No. 19-333

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 Writ of Certiorari
To the Washington Supreme Court

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

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INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law is an Alabama-based-legal organization dedicated to religious liberty and to the strict reading of the Constitution as intended by its Framers. The Foundation believes religious liberty is the God-given right of all people claimed in the Declaration of Independence and protected by the First Amendment. The Foundation has an interest in this case because allowing the Washington Supreme Court's decision to stand will imperil the rights of many Americans who have religious objections to homosexuality. The Foundation also believes that the Framers of the First Amendment intended for the Free Exercise Clause to provide robust protection for Americans who have religious objections to generally applicable laws, and it seeks to restore that interpretation of the First Amendment.

SUMMARY OF THE ARGUMENT

After two years, this case has returned to this Court for a final resolution. It is not only the parties who desperately hope for clarity from this Court, but

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[1] Pursuant to Rule 37.3, *Amicus* has notified all parties of intent to submit this Brief and has requested consent from all parties. All parties have consented. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

also the country as a whole. Over the last decade, several state appellate courts and a federal court of appeals have considered whether the First Amendment excuses artists with religious objections to same-sex marriage from using their artistic talent to celebrate that event, which they consider sinful. The lower courts are pretty evenly split on this question, and the split is getting worse. As to the importance of the federal questions in this case, this Court has said repeatedly that the government may not compel a person to speak a message that conflicts with his or her deeply held beliefs. Because this case reflects a split in the courts below and presents important questions of federal law, it is ripe for this Court's review.

The Petitioners suggest, and we agree, that if *Employment Division v. Smith* controls this case, then it should be overruled. This is a major issue that deserves to be discussed in detail because of its importance. Members of this Court and scholars from all across the ideological spectrum have severely criticized *Smith*, and over 20 states have passed laws increasing protection for religious liberty in light of *Smith*. The reaction against *Smith* is warranted for this reason: religious liberty is an unalienable right given by God that the State cannot take away. In James Madison's view, the Free Exercise Clause provides accommodations for religious objectors except under very limited circumstances. In this case, Madison and the Framers of the First Amendment would have had no trouble concluding that the Free

Exercise Clause exempts the Petitioners from having to celebrate a same-sex wedding against their will.

This case involves two other constitutional rights: freedom of speech (or more particularly, the freedom not to speak), and freedom from involuntary servitude. Last year in *Janus* and *NIFLA*, this Court drew on a long line of free speech decisions and emphasized that the government may not compel a person to speak a message against his or her most deeply held beliefs. And although this issue has not been discussed much, being forced to labor for another against one's will implicates the Thirteenth Amendment's prohibition of involuntary servitude.

Because of the disorder in the lower courts and the critical importance of the federal questions involved, this Court should grant certiorari.

ARGUMENT

I. This case warrants discretionary review because it involves important questions of federal law that lower appellate courts have resolved differently.

In the decision below, the Washington Supreme Court held that the First Amendment does not protect a Christian florist whose religious beliefs prohibit her from using her artistic talents to celebrate a same-sex marriage.

The Washington Supreme Court's decision conflicts with the recent decision of the Arizona Supreme Court in *Brush & Nib Studio, LC, v. City of*

Phoenix, No. CV-18-0176-PR (Ariz. Sep. 16, 2019).[2] In that case, the Arizona Supreme Court held that Christian artists who had religious objections to same-sex marriage did not have to create custom artwork for same-sex marriage because doing so would compel them to use their artistic talents to speak a message that violated their religious beliefs. Relying on decisions from this Court, the Arizona Supreme Court concluded that "freedom of speech and religion requires tolerance of different beliefs and points of view." *Brush & Nib Studio*, slip op. at ¶ 164. In contrast, the Washington Supreme Court held that First Amendment protections did not shield the Petitioners at all.

