also reiterated its earlier conclusion that even if strict scrutiny applied, the WLAD satisfied that standard. Pet. App. 54a.

REASONS FOR DENYING THE PETITION

A. Petitioners Misrepresent the Facts and the Questions Presented

Petitioners ask this Court to grant certiorari based on multiple misrepresentations about the facts and thus about what questions are truly presented. The Court should decline.

First, Petitioners claim that this case presents questions about "the creation and sale of *custom floral arrangements*," a claim that is central to their arguments. Pet. i (emphasis added). But in reality, Stutzman refused to serve Ingersoll before she had any idea what he wanted, Pet. App. 4a, 79a-81a, and if she had spoken to him, she would have learned that he was considering buying unarranged flowers, App. 6a-7a. They never had that conversation because she refused to serve a gay couple for their wedding, period, regardless of what they wanted. App. 6a-7a. The question Petitioners claim is presented is thus not at issue. The Court should decline to address this hypothetical.

Similarly, Petitioners repeatedly claim that if Stutzman had served Ingersoll, she would have been required to "attend and participate in" the wedding. Pet. 10; *see also* Pet. i, 2, 15, 36. But Ingersoll never

asked her to do anything of the sort. Pet. App. 4a, 80a. Again, this aspect of the questions presented is entirely hypothetical.

Petitioners also assert that Stutzman "does not engage in sexual orientation discrimination," because although she refuses to serve gays and lesbians for their weddings, she "hires LGBT employees and serves LGBT clients" for other events. Pet. 2. This argument merits repudiation, not certiorari. If an employer said: "I am happy to hire women, just not as managers," or a photographer said: "I am happy to serve interracial couples, just not for their weddings," everyone would recognize that their behavior was still discrimination. The same is true here. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (explaining that if a restaurant offers a full menu to male customers, it would be absurd to allow it to "refuse to serve entrees to women, even if it will serve them appetizers") , *cert. denied*, 134 S. Ct. 1787 (2014); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 (Colo. App. 2015), *cert. granted* (June 26, 2017); *In re Gifford v. McCarthy*, 137 A.D.3d 30, 37-38 (N.Y. App. Div. 2016) (citing *Batavia Lodge 196, Loyal Order of Moose v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 145 (1974) (which addressed a lodge where African Americans were allowed onto the premises but were refused service at the bar inside)).

Finally, Petitioners claim that "the state has defamed [Stutzman] as a bigot, threatened to strip away everything she owns, and effectively excluded her and all like-minded people of faith from the State's 'economic life.'" Pet. 36. This is just false, and the Court should not reward such hyperbole.

The State first asked Stutzman to stop discriminating in a private letter, promising to take no further action against her if she agreed. She refused. Pet. App. 7a, 81a-82a. And although the State could have sought up to $2,000 in penalties and the full amount of its attorney fees, Wash. Rev. Code § 19.86.080, .140, the Attorney General requested and was awarded only $1 in attorney fees and a $1,000 penalty. Pet. App. 62a. The State seeks Stutzman's compliance with its laws against discrimination, not her economic ruin.

Most importantly, the State is not seeking to exclude Stutzman or other people of faith from economic life. Stutzman has multiple options that would allow her to continue her business, comply with state law, and follow her religious beliefs. For example, selling wedding flowers constitutes only about three percent of Stutzman's business. App. 1a-3a. If she simply stopped selling wedding flowers, she would be under no obligation to provide wedding flowers to gay and lesbian couples, because she would not offer that service to anyone. She has taken this option since this case began in 2013, declining to sell wedding flowers altogether, and she remains in business today. App. 10a-11a. If she is unwilling to continue foregoing this small portion of her business, she could also simply delegate the task of creating arrangements for all weddings to her employees, several of whom have no religious objection to providing wedding flowers to gay and lesbian couples. *See* App. 3a-6a, 8a-9a. In short, Washington law very much allows Stutzman to participate in economic life, it simply prohibits her

from discriminating in the sale of goods or services that she chooses to offer the public.

