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

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioner Arlene's Flowers, Inc. is a for-profit Washington corporation wholly owned by Barronelle Stutzman. It does not have any parent companies, and no entity or other person has any ownership interest in it.

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INTRODUCTION

Barronelle Stutzman did not seek out public controversy or litigation. She was content to respectfully agree to disagree about the nature of marriage and continue to serve Robert Ingersoll and Curt Freed for another decade. Yet the State of Washington demanded that Barronelle surrender her First Amendment rights as the price of creating artistic expression at her family business. Respondents' briefs do not temper that ultimatum; rather, they claim Barronelle lacks any constitutional relief. Nor, in Respondents' view, does the Constitution protect voice actors, poets, and other professional speech creators who the state may force to speak at will—no constitutional limits apply. App.287-94a. Such unrestrained government power to compel expression is not the law.

State action with the potential to take away everything Barronelle owns—her livelihood, her retirement and life savings, and even her home—simply because she respectfully declined to participate in and create art that would celebrate a same-sex wedding ceremony officiated by a minister unquestionably implicates the First Amendment. App.58-67a; 423a. That is particularly true when Washington's stigmatic label of Barronelle as a "discriminator" paved the way for her to receive hate mail, phone calls, and even death threats so severe that she had to install a security system and change her normal route to work. App.359-64a. All of this resulted because Barronelle followed her faith when asked to celebrate a sacred ritual for a longtime patron who she considered a friend. App.318-22a.

Respondents' contrary arguments are grounded in the fiction that Barronelle is an automated floral-design instrument engaged in purely commercial activity. Barronelle is not an automaton, but an artist of faith with deep convictions about the meaning of marriage. She has no custom floral arrangement to "sell" until she partners with a bride and groom, discusses their history, wedding dreams and details, and creates an artistic design tailored to celebrate their marriage. App.314-16a; 332-34a. Given Robert's nine-year history of requesting only custom floral arrangements from Barronelle, that is what she reasonably believed he wanted for his wedding. App.319-22a. Moreover, Robert and Curt themselves explained that Barronelle's "exceptional creativity," App.429-30a, and "amazing work," App.411-12a, are why they commissioned her artistry time and again.

If Robert had wanted off-the-shelf items for his wedding, Barronelle would happily have provided them. App.322-23a. Barronelle has no objection to serving or employing LGBT persons—she happily created custom arrangements for Robert and Curt for nearly a decade and has employed several LGBT individuals. Unlike the vast majority of business owners, however, Barronelle's wedding service consists of designing artistic expression tailored to celebrate a sacred event in which her faith teaches her that God joins the two to become one flesh. Barronelle cannot in good conscience celebrate through her art *any* marriage not between a husband and a wife, including the polygamous or polyamorous marriages of straight individuals. App.306-07a. That is not sexual orientation discrimination.

Respondents make much of the fact that Barronelle will create custom floral arrangements that celebrate weddings involving Muslims, atheists, and other non-Christians. Wash. Opp. Br. ("Wash.") 2; Ingersoll & Freed Opp. Br. ("I&F") 3. This is of no moment. Barronelle believes that weddings between a man and a woman, no matter the religion of the participants, affirm her understanding of marriage—the union of bride and groom. App.306-07a; 341a. Any other wedding presents such a direct conflict with her faith that she must decline. This line, which Barronelle and other people of faith have drawn, is rationally explained by her theological expert, App.340-41a, although her constitutional rights do not hinge on others appreciating its logic, *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

For forty years, Barronelle has gladly served everyone. But she cannot celebrate all ideas or events. Barronelle's right to follow her conscience is promised by the Constitution. The state may not violate it on pain of stripping away her life's work and everything she and her family have built over generations. For Barronelle, there is much at stake. As Respondents rightly concede, this Court should hold the petition until the disposition of *Masterpiece Cakeshop*, Wash.21; I&F11, although it could also grant review to give additional guidance to lower courts regarding the rights of expressive professionals in the wedding industry.