The decisions of the Washington Supreme Court and the Arizona Supreme Court add to an already-existing split between state appellate courts and federal courts of appeal. On the one hand, some courts hold that the First Amendment protects the rights of individuals against the compelled praise of practices they find sinful. *Telescope Media Group v. Lucero*, No. 17-3352 (8th Cir. Aug. 23, 2019) (holding

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[2] Although the Arizona Supreme Court technically resolved that case on Arizona law instead of federal law, it relied almost exclusively on federal precedent to interpret the free-speech and religious-liberty issues. *See Brush & Nib Studio*, slip op. at ¶ 47 ("[B]ecause federal precedent resolves Plaintiff's claim, we can adequately address it under First Amendment jurisprudence"); *id.* at ¶ 127 ("Because the text and requirements of FERA [the Arizona version of the Religious Freedom Restoration Act] and RFRA are nearly identical, we rely on cases interpreting RFRA as persuasive authority in construing the requirements of FERA.").

that the First Amendment protects Christian video producers from using their artistic talents to promote same-sex marriage); *Brush & Nib Studio*, *supra*. On the other hand, some courts hold that the First Amendment gives no protection to conscientious objectors in such situations. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (holding that a Christian photographer was not protected by the First Amendment from catering to a same-sex wedding); *Klein v. Oregon Bureau of Labor & Indus.*, 289 Or. App. 507 (2017) (holding that free speech and free exercise of religion did not protect Christian bakers who did not wish to cater to a same-sex wedding), *cert. denied*, No. S065744 (Or. June 21, 2018), *rev'd and remanded*, 139 S.Ct. 2713 (2019).

The importance of these questions cannot be overstated. While it is true that this Court (often wisely) waits for the lower courts to resolve novel questions of law, freedom of speech and free exercise of religion present special concerns that merit this Court's intervention. As Justice Kennedy warned in 2018, it is a matter of "serious constitutional concern" when the government "compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts ...." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2378-79 (2018) ("*NIFLA*") (Kennedy, J., concurring).

The Founding generation shared this view. In 1785, James Madison strongly resisted an infringement on religious liberty that was much

lighter, comparatively speaking, than the present case. Why did Madison oppose such an infringement with so much vigor?

> "Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it."

James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785).

Supreme Court Rule 10 states that grounds for discretionary review include a split among state courts of last resort on the same question of federal law (Rule 10(b)) and a question of law so important that it warrants the Court's intervention (Rule 10(c)). Both of those situations are present in this case. This Court should not wait for additional lower courts to add to a split between courts that is showing no signs of resolution; nor should it allow the People's most sacred rights to be subjected to further experiments.

II. The Petitioners have invited this Court to reconsider its Free Exercise jurisprudence, raising an important issue of federal law.

The Free Exercise Clause, which the Fourteenth Amendment applies to the States, forbids the States from prohibiting the "free exercise" of religion. James Madison defined "religion" as "'the duty which we owe to our Creator and the Manner of discharging it.'" *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 64 (1947) (quoting Madison, *supra*.) Free exercise of religion clearly involves much more than freedom of belief; the very term "exercise" demonstrates that the Clause protects religious speech and action as well. *See Trinity Lutheran Church, Inc. v. Comer*, 137 S.Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) (noting that the Free Exercise "guarantees the free *exercise* of religion, not just the right to inward belief (or status).").

But as several Justices of this Court have recognized, the recent rise of "gay rights" has put religious liberty in check. When the Supreme Court recognized same-sex marriage in *Obergefell v. Hodges*, Chief Justice Roberts, joined by Justices Scalia and Thomas, warned, "The majority graciously suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage.... The First Amendment guarantees, however, the freedom to 'exercise' religion. Ominously, that is not a word the majority uses." *Obergefell v. Hodges*, 135 S.Ct.

2584, 2625 (2015) (Roberts, C.J., dissenting).[3] Justice Alito likewise warned, "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." *Id.* at 2642-43 (Alito, J., dissenting).[4]

As this case demonstrates, these Justices' concerns were nearly prophetic in their accuracy. Stutzman declined to create a custom floral arrangement to celebrate a same-sex wedding because of her religious beliefs about marriage (and she could not have been more kind, respectful, or polite in how she did it). As a result, the State of Washington launched an unprecedented prosecution against her that would not only violate her most fundamental First Amendment rights, but would

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[3] Chief Justice Roberts expressed similar concerns about this issue at oral arguments early this Term, noting that many legislatures have created religious-liberty exceptions for laws prohibiting discrimination on the basis of sexual orientation. Transcript of Oral Argument at 25-26, *Bostock v. Clayton County, Georgia*, No. 17-1618 (Oct. 8, 2019), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_o7jp.pdf.