B. There is No Conflict to Resolve Because No Court Has Ever Adopted the Extreme Position Petitioners Advance Here

1. State Appellate Courts Have Uniformly Rejected Petitioners' Arguments, and for Good Reason

In recent years, there have been multiple challenges to state antidiscrimination statutes based on arguments similar to Petitioners'. Business owners operating places of public accommodation ranging from ballrooms to bed and breakfasts have asserted that the First Amendment requires States to allow them to refuse to serve gay and lesbian people.[2] Several cases have involved the refusal to provide wedding services, including venues, invitations, photography, cakes, and flowers.[3]

Courts in these cases have uniformly rejected the argument that "expression" in various wedding-related occupations allows these business owners to

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[2] *E.g.*, *In re Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016); *Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11-1-3103-12 ECN, 2013 WL 1614105 (Haw. Cir. Ct. Mar. 28, 2013), *review pending* (Haw. Ct. App. Case No. CAAP-13-0000806).

[3] *E.g.*, *Brush & Nib Studio, LC v. City of Phoenix*, CV 2016-052251 (Superior Court of Arizona, Maricopa County, Sept. 16, 2016) (invitations); *Bernstein v. Ocean Grove Camp Meeting Ass'n*, OAG Dkt. No. CRT 6145-09, DCR Dkt. No. PN34XB-03008 (N.J. OAG Civ. Rights Div. Order Oct. 23 2012) (venue).

deny service to gay and lesbian people. *See, e.g.*, *Elane Photography*, 309 P.3d 53; *In re Gifford*, 137 A.D.3d 30; *Masterpiece Cakeshop*, 370 P.3d 272. Courts have rejected this argument based not only on this Court's precedent, but also the untenable and bizarre consequences that follow from Petitioners' view.

To begin with, courts have recognized that accepting Petitioners' view would mean that any place of public accommodation that can claim its work involves expression—from tattoo parlors to lawyers, architects to hair salons—could turn customers away because of who they are. *E.g.*, *Elane Photography*, 309 P.3d at 71-72; *see also Hishon v. King & Spalding*, 467 U.S. 69, 71-73 (1984). Courts will be put in the impossible position of choosing which businesses are sufficiently "expressive" to obtain this right to discriminate. *See, e.g.*, *Elane Photography*, 309 P.3d at 71 ("Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.").

Courts have also uniformly rejected Petitioners' insidious suggestion that their discrimination is benign because other nearby businesses are willing to serve gay customers for their weddings. Pet. 1, 10-11 (discussing referral to nearby florists). This misguided argument ignores one of the crucial purposes of antidiscrimination laws. Such laws are not merely about access to goods and services, but about protecting all Americans from the "serious social and personal harms" of being told they are not deserving of equal treatment. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see also, e.g.*, *id.* at 625 (recognizing that discrimination "deprives persons of their individual dignity"; and noting "the deprivation of

personal dignity that surely accompanies denials of equal access to public establishments" (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964))). That is why the Washington Supreme Court "emphatically reject[ed] this argument," saying, "[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches." Pet. App. 51a (alteration by the Court) (quoting Br. of Resp'ts Ingersoll and Freed at 32).

In short, there is no disagreement in the courts about the central claims in this case, and with good reason: accepting Petitioners' view would roll back a century of progress our country has made in seeking to eradicate discrimination.

2. The Washington Supreme Court's Free Speech Analysis Creates No Conflict

Petitioners claim that the Washington Supreme Court created a conflict with other courts because it should first have asked whether "flower arrangements" qualify as "pure speech." Pet. 18-21. They then claim that other courts would have concluded that flower arrangements are pure speech, rather than applying the test from *Spence v. Washington*, 418 U.S. 405 (1974), to evaluate whether conduct is inherently expressive. Pet. 21-28. But Petitioners' whole argument starts from a mistaken premise, and their alleged conflicts are thus illusory.

