No. 19-333

In the

Supreme Court of the United States

ARLENE'S FLOWERS, INC., ET AL.,
Petitioners,

v.

WASHINGTON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the State violates a floral designer's First Amendment rights to free exercise and free speech by forcing her to take part in and create custom floral art celebrating same-sex weddings or by acting based on hostility toward her religious beliefs.

2. Whether the Free Exercise Clause's prohibition on religious hostility applies to the executive branch.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual rights of Free Exercise of Religion and Freedom of Speech. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Janus v. American Federation of State, County, and Mun. Employees*, 138 S.Ct. 2448 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

SUMMARY OF ARGUMENT

This case presents an opportunity to reexamine this Court's rulings on the constitutional guaranty of the free exercise of religion. It also presents a question left undecided by this Court in *Masterpiece* regarding the free speech rights of creative artists – a question that the court below resolved in a manner that conflicts with the recent decisions of the Arizona Supreme Court and the Eighth Circuit Court of Appeals.

As the past three decades have made clear, the decision in *Employment Division, Department of Human*

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

Resources of Oregon v. Smith, 494 U.S. 872 (1990), eviscerated the guaranty of Free Exercise of Religion. Indeed, four members of this Court noted that the *Smith* decision "drastically cut back on the protection provided by the Free Exercise Clause. *Kennedy v. Bremerton School Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, concurring in the denial of certiorari). The *Smith* decision accomplished this "drastic" curtailment of constitutionally protected rights in an analysis that was unmoored from the original understanding of the Free Exercise Clause. *Smith*'s ahistorical nature thus puts it in deep tension with this Court's recent trend in cases involving the Religion Clauses of interpreting those clauses according to their original meaning.

The decision of the Washington court is also in conflict with recent decisions of the Arizona Supreme Court and the Eighth Circuit Court of Appeals. Both of those courts recently held that the state could not compel business owners to engage in speech through their creative talents to express a message with which they disagreed. *Brush & Nib Studio, LC v. City of Phoenix*, 2019 WL 4400328, *13 (Arizona Supreme Court 2019); *Telescope Media Group v. Lucero*, 936 F.3d 740, 749 (8th Cir. 2019). This view is in line with Justice Thomas's concurrence in part in *Masterpiece Cakeshop*. As Justice Thomas noted, once an individual decides to speak, they are entitled to choose what to say and what not to say. *Masterpiece Cakeshop*, 138 S.Ct. at 1742 (Thomas, J., concurring in part). By contrast, the Washington Supreme Court rejected petitioners' free speech argument because the artistic floral arrangement did not contain a "particularized" message. This is in direct conflict with the decisions

of the Eighth Circuit and Arizona Supreme Court. This Court should grant review to resolve the conflict.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review to Reexamine its Decision in *Smith*.

A. This Court looks to original meaning and practice when interpreting the Religion Clauses

This decade the Court has decided three cases that together send a clear message regarding the proper methodology for determining the meaning of the First Amendment's Religion Clauses: look to the original meaning and historical practices.

1. *Hosanna-Tabor*

This Court began its return to a jurisprudence of original meaning as to the Constitution's Religion Clauses in the unanimous decision of *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) . There, in determining whether the Constitution required a "ministerial exception" to federal antidiscrimination laws in the context of employment, the Court determined that both the Free Exercise Clause and the Establishment Clause independently required recognizing such an exception. *Id*. at 181.

In so concluding, the opinion first reviewed the history regarding free exercise of religion, starting with the Magna Carta in 1215, turning to the English Acts of Supremacy and Uniformity, addressing the American colonial experience, examining the First Amendment's adoption, and concluding with events from the early Republic. *Id*. at 182-185. Only after reviewing

this history of religious liberty did the Court look at relevant precedent, which "confirm[ed]" what the original meaning analysis had revealed. *Id.* at 185.