[4] There is an argument to be made that even the majority opinion in *Obergefell* required religious liberty to be protected in cases like these. *See Obergefell*, 135 S.Ct. at 2607 (noting that religious people may continue professing their opposition to gay marriage). In either case though, the dissenters heavily emphasized the danger to religious liberty, which the present case illustrates very well.

also destroy her life. The State sought to force her to celebrate same-sex marriage or lose her business. This was a clear infringement on her right to free exercise of religion.

Since this is such an obvious issue, why is this not an open-and-shut case? The answer appears to be because of this Court's decision in *Employment Division v. Smith*, which significantly weakened free exercise jurisprudence. As this Court knows, *Smith* held that, generally, "the right of free exercise does not relieve an individual of the obligation to comply with a valid, neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (citations and quotation marks omitted). In other words, if a person's religion says, "Thou shalt," and the State says, "Thou shalt not," then the general rule is that the person must obey the State and violate his or her conscience (which also may mean disobeying God).

Perhaps recognizing that *Smith* significantly weakened the power of the Free Exercise Clause, this Court has limited *Smith*'s general rule. For instance, the Court has held that free exercise claims warrant more protection when an additional constitutional violation accompanies an infringement on free exercise of religion. *Smith*, 494 U.S. at 881-82. That is certainly the case here, because the Petitioners' free speech rights are also being violated. *See infra,* Part IV. This Court has also held that State action

that targets religious exercise, regardless of whether it is "masked" or "overt," is neither valid nor neutral. *Masterpiece Cakeshop*, *Ltd., v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Church of Lukimi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993). As the Petitioners demonstrate, there are reasons to believe that such targeting occurred.

But there is an even more fundamental flaw here: *Smith*, *Hialeah*, and even *Masterpiece Cakeshop* misunderstand the scope of the Free Exercise Clause. As Madison said in his Memorial and Remonstrance,

> "[W]hat is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society,

> and that Religion is wholly exempt from its cognizance."

Everson, 330 U.S. at 64-65 (quoting Madison, *supra*). Madison's argument reflects the logic of the Declaration of Independence: our Creator gave us rights that pre-exist the State, and people form governments in order to secure those rights. *See The Declaration of Independence* para. 2 (U.S. 1776). Consequently, the government cannot take away the rights that it was created to secure in the first place—one of which is free exercise of religion.

It should be no surprise then that Madison believed that "the free exercise right should prevail 'in every case where it does not trespass on private rights or the public peace.'" Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1464 (1989) (quoting Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 98, 100 (G. Hunt ed. 1901)). After engaging in a thorough analysis of Madison's view of religious liberty, Professor Michael McConnell concluded,

> "If the scope of religious liberty is defined by religious duty (man must render to God 'such homage as he believes to be acceptable...to him'), and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take

> precedence over the laws of the state, even if they are secular and generally applicable."

McConnell, *supra* at 1453. Consequently, religious exemptions from neutral laws of general applicability, except under extremely limited circumstances, are probably what the Founders had in mind. See *id.* at 1511-13. *Smith* got that completely backwards.

Since God-given rights precede the State, the government does not have the jurisdiction to take them away. To do so is to act *ultra vires*. As Justice Douglas wrote, "The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." *McGowan v. Maryland*, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

III. This case presents an excellent opportunity to reconsider the Court's free exercise jurisprudence.

Earlier this year, this Court denied certiorari in a case involving a public high school football coach who was fired for praying at the 50 yard-line after games. *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634 (2019). Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, issued a statement, concurring that the free-speech claims in that case were too fact-specific to warrant certiorari review.