Washington law does not regulate flower arrangements. It does not say how flowers may be arranged, require anyone to arrange flowers, or prohibit anyone from arranging flowers (unlike, for example, the cases Petitioners cite that address local

ordinances banning tattoo parlors[4]). It simply says that if a person chooses to sell flower arrangements or other goods, she cannot reject customers based on their race, religion, or sexual orientation. Wash. Rev. Code § 49.60.215; Wash. Rev. Code § 49.60.030(1).

The Washington Supreme Court therefore correctly recognized that "the regulated activity at issue in this case" is not the arranging of flowers, but rather "Stutzman's sale of wedding floral arrangements." Pet. App. 25a; Pet. App. 24a (explaining that "the conduct at issue here" is Petitioners' "commercial sale of floral wedding arrangements"). The Court went on to assess whether this "regulated activity" qualifies as "expressive conduct," correctly concluding that it does not. Pet. App. 25a.

Contrary to Petitioners' claims, this approach is entirely consistent with *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, 547 U.S. 47 (2006), which addressed a federal law—the Solomon Amendment—that required universities to give military recruiters the same access to students that they gave other recruiters. Petitioners claim that "no pure speech was directly at issue in that case," which was why the Court asked whether the universities' conduct was inherently expressive. Pet. 20. That argument is untenable. This Court's opinion made clear that the "recruiting assistance provided by the schools often include[d] elements of speech," such as sending emails or posting flyers. *FAIR*, 547 U.S. at

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[4] *See* Pet. 25-26 (citing *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010); *Buehrle v. City of Key West*, 813 F.3d 973 (11th Cir. 2015)).

61. Nonetheless, the Court held that the law was best analyzed as a "regulation of conduct." *FAIR*, 547 U.S. at 62 ("The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct . . . ."). The law was best analyzed as a regulation of conduct because "[t]he Solomon Amendment . . . does not dictate the content of the [universities'] speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.* at 62. The same is true here. Even if flowers are "pure speech," Washington law does not "dictate the content" of Petitioners' flowers at all, but rather simply requires that they be provided equally. Indeed, the *FAIR* Court used antidiscrimination laws like the WLAD as an example of the type of law that should be analyzed the same way, saying: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id.*

Cases addressing whether abstract painting or other art forms can qualify as pure speech are thus utterly inapposite, and the Washington Supreme Court did not disagree with any of their conclusions. Pet. 22-24. If antidiscrimination laws are best analyzed as regulations of conduct, even when they require a business owner to take down a sign or speak certain words (e.g., to speak to a customer they would prefer not to serve), the Washington court's approach here was plainly correct.

The *FAIR* Court reemphasized that this was the right approach when it considered whether the universities were being forced to convey another's message with which they disagreed. Rather than asking whether the emails or flyers the universities had to distribute were pure speech (which they obviously were), the Court held that the universities' "*decision to allow recruiters on campus* is not inherently expressive." *FAIR*, 547 U.S. at 64 (emphasis added). By the same token here, regardless of whether flower arrangements themselves are pure speech, Petitioners' decision to serve certain customers is neither pure speech nor inherently expressive. As the Washington court explained: "The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding. As Stutzman acknowledged at deposition, providing flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." Pet. App. 27a.

Petitioners' objection to the Washington court's application of the *Spence* expressive conduct test is thus entirely misplaced. Pet. 24-28. The Washington court applied that test just like the *FAIR* Court: after concluding that the laws at issue were best viewed as regulating Petitioners' conduct. That approach was not only consistent with *FAIR*, it was compelled by it. *See FAIR*, 547 U.S. at 62 (explaining that antidiscrimination laws are best viewed as regulating conduct).

Petitioners also claim a conflict because they say the Washington Supreme Court held that speech is entitled to less protection when created for profit. Pet. 28. That is not what the court held. The court simply held that the State was not regulating how Stutzman designed flowers, but how she sold them. Pet. App. 24a, 25a ("[T]he regulated activity at issue in this case [is] Stutzman's sale of wedding floral arrangements . . . ."). This distinction is critical because it highlights that the WLAD is not only viewpoint and content neutral—it is not targeted at speech at all. It simply prohibits Petitioners from refusing to serve people on the basis of their sexual orientation.