ARGUMENT

I. Expansive Public Accommodation Laws Like the WLAD Pose a Substantial Threat to First Amendment Rights.

Public accommodation laws traditionally served noble purposes, such as ensuring access to inns and trains, but their drastic expansion poses a substantial threat to First Amendment rights. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-57 & n.2 (2000). Many states now define a "public accommodation" to include anyone who offers services to the public for a fee, including such classic speech creators as newspapers, publishing companies, and media corporations. *See, e.g.*, D.C. Code § 2-1401.02(24) (defining a public accommodation as "establishments dealing with goods or services of any kind"); Haw. Rev. Stat. § 489-2 (defining a public accommodation as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind"). Other states include even those who offer services to the public at no cost. *See, e.g.*, S.D. Codified Laws § 20-13-1(12) (defining a public accommodation as "any place, establishment, or facility of whatever kind … that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuitously").

As the public-accommodation net has widened to encompass nearly anyone who sells anything or serves anyone, without regard to whether they produce expression, so too has the number of classes protected by law. No longer limited to race, sex, and religion, legal protection now extends to primary language, Cal. Civ. Code § 51(b); gender identity or

expression, Nev. Rev. Stat. § 651.070; spousal affiliation, N.M. Stat. § 28-1-7(F); affectional or sexual orientation, N.J. Rev. Stat. § 10:5-3; dishonorable military discharge, 775 Ill. Comp. Stat. § 5/1-102; and even personal appearance, source of income, matriculation, and political affiliation, D.C. Code § 2-1401.01; *see also Dale*, 530 U.S. at 656 n.2 (citing additional examples).

Some public accommodation laws, including the WLAD, extend well beyond direct or intentional discrimination on these grounds. They bar any distinction that state officials judge to indirectly result in discrimination. *See, e.g.*, Wash. Rev. Code § 49.60.215(1) (banning "an act which directly or indirectly results in any distinction, restriction, or discrimination" on a protected ground). Here, state officials found that Barronelle's religious objection to celebrating same-sex marriage—not serving LGBT persons—fit the bill. App.13-17a.

Such expansive provisions bear little resemblance to the common law or the circumspect public accommodation statutes of the past. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571-72 (1995). They are an entirely new phenomenon that poses a direct and uncompromising harm to freedom of speech. Despite this fact, Respondents argue in favor of stripping First Amendment protections entirely away from those who sell expression for a living. Wash.13-14; I&F8. That extreme view finds no basis in the Constitution or this Court's precedent.

II. Washington Applies the WLAD in a Content-Based Manner to Force Barronelle to Create Artistic Expression Against Her Will.

Washington rightly concedes that the WLAD burdens free exercise and points to a narrow exception for religious organizations to show that interest has been accommodated, however minimally. Wash.19. But when it comes to the WLAD's burden on free speech, the state boasts of making no allowances. It applies the WLAD in exactly the same way regardless of whether Barronelle creates artistic expression or widgets. Wash.13. Just as the Free Exercise Clause requires adjustments to the WLAD's operation, the Free Speech Clause does as well. Public accommodation laws are not immune from scrutiny.

Myriad decisions of this Court ask whether a law regulates expression and, if it does, applies First Amendment scrutiny—both inside the public accommodations context, *see, e.g.*, *Hurley*, 515 U.S. at 568-69, and outside it, *see, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011). Inquiries of this nature have not proven unworkable or a strain on the courts, and they rarely prove necessary because government usually avoids placing unlawful burdens on expression. *See, e.g.*, *Redgrave v. Bos. Symphony Orchestra, Inc.*, 855 F.2d 888, 904-12 (1st Cir. 1988).

In this case, Washington admits that Barronelle creates expression and seeks to compel it anyway. App.292a. That extreme position cannot be the law

and is certainly not required for the WLAD to retain its force. Since *Hurley* and *Dale*, federal courts have prevented nondiscrimination laws from interfering with the expression of commercial businesses, and no harm has resulted. *See, e.g.*, *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 997-1000 (M.D. Tenn. 2012).