However, Justice Alito also noted that the petitioner had not raised a free-exercise claim, perhaps "due to certain decisions from this Court," including *Employment Division v. Smith*, 494 U.S. 872 (1990). *Kennedy*, 139 S.Ct. at 637 (statement of Alito, J.). Justice Alito described *Smith* as "drastically cutting back on the protection provided by the Free Exercise Clause ...." *Id.* He concluded by noting that "[i]n this case, however, we have not been asked to revisit those decisions." *Id.* Accordingly, at least four Justices of this Court may be open to reconsidering *Smith* if asked.

The Petitioners in this case have asked the Court to do so. See Pet. at 25 (noting that *Smith* has been criticized many times by liberal, moderate, and conservative justices of this Court). Because the parties have raised the issue and a substantial number of justices of this Court recently have called for reconsideration of *Smith*, and because overruling *Smith* would have a substantial impact on the outcome of this case, this Court should grant certiorari and allow briefing on this issue.

Smith received wide-spread and harsh criticism from the beginning. Before discussing the reactions to *Smith*, it should be noted that the case was decided by a sharply divided Court.[5] Justice Scalia wrote the majority opinion, joined by Chief Justice

[5] "A unanimous decision may have greater weight than a split decision—and often the closer the split, the weaker the precedent." Bryan Garner, Stephen Breyer, Neil Gorsuch, Brett Kavanaugh, et al., *The Law of Judicial Precedent* 182 (2016).

Rehnquist and Justices White, Stevens, and Kennedy. Justice Blackmun dissented, joined by Justices Brennan and Marshall, criticizing the Court for departing from precedents that had recognized more protection for religious freedom in the past. Justice O'Connor wrote a concurrence that sounded much more like a dissent: she excoriated the majority for departing from its precedents but concurred in the result for different reasons.

After *Smith*, a massive coalition of organizations, ranging from liberal groups like the American Civil Liberties Union and People for the American Way to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist Convention, joined together to denounce the decision. Congress responded by passing the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-3. It passed in the House by a voice vote and in the Senate 97-3, and President Clinton signed it into law. The Supreme Court struck it down as applied to the states by a vote of 6 to 3 in *City of Boerne v Flores*, 521 U.S. 507 (1997), but it unanimously upheld as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

Following *Flores*, in 2000 the American Civil Liberties Union worked with a coalition of organizations to secure passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§2000cc et seq. RLUIPA prohibits the

imposition of burdens on the free exercise rights of prisoners and limits the use of zoning laws to restrict religious institutions' use of their property.

Twenty-one states have adopted state versions of the Religious Freedom Restoration Act requiring their state governments to afford more protection to religious liberty, and ten additional states have incorporated the principles of the Act by state court decision.[6]

Scholars have likewise criticized *Smith*. One of the most noteworthy is Professor Michael McConnell, who cogently observes that the Court effectively decided *Smith* on its own, as none of the parties had asked the Court to weaken protections for religious liberty.[7] Jane Rutherford, writing in the William and

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[6] States which have adopted "mini-RFRA" statutes include Connecticut, Rhode Island, Pennsylvania, Virginia, South Carolina, Florida, Alabama, Mississippi, Louisiana, Tennessee, Kentucky, Illinois, Indiana, Missouri, Kansas, Oklahoma, Texas, New Mexico, Arizona, and Idaho. Similar proposals are pending in other states. The state courts of another ten states (Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin) have incorporated the principles of the Act by state court decision. *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[7] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990). Professor McConnell also notes that "over a hundred constitutional scholars" had petitioned the Court for a rehearing which was denied. *Id.* at 1111.

Mary Bill of Rights Journal, argues that *Smith* leads to the unfortunate result of subjecting minority faiths to the power of the majority and decreasing the rights of minorities to express their individual spirituality.[8] John Witte, Jr., of Emory University, writing in the *Notre Dame Law Review*, demonstrates that *Smith* is at odds with the basic principles that underlie the religion clauses, especially liberty of conscience, free exercise, pluralism, and separationism.[9]

In summary, *Employment Division v. Smith*:

* Was adopted *sua sponte* without request, argument, or briefing from the parties;

* Was adopted by a bare majority over a strong dissenting opinion by three Justices and a concurring opinion that rejected the *Smith* rationale and concurred only in the result;

* Was sharply criticized by a wide spectrum of the legal and religious community of the nation;

* Was criticized by a wide spectrum of constitutional scholars;

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[8] Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 Wm. & Mary Bill Rts J. 303 (2001).