Finally, Petitioners' contention that the Washington court's holding conflicts with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), fails. As the Washington court noted, in *Hurley* the state was treating a parade itself as a place of "public accommodation." Pet. App. 29a. "The Court noted that the parade's 'inherent expressiveness' distinguished it from the places traditionally subject to public accommodations laws—places that provide 'publicly available goods, privileges, and services.' *Hurley* is therefore unavailing to Stutzman: her store is the kind of public accommodation that has traditionally been subject to antidiscrimination laws." Pet. App. 29a (citation omitted) (quoting *Hurley*, 515 U.S. at 568-72). In short, while Petitioners are correct that *Hurley*'s holding "boils down to the choice of a speaker not to propound a particular point of view," Pet. 31 (quoting *Hurley*, 515 U.S. at 575), that choice simply is not at stake here. Requiring Petitioners to serve customers

equally does not compel them "to propound a particular point of view." While spectators of a parade would perceive one of the parade presentations as "part of the whole," those observing businesses—even "expressive" ones—do not assume that the owner agrees with or endorses every customer's choices, as to aesthetics or views. *See, e.g.*, *Elane Photography*, 309 P.3d at 69-70 ("It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)."). Stutzman herself recognized as much when she admitted that serving a Muslim or atheist couple for their wedding does not endorse their views. App. 7a-8a.

In short, the Washington Supreme Court carefully applied this Court's free speech precedent, creating no conflict with decisions of this Court or any other.

3. The Washington Supreme Court's Free Exercise Analysis Creates No Conflict

Petitioners' free exercise claim is based on their dissatisfaction with *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), not on any departure from this Court's precedent by the Washington Supreme Court or any conflict as to how the *Smith* test should be applied.

Petitioners first claim that the Washington court exacerbated an existing conflict about how to apply *Smith*'s "hybrid rights doctrine." Pet. 32-35. But while Petitioners may be correct that courts have phrased the hybrid rights test differently, there has been virtual unanimity among lower courts in their refusal to use the exception as a basis to apply strict scrutiny. Indeed, not one of the cases Petitioners cite used the "hybrid rights exception" as a basis for applying strict scrutiny.[5] The Washington Supreme Court simply followed that near-universal practice. And the Washington court went on to find that even if the hybrid rights doctrine applied, Petitioners' claim would fail because the WLAD would survive strict scrutiny, a holding that is plainly correct (as explained below) and that makes this case a terrible vehicle to address the hybrid rights doctrine.

Recognizing that their claim must fail under *Smith*, Petitioners ask in the alternative that *Smith* be overruled. But this case provides no opportunity to address that question because, as the Washington

[5] The State is aware of only one case in which strict scrutiny has been applied under a hybrid rights theory, rather than because the other alleged constitutional violation independently warranted strict scrutiny. *Shepp v. Shepp*, 906 A.2d 1165 (Pa. 2006). In that case, a trial court forbade a father from speaking to his daughter about his religious beliefs concerning polygamy. *Id.* at 1168. The court found a free exercise/parental rights hybrid, concluded the analysis therefore was not controlled by *Smith*, and applied the standard used in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to rule for the father. *Shepp*, 906 A.2d at 1173.

court correctly held, the antidiscrimination laws at issue here would survive even under the pre-*Smith* strict scrutiny test.