Respondents now claim that free speech comes at too high a cost. Not true. The vast majority of businesses deal in purely commercial activity, not expression. Applying the WLAD to them raises no free-speech concerns because businesses are not creating expression when they serve a meal, provide a ride, or supply a room to stay the night. Even speech creators may be required to abide by employment nondiscrimination laws and sell pre-made items or raw materials to anyone for any purpose, including celebrating a same-sex marriage—something Barronelle is perfectly willing to do. App.322-23a. In those situations, the only action compelled is treating employees based on their merits and engaging in simple commercial transactions with everyone.

Forcing Barronelle to design artistic expression celebrating same-sex marriages because she chooses to do so for unions between a man and a woman is altogether different. Coercion under the WLAD adheres *only* because Barronelle chooses to create expression celebrating marriages between one man and one woman. That is a content-based penalty on her choice to express the beauty of marriage as she believes God designed it. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). And it

fundamentally changes the content of Barronelle's speech because it forces her to create artistic expression about marriage that she would not otherwise create. *Cf. Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

III. *Hurley* was About Mediums of Expression, Not the Identity of the Speaker, and *FAIR* Did Not Approve the Direct Compulsion of Speech.

Respondents portray *Hurley* as turning on the nonprofit or commercial identity of the speaker. Wash.15-16. But this Court has explicitly rejected such distinctions, *see e.g.*, *Citizens United v. F.C.C.*, 558 U.S. 310, 364 (2010), and *Hurley* said no such thing. What concerned this Court was not the *identity* of the speaker but whether the *medium* (*i.e.*, a parade) was expressive. Because the parade was "expressive," the First Amendment "principle of autonomy to control one's own speech" applied, 515 U.S. at 574. Far from leaving those engaged in profit-making unprotected, *Hurley* explained that "business corporations generally" and professional speech creators like Barronelle enjoy free speech rights. *Id.* Hence, the state's concession that Barronelle creates expression is all that matters here. App.292a.

Nor does *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), suggest that speaker identity or any other factor allows the government to directly compel speech. Wash.12-13. Law schools argued that granting military recruiters a physical space on campus in which to meet with students compelled both pure

speech and expressive conduct. 547 U.S. at 63-68. But this Court held that hosting interviews and receptions for military recruiting did not directly require the law schools to engage in either pure expression or expressive activity. *Id.* Granting military recruiters access to a forum where they could engage in their own speech did not alter the law schools' expression. *Id.* at 63.

The law schools' only speech were emails and notices informing students when and where they could meet with military recruiters. *Id.* at 61. Such information was essential for military recruiters to meet with and convey their own message to students. Because sending emails and posting notices was "plainly incidental to the Solomon Amendment's regulation of [non-expressive] conduct," *i.e.*, physical access to campus, the Court upheld this tangential requirement. *Id.* at 62. *FAIR* does not suggest that the federal government could directly compel the law schools to speak the military recruiters' ideological message. Conditioning law schools' receipt of certain government funds on sending the emails and notices in *FAIR* is nothing like applying the WLAD to force Barronelle—on pain of injunctions, fines, damages, and devastating attorneys' fees awards—to design artistic expression celebrating same-sex marriage.

IV. Cases Involving Public Accommodation Laws and Their Application Outside of the Speech Context Have No Bearing Here.

Public accommodation laws have done much good outside of the speech context and Barronelle neither facially challenges the WLAD nor its protection of sexual orientation. She does not discriminate based on sexual orientation herself, as evidenced by the fact that she designed custom floral arrangements for Robert and Curt for nearly a decade and has gladly employed LGBT employees. App.347-49a. But, as Washington conceded below, this case involves applying the WLAD to expression, and that fact makes all the difference. App.292a.