[9] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1999).

* Was repudiated by an overwhelming vote of Congress in adopting the Religious Freedom Restoration Act, which was signed into law by President Clinton but partially invalidated in *Flores*;

* Was repudiated by (thus far) thirty-one states through the adoption of mini-RFRA statutes or state constitutional amendment or state court decisions;

* Has proven unfair and unworkable in practice; and

* Is manifestly contrary to the Framers' elevated view of religious liberty by reducing this most-cherished right to mere lower-tier status.

Because of all of these factors, it is clearly time for the Court to reconsider *Employment Division v. Smith*.

It is true that this Court could grant certiorari on more limited issues, such as whether the Washington Supreme Court correctly concluded that there was no targeting of Stutzman's beliefs or whether this Court's decision in *Masterpiece Cakeshop* applies to the executive branch. But granting certiorari to resolve only these more limited issues will not resolve the splits among the lower courts or answer the more important question of federal law. Supreme Court Rule 10(b)&(c). The Court should not only grant certiorari but also allow briefing on this issue.

IV. Compelled speech against one's religious convictions is one of the most egregious forms of a First Amendment violation.

"[T]o be worthy of our freedoms," writes Justice Neil Gorsuch, "we all have to adopt certain civic habits that enable others to enjoy them too." Neil Gorsuch, *A Republic, If You Can Keep It* 31 (2019). What does that mean? "When it comes to the First Amendment," Justice Gorsuch explains, "that means tolerating those who don't agree with us, or whose ideas upset us; giving others the benefit of the doubt about their motives; listening and engaging with the merits of their ideas rather than dismissing them because of our own preconceptions about the speaker or topic." *Id.* Rather than embracing the process that the First Amendment demands, however, Washington demeans Barronelle's sincerely held belief that marriage is a covenant between one man and one woman and seeks to compel her, through an extraordinary exercise of government power, to participate in a sacred ceremony in violation of her conscience.

Washington may not force Barronelle, a private actor, to endorse its position on same-sex weddings against her will. The First Amendment protects the right of people to determine for themselves which beliefs they wish to embrace and express. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from

speaking at all"). The Foundation strongly believes floral design is artistic expression, but even if it is not, it still sends a message and is therefore protected by the Free Speech Clause. Consequently, the government may not infringe upon an individual's First Amendment right to speak *or to refrain from speaking* her opinion, based on her religion, about same-sex marriage. *Wooley*, 430 U.S. at 714. "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *U.S. v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

First Amendment protections have been extended to situations that do not involve such institutions such as marriage that implicate entire social arrangements and form the bedrock of all society. If "the passive act of carrying the state motto on a license plate" involves First Amendment protections, for instance, then surely sincerely held religious views regarding the fundamental, sacred institution of marriage merit such protections. *Wooley*, 430 U.S. at 715. If the government may not compel individuals to display a state motto on their license plates, in other words, then surely it may not compel them to condone activity—a same-sex wedding—that they believe to be contrary to God's design for marriage.

"The rights of free speech and free exercise, so precious to this nation since its founding," the Supreme Court of Arizona recently opined in a case

analogous to this one, "are not limited to soft murmurings behind the doors of a person's home or church, or private conversations with likeminded friends and family." *Brush & Nib Studio,* slip op. at 3. "These guarantees," according to the Supreme Court of Arizona, "protect the right of every American to express their beliefs in public," including "the right to create and sell words, paintings, and art that express a person's sincere religious beliefs." *Id.* at 3-4. This right inheres in both political and commercial speech, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), and involves both statements of fact and statements of opinion. *Riley v. National Federation of the Blind*, 487 U.S. 781, 797-98 (1988). This Court has held that even speech that is not religious or ideological in nature enjoys First Amendment protection. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). The speech in *Schad* involved nude dancing. Would this Court extend First Amendment protections to nude dancing but refuse them to the florist who, because of his sincerely held religious beliefs, will not participate in a same-sex wedding ceremony? [10]