The Washington court correctly concluded that the State has a compelling interest in eradicating discrimination in public accommodations and that there is no narrower means available to do so than banning such discrimination. This Court has repeatedly recognized a compelling state interest in public accommodation laws aimed at eradicating discrimination. For example, in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984), the Court emphasized the States' "strong historical commitment to eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." The Court explained that public accommodation laws protect "the State's citizenry from a number of serious social and personal harms," *id.* at 625, and that discrimination "cause[s] unique evils that government has a compelling interest to prevent," *id.* at 628. Thus, the central goal underlying public accommodation laws—eradication of discrimination—"plainly serves compelling state interests of the highest order." *Id* at 624; *see also New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 n.5 (1988) (recognizing "State's 'compelling interest' in combating invidious discrimination"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (public accommodation laws serve compelling state interests).

The Court has found public accommodation laws no less compelling where the discrimination at issue has been based on sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated a state constitutional amendment forbidding any law designed to protect a person from discrimination based on sexual orientation. The Court reasoned: "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631. There could be no rational basis for requiring sexual orientation to be excluded from public accommodation protections. *Id.* at 635.

Application of the WLAD is narrowly tailored to serve the State's compelling interest in eliminating discrimination. There is no realistic less restrictive means to end discrimination in public accommodations than to prohibit such discrimination. *See Roberts*, 468 U.S. at 625-27 (ban on discrimination upheld as least restrictive means to assure equal access to goods, privileges, and places of public accommodation). The WLAD contains exemptions designed to minimize its impact on religious belief and practice, including a provision that excludes from the definition of employer any nonprofit religious or sectarian organization. Wash. Rev. Code § 49.60.040(11). These exemptions help minimize conflict between the WLAD and religious belief. But the State is not required to eliminate such conflict

altogether, for to do so would require giving up on the goal of eliminating discrimination.[6]

In short, nothing in the Washington court's free exercise analysis creates any conflict with decisions of this Court or any other.

C. There Is No Reason to Grant Certiorari in this Case and Consolidate it with *Masterpiece Cakeshop* for Oral Argument

While the Court may decide to hold this case pending *Masterpiece Cakeshop*, there is no good reason to grant certiorari in this case and consolidate the two cases for oral argument.

First, doing so will not aid the Court's consideration of the legal issues because this case offers nothing not already present in *Masterpiece Cakeshop*. Even Petitioners admit that the legal issues in *Masterpiece Cakeshop* and this case "overlap." Pet. 37. In reality, they are essentially identical, as the questions presented reflect, as are the lawyers for the petitioners in both cases.

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[6] Discrimination founded on religious belief is still discrimination. For example, Stutzman's own Southern Baptist faith for decades offered a purportedly "reasoned religious distinction" for race discrimination. *See, e.g.*, Southern Baptist Convention, *Resolution On Racial Reconciliation On The 150th Anniversary Of The Southern Baptist Convention* (1995) (acknowledging that historically, "Christian morality [led] some Southern Baptists to believe that racial prejudice and discrimination are compatible with the Gospel"), http://www.sbc.net/resolutions/899/resolution-on-racial-reconciliation-on-the-150th-anniversary-of-the-southern-baptist-convention.

Second, in addition to presenting the same legal issues, the cases offer facts that do not differ in any respect that would influence the constitutional analysis. Both cases involve denial of service based on the customers' sexual orientation before the business owner knew what the customer wanted to order for their wedding. The only factual distinction Petitioners assert is evidence that Stutzman hired people who are gay, which she contends "negate[s] any concern that she discriminates against individuals based on their sexual orientation." Pet. 37-38. That is not only incorrect, as explained above, but it also is not a material difference. The petitioners in *Masterpiece Cakeshop* likewise argue that they do not discriminate based on sexual orientation and that the bakery is willing to interact with gay and lesbian individuals in some circumstances. Masterpiece Merits Br. 8-9.

Third, granting certiorari in this case and consolidating the cases for oral argument would cause significant practical problems. *Masterpiece Cakeshop* has been scheduled for argument on December 5, 2017. Even if this petition were accepted at the earliest possible conference, the merits briefing would not be completed until February of next year. *Masterpiece Cakeshop* would thus need to be removed from the December calendar and scheduled for argument some time next spring.