Respondents' discussion of public accommodation cases like *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), glosses over this important distinction. Wash.18. *Roberts* approved the application of Minnesota's public accommodation law only *after* concluding that it had no affect on the Jaycees' expression. *Id.* at 626. *Hurley* distinguished *Roberts* on that basis. 515 U.S. at 580. And this Court routinely references the absence of an interference with speech in approving certain applications of nondiscrimination laws. *See, e.g.*, *N.Y. State Club Ass'n, Inc. v. N.Y.C.*, 487 U.S. 1, 13 (1988) (rejecting a challenge to New York City's public accommodation law because it did not facially compel clubs "to abandon or alter" their expression); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (applying California's public accommodation law did not "affect in any significant

way" the group's expression); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (citing the law firm's inability to show its expression "would be inhibited" by applying Title VII). But where, as here, applying a nondiscrimination law compels expression, the First Amendment intercedes. *See Hurley*, 515 U.S. at 574.

Though Respondents also cite *Romer v. Evans*, 517 U.S. 620 (1996), that decision has no bearing here. Wash.19; I&F8. Washington has treated sexual orientation as a protected class for over a decade. Based on that provision of the WLAD, the Washington Supreme Court ignored Barronelle's long service to Robert and Curt and the state's concession that Barronelle deals in expression, labeled her a "discriminator," and held her personally liable for civil penalties, damages, and attorneys' fees and costs expected to total hundreds of thousands of dollars. App.10-57a. Under these facts, the only people singled out for "disfavored legal status" are Barronelle and those who share her religious view of marriage. *Romer*, 517 U.S. at 633.

V. The Hybrid Rights Exception is an Integral Part of *Smith's* Holding, and the Free Exercise Clause Bars Washington from Compelling Barronelle to Attend and Facilitate a Religious Same-Sex Wedding Ceremony.

Respondents extol the rule laid down in *Employment Division v. Smith*, 494 U.S. 872 (1990), while calling for this Court to repudiate the hybrid-rights exception. Wash.17. But they cannot have it both ways. The only manner in which *Smith* could

argue that its rule comported with this Court's precedent was by carving out an exception for hybrid rights. *Smith*, 494 U.S. at 881-82. Eliminating that exception would undermine the groundwork for *Smith's* rule and necessitate a total reexamination of its holding. That is particularly true here because *Smith's* discussion of religious freedom and compelled expression is directly on point. *Id.* at 882.

Moreover, reconsideration is necessary if *Smith* permits Washington to force Barronelle to personally attend and facilitate the celebration of a same-sex wedding ceremony, officiated by a licensed or ordained minister, against her will. App.113a; 423a. The Free Exercise Clause categorically forbids government from obliging citizens to attend or participate in a religious service of any kind. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("[G]overnment may not coerce anyone to support or participate in religion or its exercise …."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (government cannot "force nor influence a person to go to or to remain away from church"). Public accommodation laws cannot override that essential component of religious liberty.

VI. This Court Should Hold the Petition in Light of *Masterpiece Cakeshop* or Grant Review.

Washington deems financial ruin an appropriate penalty for Barronelle and other speech creators whose beliefs about marriage overwhelm their pursuit of profit. But state efforts to punish artists and other creators of expression who seek to live out

their religious identity is not limited to floral designers and monetary exactions. Possible jail time for a handful of religious filmmakers, painters, and calligraphers in the wedding industry is also on the table. *See Telescope Media Grp. v. Lindsey*, No. 16-4094, 2018 WL 4179899 (D. Minn. Sept. 20, 2017); *Brush & Nib Studio LLC v. City of Phoenix*, CV 2016-052251 (Sup. Ct. Maricopa Cnty. Oct. 25, 2017).

Given this Court's intervening scheduling of oral arguments in *Masterpiece Cakeshop* on December 5, 2017, all parties now agree that the Court should hold the petition until an opinion issues in that case. Wash.21; I&F11. But if the Court finds the unique facts of this case helpful, particularly Barronelle's artistic medium of floral design, App.331-34, her nine plus years of service to Robert and Curt, App.3a, and her personal liability to pay likely hundreds of thousands of dollars in fines, damages, and attorneys' fees, App.58-67a, it could also calendar a separate oral argument and issue a separate or consolidated opinion to give additional guidance to lower courts. Either way, this Court should establish that the First Amendment does not permit Washington to strip away everything that Barronelle owns based on her religious identity and adherence to the millennia-old teachings of her faith.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, this Court should hold the petition or grant review.

Respectfully submitted,

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