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 FOR THE CATO INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND CONSOLIDATION WITH *MASTERPIECE CAKESHOP*

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QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Creating Custom Flower Arrangements and Baking Custom Wedding Cakes Both Constitute Artistic Expression That Is Protected by the First Amendment 4

II. Both Cases Concern the Extent to Which the Government May Use Anti-Discrimination Law to Compel Business Owners to Participate in Same-Sex Wedding Ceremonies to Which They Object 7

III. Reviewing These Cases Together Would Help the Court in Its Analysis and Provide Much-Needed Guidance to the Lower Courts 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Cohen v. California,
403 U.S. 15 (1971) 4

Erie v. Pap's A.M.,
529 U.S. 277 (2000) 4

First Covenant Church v. City of Seattle,
840 P.2d 174 (Wash. 1992) 9

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 5

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952) 6

Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, No. 16-111
(cert. granted June 26, 2017) 2

Ortiz v. New Mexico,
749 P.2d 80 (N.M. 1988) 9

Rumsfeld v. FAIR,
547 U.S. 47 (2004) 5

Schad v. Borough of Mt. Ephraim,
452 U.S. 61 (1981) 6

Se. Promotions Ltd. v. Conrad,
420 U.S. 546 (1975) 6

State v. Arlene's Flowers, Inc.,
389 P.3d 543 (Wash. 2017) 7

Stromberg v. California,
283 U.S. 359 (1931) 4

Texas v. Johnson,
491 U.S. 397 (1989) 4

Tinker v. Des Moines Indep. Cmty. Schl. Dist.,
393 U.S. 503 (1969) 4

United States v. O'Brien,
391 U.S. 367 (1968) 4

Virginia v. Black,
538 U.S. 343 (2003) 4

Walker v. Tex. Div., Sons of Confed. Veterans, Inc.,
135 S. Ct. 2239 (2015) 8

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 6

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 2, 7, 8

Wooley v. Maynard,
430 U.S. 705 (1977) 2, 8, 9

Other Authorities

Petition for Writ of Certiorari, *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*,
No. 16-111 (July 22, 2016) 6

Petition for Writ of Certiorari, *Arlene's Flowers, Inc. v. Washington*, No. 17-108 (July 14, 2017) .. 5, 6

The Bridal Foundation, Jane Packer,
http://bit.ly/2uQYKEk 5-6

INTEREST OF *AMICUS CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

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The **Individual Rights Foundation** is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

This case concerns *amici* because it implicates the First Amendment's protection against compelled expressive activity.

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[1] Rule 37 statement: All parties lodged blanket consenting to the filing of *amicus* briefs. No counsel for any party authored any of this brief; *amici* alone funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, like the already-granted *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 16-111 (cert. granted June 26, 2017), concerns a state's attempt to compel a private individual to express support for ideas that are anathema to their sincerely held religious convictions in violation of the First Amendment. Floral design is a form of artistic expression akin to painting or sculpture, and by mandating that the petitioner here, Barronelle Stutzman, create custom flower arrangements in celebration of same-sex marriage ceremonies or be forced out of business, the Washington Supreme Court has effectively undermined this Court's declaration that speech compulsions are just as unconstitutional as speech restrictions. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that even "the passive act of carrying the state motto on a license plate . . . . 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Barronelle Stutzman has been a floral-design artist for more than 40 years. She owns and operates Arlene's Flowers, which she runs according to the same Christian faith and values that she follows in all other aspects of her life. The controversy that led to this litigation began when Robert Ingersoll—for whom Barronelle had happily created flower arrangements for more than nine years—asked her to design the flowers for his wedding to his same-sex partner Curt Freed. Because her faith recognizes marriage as only between a man and a woman, she politely declined and referred

the couple to a number of other nearby florists. Soon after, Washington's attorney general sued Barronelle for violating the Washington Law Against Discrimination and the Washington Consumer Protection Act, and the ACLU filed a private suit on behalf of Robert and Curt. The trial court granted summary judgment for the state and the couple. The Washington Supreme Court affirmed, holding that Barronelle's floral design and arrangement did not constitute artistic expression and was merely unexpressive conduct.

If that background sounds familiar, it's because if you replace "florist" with "baker" and Washington with Colorado, you get *Masterpiece Cakeshop*, which the Court agreed to hear on June 26. There is significant overlap in the facts and legal issues raised by each case, and it would be beneficial for the Court to review them together, as requested by the petitioners. *Amici* also urge the Court to consolidate the cases because they both concern essentially the same kind of government action; both involve artistic expression mistakenly construed as largely nonexpressive commercial conduct by lower courts; and reviewing the two cases together would provide the Court with a more extensive factual record on which to base a decision, as well as help clarify the applicability of the ultimate decision's holding. If the Court chooses not to grant this petition, *amici* urge it to at least hold the case pending the resolution of *Masterpiece Cakeshop*.