In short, there are no advantages to hearing this case together with *Masterpiece Cakeshop*. The Court should either deny review here or hold this case

pending *Masterpiece Cakeshop* and emphatically reject the petitioner's identical arguments in that case.

CONCLUSION

Petitioners ask this Court to dramatically change the law in order to allow discrimination by a wide range of businesses. Nothing in the Constitution requires this. The Court should reject Petitioners' invitation to take a giant leap backwards on civil rights.

RESPECTFULLY SUBMITTED.

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October 20, 2017

Appendix

CP 94— Deposition Of Barronelle Stutzman
Oct. 3, 2013, page 18

A. Yes, sir. Well, since I've had it.

Q. Since you've had it?

A. Yeah.

Q. Where was it before that?

A. It was down on the parkway.

Q. Okay. How long was it on the parkway?

A. Before there was business licenses.

Q. Okay. I won't ask to date that then. At the time it was down on the parkway was Arlene's Flowers involved in flowers for weddings?

A. I have no idea.

Q. Okay. Your mother didn't own it at that time?

A. No.

Q. Okay. How long during the time your mother and you have owned the store has Arlene's Flowers been involved in selling floral arrangements and services for weddings?

A. Always.

Q. Always. Okay. And have you always been involved in it yourself?

A. Involved in the weddings?

Q. Yes.

A. No, not until I was trained.

Q. Trained. Okay. How much of your business in the last five years if you can estimate for us is related to [end of CP 94]

CP 95— Deposition Of Barronelle Stutzman Oct. 3, 2013, page 19

weddings? Just approximately?

A. I don't keep track of that, so.

Q. Can you give me your best estimate, understanding that you don't keep precise track?

A. You want a percentage?

Q. If that works for you, yes.

A. I can't -- accurately I cannot give you a count.

Q. I'm not looking to pin you down to accurate.

A. Okay. If I'm guessing, maybe three percent.

Q. Okay. So just to put it in context. Arlene's Flowers sells flowers for all occasions; is that right?

A. Yes, sir.

Q. Okay. And all occasions includes things from the happy joy of babies to the sad occasion of people passing away and every life event in between. Is that fair?

A. Yes, sir.

Q. How many people work at Arlene's Flowers?

A. Average is ten.

Q. Okay. Does that go up and down seasonally?

A. Yes, sir.

Q. Okay. And how many hours a week do you work at the store these days?

A. I'm scheduled for Monday, Wednesday and Fridays.

Q. Full days on those days? [end of CP 95]

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CP 162— Deposition Of Barronelle Stutzman Oct. 3, 2013, page 86

attendance?

A. No.

Q. Do you remember who was in attendance?

A. No.

Q. Were most --

A. Not all of them.

Q. Fair enough. Who do you remember was there?

A. Most of them.

Q. Can you tell us approximately how many days after your meeting with Robert this meeting took place?

A. I believe it was the next day.

Q. Okay. And was Janell Becker present for the meeting?

A. Yes, sir.

Q. Was an employee by the name of Eryn present?

A. Yes, sir.

Q. What's Eryn's name?

A. Eryn Hugo. Hugo, I believe, H-U-G-O.

Q. Did you lead the meeting?

A. Yes, sir.

Q. What did you tell your employees at the meeting?

A. I told them what happened and that it was Darrell and my decision that we would not participate in that type of event. And that if they had any objections or they were concerned that if they wanted to quit they certainly had every right to do that. And that's the [end of CP 162]

CP 163— Deposition Of Barronelle Stutzman Oct. 3, 2013, page 87

sum of it.