It would seem methodologically inconsistent for this Court to rely first and foremost on historical analysis when interpreting the Free Exercise Clause in light of a federal employment antidiscrimination statute in *Hosanna-Tabor*, and then to jettison such an approach in other contexts. What is more, *Hosanna-Tabor* recognized that such discrimination laws are "valid and neutral law[s] of general applicability." *Id.* at 190. Yet this Court refused to apply *Smith* in that context. *Id.*[2]

2. *Town of Greece*

Just two years after *Hosanna-Tabor*, this Court faced the question of the constitutionality of legislative prayer under the Establishment Clause in *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014). In answering that question, the Court emphatically declared that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 576 (internal quotation marks omitted). Further, the Court declared that any First Amendment test "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 566. And the Court framed its inquiry as "whether the prayer practice in the town of Greece fits within

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[2] It is true *Hosanna-Tabor* may have sought to keep *Smith* on life support by noting that a church's selection of a minister is different from drug laws, but its reasoning was sparse and more declaratory than analytical on that point. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189-90 (2012).

the tradition long followed in Congress and the state legislatures." *Id.* at 577.

The Court compared the contested practice against that historical yardstick, examining the practices of the Continental Congress, *id.* at 583-84, the practices of the First Congress, *id.* at 576, 578-79, and the practices and debates of Congress in the decade before the passage of the Fourteenth Amendment, *id.* at 576. Noting legislative prayer, even sectarian prayers, had existed continuously "[f]rom the earliest days of the Nation," *id.* at 584, the Court upheld the town's prayers, *id.* at 591-92.

3. *American Legion*

Finally, just this year the Court decided *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019). In determining whether a World War I memorial in the form of a Latin cross that was located in a public park violated the Establishment Clause, the Court rejected the ahistorical *Lemon* test and instead turned to historical understandings and longstanding practices. *Id.* at 2080-85.

For example, the Court examined the "prevalen[t] … philosophy at the time of the founding [a]s reflected in … prominent actions taken by the First Congress" and President Washington as proof that "the Framers considered [some practices as] benign acknowledgment[s] of religion's role in society." *Id.* at 2087 (quoting *Town of Greece*, 572 U.S. at 576) (plurality opinion). And the Court held that "[w]here categories of monuments, symbols, and practices with a longstanding history follow in th[e] tradition" of "recogni[zing] … the important role that religion plays in the lives of many Americans[,]" such monuments, symbols, and

practices "are likewise constitutional." *Id.* at 2089 (plurality opinion). Thus, the cross did not violate the Establishment Clause based on this historical analysis. *Id.*

B. *Smith*'s interpretive methodology completely lacked historical analysis

Despite being authored by modern originalism's godfather, Justice Scalia, *Smith*'s analysis of the Free Exercise Clause lacked any inquiry into original meaning, instead focusing entirely on precedent—precedent that didn't start until a century after the Clause's adoption. *See* 494 U.S. at 877-89. Not even a single footnote examined original meaning even in the most cursory way.

As one of the leading religion clause scholars put it: "[t]his is a strange and unconvincing way to deal with the text of the Constitution, or of any law." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990). McConnell notes: "the Court did not pause to consider whether the historical context surrounding the adoption of the Free Exercise Clause might have a bearing on the [meaning] of the [Clause's] text." This is particularly noteworthy because, according to McConnell, "the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning." *Id.* at 1116-17. Of course, *Smith* could have reached the right decision by the wrong methodology. But the fact that the Court made no attempt to interpret the Free Exercise Clause in light of original meaning and historical practice makes the decision's conclusions suspect at best. *Smith*'s ahistorical analysis is in deep tension

with this Court's recent Religion Clauses jurisprudence.

C. Justice Scalia's concurrence in *City of Boerne* failed to correct *Smith*'s missing original meaning analysis

Perhaps sensing the methodological inadequacies of his *Smith* opinion, Justice Scalia sought to buttress it with some historical analysis in his concurring opinion in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). However, Justice Scalia himself confessed that he only attempted to "respond briefly" to historical arguments raised by Justice O'Connor that *Smith* was inconsistent with the Free Exercise Clause's original meaning. *Id*. at 537 (Scalia, J., concurring in part).