ARGUMENT

I. Creating Custom Flower Arrangements and Baking Custom Wedding Cakes Both Constitute Artistic Expression That Is Protected by the First Amendment

This Court has long held that the First Amendment's protection of free expression encompasses more than the mere speaking or writing of words, and in fact covers a broad range of artistic expression and symbolic activities. *See Stromberg v. California*, 283 U.S. 359 (1931) (holding that California's ban on displaying red flags could not be justified as an attempt to prevent anarchist or communist violence); *Tinker v. Des Moines Indep. Cmty. Schl. Dist.*, 393 U.S. 503 (1969) (protecting the right of public high school students to wear black armbands to school in protest against the Vietnam War); *Cohen v. California*, 403 U.S. 15 (1971) (overturning a disturbing-the-peace conviction for wearing a jacket displaying the phrase "Fuck the Draft" inside a courthouse); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that laws prohibiting desecration of the American flag violate the First Amendment); *Virginia v. Black*, 538 U.S. 343 (2003) (holding that even the racially charged act of burning a cross, without additional evidence of a specific intent to intimidate, constitutes protected symbolic speech).[2] Art is speech, regardless of whether it actually expresses any important ideas—or even any perceptibly coherent

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[2] Even cases upholding restrictions on symbolic speech, such as *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft cards) or *Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (nude erotic dancing), have acknowledged the expressive content of the restricted speech and merely outlined relatively narrow contexts in which the state interest can outweigh the First Amendment interest.

idea at all. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*—which upheld the right of parade organizers not to allow a gay-rights group to march because they did not want to endorse the its message—even went so far as to say that the paint-splatter art of Jackson Pollock, atonal music of Arnold Schoenberg, and nonsense words of Lewis Carroll's Jabberwocky poem are "unquestionably shielded" by the First Amendment. 515 U.S. 557, 569 (1995).

While not all conduct that may arguably contain some amount of expressive content is protected by the First Amendment, *see Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2004) ("Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is."), both custom flower-arranging and custom cake-making fit easily within the scope of protection described in *Hurley* and other cases.

As the petitioners here argue, floral designs are artistic expression. Pet. for Writ of Certiorari at 21, *Arlene's Flowers, Inc. v. Washington*, No. 17-108 (Jul. 14, 2017). Numerous schools of floristry art exist throughout the world, offering a wide variety of courses, including ones tailored to weddings. The Jane Packer School in London, for example, offers a course called "The Bridal Foundation." *The Bridal Foundation*, Jane Packer, http://bit.ly/2uQYKEk. In it, students "[l]earn how to create a variety of bridal bouquets, bridesmaids' bouquets, accessories and buttonholes in Jane's *signature style*. [The course] equip[s] all students with the skills and confidence to tackle simple

wedding requests with style. [The school] then encourages [its] students to *develop their own style* with the guide of Jane's philosophy to produce all aspects required of a wedding." *Id.* (emphasis added).

Barronelle Stutzman puts a great deal of artistic energy into creating wedding arrangements, often meeting with couples for multiple hours "to learn about them, their story, their tastes, and desired aesthetic," and then, "[i]nspired by such factors as the season and location of the wedding, and colors and themes the couple have chosen, Barronelle creates original floral arrangements using artistic principles that range from proportion, color, space, and line to texture, harmony, and even fragrance." Pet. for Writ of Certiorari at 3–4, *Arlene's Flowers*, No. 17-108.

Likewise, the cakes at issue in *Masterpiece Cakeshop* "are a form of original artwork that require him to paint, draw, and sculpt various decorative elements and meld them together into a unified design that communicates a personalized celebratory message." Pet. for Writ of Certiorari at 19, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111 (Jul. 22, 2017).

Although the Court has never spoken directly on the First Amendment status of either floral design or cake-baking, it has identified numerous forms of art as speech. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (dance); *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (movies). Despite the arguments put forth by the state courts of Washington and Colorado, both floral design and baking

wedding cakes—explicitly artistic activities—fit in far better with those protected art forms than the decision not to allow military recruiters at a law school that was at issue in *Rumsfeld v. FAIR*. Simply asserting that arranging flowers (or baking and decorating a cake) for a wedding is not "inherently expressive," as the Washington Supreme Court did, *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 559 (Wash. 2017), cannot override the clear evidence and longstanding precedent screaming at the top of their lungs that *this is art*.

II. Both Cases Concern the Extent to Which the Government May Use Anti-Discrimination Law to Compel Business Owners to Participate in Same-Sex Wedding Ceremonies to Which They Object

In addition to the problem of defining what exactly qualifies as expression worthy of First Amendment protection, the second core legal question—common to both this case and *Masterpiece Cakeshop*—is whether the compelled-speech doctrine applies to refusals of for-hire professionals to engage in artistic expression that they believe would constitute a personal endorsement of same-sex marriage. The courts below in both cases mistakenly said that it does not, and *amici* urge this Court to set the record straight.