Q. How long did the meeting last?

A. Not positive.

Q. Was it more than a few minutes?

A. Yes.

Q. More than an hour?

A. It could have been, not sure.

Q. Okay. Did your employees raise concerns at the meeting?

A. Yes, sir.

Q. What concerns did they raise?

A. They asked why.

Q. What did you tell them?

A. I told them because I believe biblically that a marriage is between a man and a woman.

Q. Did they respond to that?

A. Yes.

Q. Let me first ask you, who asked why?

A. I don't -- I don't recall who asked why.

Q. Can you remember the names of any of your employees who raised concerns at that meeting?

A. Eryn was one. And I believe Bridgett.

Q. What is Bridgett's last name?

A. Lawyer.

Q. Can you spell that for us, please [end of CP 163]

CP 164— Deposition Of Barronelle Stutzman Oct. 3, 2013, page 88

A. L-A-W-Y-E-R.

Q. Like our profession?

A. Uh-huh.

Q. She's not a lawyer though I take it?

A. No.

Q. Other than in family name. What concerns did Eryn raise?

A. Eryn didn't understand why.

Q. And did you tell her what you've told us already today?

A. Yes, sir.

Q. All right. Did she respond to that?

A. Yeah, she was very upset.

Q. Did she explain why she was upset?

A. She said she was bisexual and she didn't agree with the decision I had made and that she would give her two weeks' notice.

Q. And did she do so?

A. No, actually she came in and gave us a letter the next day.

Q. And did she cease being an employee at that time?

A. Yes, sir.

Q. Have you had any interaction with her since that time?

A. She's been in the store a couple times to visit.

Q. Okay. [end of CP 164]

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CP 321— Deposition Of Robert Ingersoll
Jan. 24, 2014, page 49

Q. And what was that?

A. Just some sticks or twigs in a vase and then we were going to do candles. We wanted to be very simple and understated.

Q. Did you tell Barronelle that you wanted to do sticks or twigs?

A. Barronelle never gave me the opportunity to discuss the flower arrangements.

Q. And if you were just doing sticks or twigs for your wedding arrangement, why did you drive all the way over to Arlene's Flowers to put together sticks and twigs?

A. Barronelle was our florist, we'd used her for awhile, and we knew that she would be able to get the things that we wanted.

Q. And you believed she would use her creativity to create something beautiful?

A. I did not at that time believe that we would have had her create them rather than to source them.

Q. By source them, do you just mean purchase the product?

A. Yes, that's what I mean.

Q. Premade?

A. Sticks and twigs aren't premade. You cut them.

Q. So they would need to be arranged, right? [end of CP 321]

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CP 431— Deposition Of Barronelle Stutzman Oct. 3, 2013, page 108

your name to go to a particular occasion; isn't that correct?

A. Why would I do that?

Q. If you didn't want your name attached to a particular event you could take your name, your sticker off the arrangement, couldn't you?

A. No.

Q. Why not?

A. Because if I'm not proud of my work, if I didn't want anybody to know where it came from, that would be the only reason I'd take my stickers off.

Q. When you sell flowers for the wedding of two atheists are you endorsing atheism?

A. I don't ask if they're atheist.

Q. Well, if you happened to know, regardless of whether you asked, you're selling flowers to people who are nonbelievers are you endorsing nonbelief?

A. No.

Q. If you sell flowers for the wedding of a Muslim couple are you endorsing Muslim as a religion?

A. No.

Q. Islam as a religion?

A. No.

MR. SCHOWENGERDT: Mike, could you clarify for the proceedings, are you talking in the [end of CP 431]

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CP 547— Declaration Of Barronelle Stutzman Dec. 8 2014, page 14

requests to other florists.

57. Rob's request is the only same-sex wedding request Arlene's received before this lawsuit began. And Rob's request is the only same-sex wedding

request Arlene's declined before this lawsuit began. As a result, between the time of Rob's request and the initiation of this lawsuit, I did not have to decline a request to participate in a same-sex wedding ceremony different from Rob's request. So during that time and before, I did not have to confront the issue whether Arlene's would provide any services for same-sex wedding ceremonies except a request for Arlene's full wedding support.

58. But Arlene's will sell flowers and create custom arrangements for homosexual and bisexual customers just as it always has. Arlene's will also sell flowers for same-sex wedding ceremonies as well. But neither I nor my employees under my direction will use our imagination and artistic skill to intimately participate in a same-sex wedding ceremony because of my religious beliefs.