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[10] *Amicus* does not necessarily agree that the First Amendment protects nude dancing. It cites this case only to show that if the Court would protect actions like these as "expressive activity," then it should have no trouble concluding that creating a custom floral arrangement is expressive activity deserving protection as well. *Accord Masterpiece Cakeshop*, 138 S.Ct. at 1747 (2018) (Thomas, J., concurring in part and concurring in judgment) (listing many other things the Supreme

The State of Washington, in effect, attempts to compel Barronelle to profess a belief that is contrary to her religion. How else would one interpret the mandate that she design floral arrangements celebrating the marital union of a man to another man? The government, however, may not force an individual "to profess a belief or disbelief in any religion." *Everson*, 330 U.S. at 15 (1947).[11] Nor may the government force an individual to say what he does not wish to say. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 573 (1995) ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say");[12] *see also Riley*, 487 U.S. at 796-97 (1988) ("freedom of speech" encompasses decisions about both "what to say and what *not* to say"). In *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this Court struck down a state law that, as applied, mandated that a child who was a Jehovah's Witness salute the American flag. This Court held in that case that the government may not require an individual to profess "what is not in his mind." *Id.* at 634.

Court has protected as free speech and concluding that under those precedents, declining to bake a cake for a same-sex wedding should be protected by the Free Speech Clause as well).

[11] *Amicus* believes that *Everson* contained critical errors but agrees with this one statement from that opinion.

[12] In *Hurley*, this Court held that simply allowing LGBT persons to participate in Hurley's parade against his will constituted compelled speech.

The State of Washington, accordingly, "must not be allowed to force [Barronelle] to express a message contrary to [her] deepest convictions." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). As this Court held last year:

> "'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*.' ... Compelling individuals to mouth support views they find objectionable violates that cardinal constitutional command."

Janus v. Am. Federation of State, County, and Municipal Employees, Council 31, 138 S.Ct. 2448, 2463 (2018) (quoting *Barnette*, 319 U.S. at 642). This is especially true when such speech involves "sensitive political topics" like "homosexuality." *Janus*, 138 S.Ct. at 2476 (noting that such speech "occupies the highest rung of the hierarchy of First Amendment values and merits special protection"). Because the topic of gay marriage is so sensitive, the right of the People to speak or not to speak in accordance with their convictions must be fully protected by the government.

V. Forcing an artist to put her artistic talents to work against her will raises Thirteenth Amendment concerns.

The Thirteenth Amendment states, in relevant part, "Neither slavery *nor involuntary servitude* … shall exist within the United States ….." U.S. Const. amend. XIII § 1 (emphasis added). This Amendment does not prohibit only the institution of slavery that plagued the United States before the mid-nineteenth century. It also prohibits the forcible labor for another against one's will. In 1988, this Court held that "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *United States v. Kozmiski*, 487 U.S. 931, 953 (1988).

In this case, the Respondents sought to force Stutzman to serve them against her will by the threat of coercion through law or the legal process. Thus, under *Kozmiski*, we have a *prima facie* case of involuntary servitude.

Such a holding in this context would certainly have drastic implications for public accommodation laws. It would be easier to resolve the case on First Amendment grounds, and therefore *Amicus* would encourage the Court do so. Nevertheless, in addition to religious freedom and freedom of speech, another right is at stake that was bought with the blood of

hundreds of thousands of men: the right to be free from working for another against one's will. So many men have died to secure this right that it should not be lightly overlooked.

CONCLUSION

The lower courts cannot agree on the very important questions of federal law presented in this case. The American people long for clarity: will this Court protect their unalienable rights to speak and act in accordance with their religious views, or will their First and Thirteenth Amendment rights be subjected to state laws that enforce the new orthodoxy about same-sex marriage? Stutzman and the American people have waited too long for an answer. This case presents an excellent opportunity to address important constitutional issues, and this Court needs to resolve the split between the lower courts. *Amicus* respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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