And "respond briefly" he did. Moving quickly from one historical criticism to another of *Smith*, Justice Scalia's analysis hardly gave serious weight to the historical evidence or appeared to cherry pick that evidence. *Id*. at 538-44. Specifically, Justice Scalia made four arguments regarding the historical evidence. *See* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 832-40 (1998). These arguments suffered from "selective quotation" that ignored the fullness of founding-era colonial and state religious liberty protections, *id*. at 833, overly broad but less likely readings of key words in founding-era state constitutions, *id*. at 834-37, ignoring variations within these same constitutions, *id*. at 837, ignoring relevant evidence, *id*. at 838, interpreting statements regarding the accommodation of religion from the period before the adoption of the First Amendment as though they showed an understanding

of the legal force of that amendment, *id.* at 837-40, and committing the logical fallacy that the absence of early case law evidence of a reading of the clause in opposition to *Smith* is the evidence of the absence of that reading, *id.* at 840.

Ultimately, Justice Scalia dismissed the evidence against his position as nothing more than an "extravagant claim," boiling *Smith* down to the issue of "whether the people, through their elected representatives, or rather this Court, shall control the outcome of … concrete cases" involving religious liberty. *Id.* at 544. And his answer: "It shall be the people." *Id.* Given that by using the term "the people" Justice Scalia meant legislatures rather than the Constitution, *Smith*'s true concerns emerge: strengthening democratic rule and limiting judicial activism. Whatever the merits of those concerns, nowhere else in the Bill of Rights does the Court determine that a constitutionally protected right is subject to the whims of the majority. In short, Justice Scalia's concurrence in *City of Boerne* does not rectify the *Smith* Court's failure to grapple with the original meaning of the Free Exercise of Religion. The Court should grant review to reexamine its decision in *Smith*.

II. This Court Should Grant Review to Resolve the Conflict between the Court Below and the Arizona Supreme Court and the Eighth Circuit.

The creative arts are as much protected by the First Amendment as the spoken word. The Free Speech Clause "looks beyond written or spoken words as mediums of expression," *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), to protect "pictures, films, paintings,

drawings, and engravings" as pure speech, *Kaplan v. California*, 413 U.S. 115, 119 (1973). The state may not compel Petitioners to produce art just as it may "never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *See Hurley*, 515 U.S. at 569.

The Washington Supreme Court attempted to avoid the Free Speech question by characterizing the regulated activity as "selling" floral arrangements. *State v. Arlene's Flowers, Inc.*, 187 Wash 2d 804, 832 (2017), *cert. granted, judgment vacated* 138 S.Ct. 2671 (2018). Yet the record in the case demonstrates that Petitioners were perfectly willing to sell any of the arrangements already created. Petitioners' refused, however, to create an artistic floral arrangement specifically for a same-sex wedding. The regulated activity, therefore, was refusal to *create* artwork for a specific event – not a refusal to sell art that had already been created.

In any event, the ruling conflicts with the Second Circuit Court of Appeals in *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996). There the court ruled that "the sale of protected material is also protected," rejecting the city's argument that sale of artwork was merely conduct and did not involve a "particularized message." *Id*. at 695. The Arizona Supreme Court and the Eighth Circuit Court of Appeals have both recently ruled that creative artists cannot be compelled to create art that violates their religious beliefs.

In *Brush & Nib Studio*, the Arizona Supreme Court considered a challenge by artists to an Arizona law that would compel them to create their art for same-sex weddings. The artists in that case created

custom wedding invitations, containing "hand-drawn words, images, and calligraphy, as well as … hand-painted images." *Brush & Nib Studio*, 2019 WL at *14. The court ruled that the creation of the invitations "constitute pure speech" and declined to apply the *Spence-Johnson* test applicable to expressive conduct. *Id.* at *14, *12. The fact that the art was produced in pursuit of a profit was irrelevant. *Id.* at *13. By contrast, the Washington Supreme Court declined to recognize creation of art as speech deserving of protection.