More than 70 years ago, in *Barnette*, this Court stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." 319 U.S. at 642 (1943), Since then, the Court has numer-

ous times reaffirmed that the First Amendment prohibits both compelled speech and speech restrictions: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637).

In *Wooley*, the Maynards objected to having to display the state motto on their state-issued license plates and sought the freedom not to display it. *Id.* at 707–08, 715. Surely, no observer would have understood the motto—printed by the government on government-provided and government-mandated license plates—as the driver's own words or sentiments. *See also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015). Yet the Court nonetheless held for the Maynards. *Wooley*, 430 U.S. at 717.

The Court reasoned that a person's "individual freedom of mind" protects her "First Amendment right to avoid becoming the courier" for the communication of speech that she does not wish to communicate. *Id.* at 714, 717. People have the "right to decline to foster . . . concepts" with which they disagree, even when the government is merely requiring them to display a slogan on a state-issued license plate. *Id.* at 714.

Even "the passive act of carrying the state motto on a license plate," *id.* at 715, may not be compelled, because such compulsion "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Id.* (quoting *Barnette*, 319 U.S. at 642). Forcing drivers to display the motto made them "an instrument for fostering public adherence to an ideological

point of view [they] find[] unacceptable." *Id.* This reasoning applies regardless of the slogan's content. *See, e.g.*, *First Covenant Church v. City of Seattle*, 840 P.2d 174, 193 (Wash. 1992) (Utter, J., concurring) (landmarks designation violated church's "freedom to express [itself] through the architecture of its church facilities"); *see also Ortiz v. New Mexico*, 749 P.2d 80, 82 (N.M. 1988) (*Wooley* protects drivers from displaying the non-ideological slogan "Land of Enchantment").

If the right not to be compelled to become a conduit for ideas one finds unacceptable extends to even the sort of "passive act" at issue in *Wooley*, it must also apply to the compelled creation of expressive art at issue in this case and *Masterpiece Cakeshop*. As discussed in Part I, *supra*, arranging flowers and baking cakes—especially for weddings—are artistic endeavors where the individual artists go to painstaking efforts to express both a celebratory feeling and the unique tastes and characteristics of the couple getting married. Forcing Barronelle Stutzman and Jack Phillips (the owner of Masterpiece Cakeshop) to use their art to send a message of celebration and approval of same-sex marriages that they sincerely believe to be immoral is, if anything, significantly more invasive of core First Amendment rights than the imposition of a universally issued license plate with a quote hardly anyone could mistake as the driver's own personal opinions.

Let's be clear about what's happening here: The government is mandating, by law, that people produce art that violates their conscience. That is just as unconstitutional as if the government were to ban the creation of art expressing disfavored opinions. The fact that the states of Washington and Colorado are doing so to combat anti-LGBT discrimination—a goal *amici*

freely acknowledge is a noble one—is irrelevant, because the rights guaranteed by the U.S. Constitution simply cannot be abrogated by even the most well-intentioned state legislation.

The First Amendment does not allow state governments to compel either the creation or dissemination of speech. Given that both floral design and making wedding cakes are forms of artistic expression protected as vigorously as literal speech, the Washington and Colorado courts' nearly identical analyses of their respective cases are contrary to both the Constitution and this Court's longstanding precedent.

III. Reviewing These Cases Together Will Help the Court in Its Analysis and Provide Much-Needed Guidance to the Lower Courts

In addition to the multiple legal and factual commonalities between this case and *Masterpiece Cakeshop*, practical considerations also militate in favor of consolidation. As mentioned in the petition, this case has a particularly well-developed, comprehensive record that would facilitate the Court's analysis of the issues presented in *Masterpiece Cakeshop*. This record, which includes depositions and expert testimony, among other evidence, will provide a deeper and more nuanced foundation from which the Court can develop a rubric for determining what sorts of professional services are sufficiently expressive to trigger First Amendment scrutiny.

Hearing and resolving these cases together would also clarify the scope of the ultimate decision's holding, reducing the amount of unnecessary future litigation surrounding these issues. A decision that acknowl-

edges the fundamental similarity of inherently expressive commercial activities such as floristry and the baking of wedding cakes—formally extending to them the same First Amendment protections that attach to literal speech—will make similar litigation over the plights of photographers, DJs, and other vendors unnecessary. The issues here are broader than the particular scenarios faced by florists or bakers; by hearing these two cases together, the Court can make that fact clear to lower courts and the general populace.

CONCLUSION

For the foregoing reasons, those stated by the Petitioners, and because no party would be adversely affected, the Court should grant the petition for a writ of certiorari and consider this case together with the already granted *Masterpiece Cakeshop*. In the alternative, the Court should hold this case pending the resolution of *Masterpiece Cakeshop*.

Respectfully submitted,

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