59. After Rob's partner posted his thoughts concerning my decision on Facebook, our store began to receive many hate-filled phone calls, emails, and Facebook messages. Some of these messages contained explicit threats against our safety, including a threat to burn down the shop. I did not respond to any of these negative messages or engage in any way with those making threats. Because of these, we used the help of a private security firm to keep my employees and me safe. A few of those emails are attached as Exhibit 10 to the declaration of Kristen Waggoner.

60. Shortly after the news media publicized my decision to refer Rob to [end of CP 547]

CP 548— Declaration Of Barronelle Stutzman Dec. 8 2014, page 15

another florist because of my religious beliefs, the Attorney General's office sent me a letter, demanding that I agree to participate in same-sex ceremonies or face court action and penalties and sign an assurance stating the same. Because of my faith, I could not agree to the Attorney General's demands and did not sign the assurance.

61. I cannot participate in same-sex wedding ceremonies without violating my religious beliefs, and I cannot allow my business and employees to participate in same-sex wedding ceremonies on Arlene's behalf without violating my religious beliefs. This is true even if I am fined or ordered to do so.

62. If necessary, I would close my business and stop participating in all weddings before violating my religious beliefs.

63. Indeed, after this lawsuit against me and my business began, Arlene's instituted a policy of turning down requests to provide service or support for any wedding, except weddings for my immediate family members. Arlene's will not provide any floral wedding services or support for any customers besides my immediate family until this case ends.

64. After this lawsuit began, Arlene's has received requests to provide services and support for same-sex wedding ceremonies and opposite-sex wedding ceremonies. But Arlene's declined all these requests, including the requests about same-sex wedding ceremonies, because of Arlene's interim policy—initiated because of and after this lawsuit—to

decline wedding requests from anyone besides my immediate family. [end of CP 548]

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CP 2155—Deposition Of Mark David Hall, Ph.D., Dec. 1, 2014, page 90

Q. Sure. Take exactly the same facts as you described them. But instead of Curt Freed being a man, substitute in a Japanese American woman or a Hispanic woman.

And if Ms. Stutsman had refused to sell flowers to Mr. Ingersoll because he was marrying someone of a different race, and she thinks the Bible says people of different races shouldn't get married, are you -- is it your position that that is the kind of religious belief that should be accommodated, despite the law against discrimination?

A. Right. So I'm glad you restated it in that way. And what I was trying to lay out by saying you have stated trans (sic) versus religious conviction, I can imagine and would even say I think this is my position that the State has a greater interest in combating these sort of miscegenation laws that it does in combating a woman who doesn't want to participate in the same-sex ceremony.

So I could imagine saying a religious accommodation would be granted in one case, but not the other.

Q. So, if they were of a different race, then there should be no religious accommodation. But

because they happen to be -- instead of an interracial [end of CP 2155]

CP 2156— Deposition Of Mark David Hall, Ph.D., Dec. 1, 2014, page 91

couple they happen to be a gay couple, that now their civil rights should not be protected to the same degree? That's your opinion?

A. What I think I would say is this. That the State has an interest in the varying weights in prohibiting different sorts of discrimination. And I can see that it's being greater in the case of -- of interracial marriage than in the case of same-sex marriage.

But I suppose when push comes to shove, I'm a pretty doggone powerful advocate of religious liberty. And so I would, in fact, argue for religious accommodation, in this case -- particularly in the case of an interracial marriage, particularly if there are plenty of alternatives available to that couple.

Q. Same hypothetical, but instead of a Japanese-American woman, it's a -- it's a -- it's Mr. Ingersoll, who I -- I will profess to you I don't know what religious affiliation he has, if any. But let's assume he's a Protestant Christian for this. And he's marrying a Jewish woman. And I know there are people who interpret the Bible to say interfaith marriages should -- are not to be recognized.

Same question. Do you believe that Ms. Stutzman should be granted a religious [end of CP 2156]