Similarly, the Eighth Circuit in *Telescope Media* declined to apply the "particularized message" requirement to wedding videographers. Like the Arizona court, the Eighth Circuit ruled that creation of the videos were a form of speech, not expressive conduct. "The 'commercial conduct' and 'economic activity' … is the making of the videos themselves, which, as we have already explained, are speech." *Telescope Media Group v. Lucero*, 936 F.3d 740, 756-57 (8th Cir. 2019).

Like Brush & Nib Studio in the Arizona case and Telescope Media in the Eighth Circuit decision, Petitioners' creative artwork is pure speech. It involves artistic judgments on layout, coloring, design, choice of flowers, and composition, *cf.* Timothy O'Sullivan, *A Harvest of Death, Gettysburg, Pennsylvania*, J. Paul Getty Museum (goo.gl/kcU1rW, Jan. 18, 2018, 4:18 PM), focus and shading, *cf.* Dorothea Lange, *Migrant Mother*, *The Story of the "Migrant Mother"*, PBS (goo.gl/R2GhrV, Jan. 18, 2018, 4:23 PM), timing and motion, *cf.* Nick Ut, *Napalm Girl*, AP Images (goo.gl/5UiQPo, Jan. 18, 2018, 4:19 PM), and message and emotion, *cf.* Joseph Rosenthal, *Iwo Jima Flag*

Raising, AP Images (goo.gl/149f5N, Jan. 18, 2018, 4:26 PM).

Artists who create floral arrangements "sculpt" with flowers, the same as a sculptor does so with stone. Learn how to be your own florist at Flower School Los Angeles, Orange County Register, December 1, 2017[3]. Major art museums engage floral designers to create floral designs for display at the museums. *Id*.; About Van Vliet & Trap.[4] Several art museums feature events that include floral interpretations of fine art masterpieces. Art in Bloom Spotlights Fine Art Masterpieces with Floral Interpretations October 17-20;[5] Fine Arts and Flowers, April 26-28, 2019;[6] 38th Annual Fine Art & Flowers.[7]

The curators of fine arts recognize floral design as an art medium that "emphasize, challenge and build upon elements and concepts" of other works of art. Art in Bloom, *supra*. The creation of this art is pure speech, not conduct. Review should be granted to resolve the conflict between the Washington Supreme Court and the decisions of the Arizona Supreme Court and the Eighth Circuit Court of Appeals.

CONCLUSION

During the American Revolution, when the cost in lost men and money was painfully high, John Adams observed that recent advances in religious liberty in some states "so far as to give compleat Liberty of Conscience to Dissenters" was "worth all of the Blood and

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[3] https://tinyurl.com/yxzassqn (October 9, 2019).
[4] http://www.vanvlietandtrap.com/#/about (October 9, 2019).
[5] https://tinyurl.com/y22l8rho (October 9, 2019).
[6] https://tinyurl.com/y6cp7577 (October 9, 2019).
[7] https://tinyurl.com/y3kyl8wg (October 9, 2019).

Treasure which has been and will be Spent in this war." Letter of John Adams to James Warren (Feb. 3, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774-1789 202 (Paul H. Smith et al. eds., 2000). This case presents this Court the opportunity to return to an interpretation of the protection of the free exercise of religion that is faithful to the original understanding of the First Amendment—and worth "all of the blood and treasure" spent to obtain it.

The case also presents the opportunity to resolve a conflict between the Washington Supreme Court on the one hand and the Arizona Supreme Court and the Eighth Circuit Court of Appeals on the other. The petition for certiorari should be granted.

October 2019

Respectfully submitted,

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