No. 91615-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN,

Appellants.

INGERSOLL AND FREED,

Respondents,

v.

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN,

Appellants.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Pursuant to Rule of Appellate Procedure 10.6, the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* in support of Appellants. All parties have consented to this filing.

I. INTEREST OF AMICUS CURIAE

The Cato Institute ("Cato") is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Cato's interest here arises from its mission to advance and support the rights that the Constitution guarantees to all citizens. Cato has participated in numerous cases of constitutional significance before the U.S. Supreme Court and other courts, and has worked in defense of the constitutionally guaranteed rights of independent businesses and individuals through its publications, lectures, public appearances, and other endeavors. This case concerns Cato because it implicates the First Amendment's protection of individuals from compelled expressive activity.

II. FAMILIARITY WITH THE ISSUES

Amicus has read the briefs of the parties to this case and understands the arguments that they are advancing before this Court.

III. SPECIFIC ISSUES ADDRESSED BY AMICUS CURIAE

In its proposed brief, *amicus* discusses the First Amendment's application to this case via the compelled-speech doctrine.

IV. REASONS FOR ADDITIONAL ARGUMENT

Amicus believes that further argument is needed on this specific issue because it is one of Appellants' central arguments and one with powerful consequences which deserves additional explanation and consideration.

Amicus has no direct interest, financial or otherwise, in the outcome of this case. Its sole interest here is to ensure the protection of the First Amendment for those whose business is to create expressive material.

For the foregoing reasons, *amicus* respectfully requests to be allowed to participate in this case by filing the attached brief.

Respectfully submitted this 4th day of February, 2016,

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INTEREST OF THE *AMICUS CURIAE*

The Cato Institute hereby incorporates its statement of interest from its motion for leave to file this brief. Cato notes that it has long supported the right of same-sex couples to get marriage licenses, including in the litigation that resulted in *Obergefell v. Hodges*, 135 S. Ct. 258 (2015).

STATEMENT OF THE CASE

Amicus incorporates by reference Appellants' Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is largely controlled by *Wooley v. Maynard*, 430 U.S. 705 (1977). *Wooley*, the New Hampshire "Live Free or Die" license-plate case, makes clear that speech compulsions are as unconstitutional as speech restrictions. *Wooley*'s logic applies to floral arrangements and other types of visual art, not just verbal expression. It also applies to compulsions to create floral arrangements and other works (including when the creation is done for money), not just to compulsions to display such works. *Wooley* should not be so quickly dismissed as the Superior Court did below.

Indeed, the Superior Court's reasoning would produce startling results. Consider, for instance, a freelance writer who writes press releases for various groups, including religious ones, but refuses to write copy for a religious organization or event with which he disagrees. Under the Superior Court's theory, such a refusal would violate the law—being a

form of religious discrimination—much as Barronelle Stutzman's refusal to arrange the flowers for an event with which she disagreed was. Yet a writer has the First Amendment right to choose which speech he creates, notwithstanding contrary state law. The same principle applies to florists.

While *Wooley* provides important constitutional protection, it also offers an important limiting principle to that protection: Although florists, writers, singers, actors, painters, and others who create First-Amendment-protected speech must have the right to decide which commissions to take and which to reject, this right does not apply to others who do not engage in protected speech. This Court can rule in favor of Arlene's Flowers on First Amendment grounds without blocking the enforcement of antidiscrimination law against denials of service by caterers, hotels, limousine service operators, and the like.[1]

Wooley secures an important constitutional right to which all speakers are entitled—whether religious or secular, liberal or conservative, pro- or anti-same-sex-marriage. The decision below violates that right.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS BOTH THE RIGHT TO SPEAK FREELY AND THE RIGHT NOT TO SPEAK

More than seventy years ago, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the U.S. Supreme Court

[1] *Amicus* takes no position for purposes of this case regarding potential defenses that *non-expressive* businesses may have against the operations of antidiscrimination laws.

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." Since then, the Court has numerous times reaffirmed that the First Amendment prohibits compelled speech as well as 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 government-issued license plates and sought the freedom not to display the motto. *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). Requiring 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 compelled 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").

This understanding of "individual freedom of mind" makes considerable sense. Democracy and liberty rely on citizens' ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

Thus in the dark days of Soviet repression, Solzhenitsyn admonished his fellow Russians to "live not by lies": to refuse to endorse speech they believed false. Alexander Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26. Each person must resolve never to "write, sign or print in any way a single phrase which in his opinion distorts the truth," never to "take into hand nor raise into the air a poster or slogan which he does not completely accept," never to "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music." *Id.*

People whose consciences require them to refuse to distribute expression "which [they do] not completely accept," *Id.*, are constitutionally protected. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and to refrain from speaking at all." *Wooley*, 430 U.S. at 714.

II. *WOOLEY* EXTENDS TO FLORISTRY, AN EXPRESSIVE ART

As Appellants argue, floral designs are artistic expressions. Brief of Appellants at 24–26, *State v. Arlene's Flowers, Inc.*, No. 91615-2. Numerous schools of floristry art exist throughout the world—FlowerSchool New York, the Floral Art School of Australia, and the Academy of Floral Art (in Great Britain), among the most notable. They offer a wide variety of courses, including ones tailored to weddings. The

Jane Packer School, in London, offers a course called "The Bridal Foundation." *The Bridal Foundation*, Jane Packer, http://www.janepackerdelivered.com/the-bridal-foundation. 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).

Some countries recognize the title of Master Florist, which in Holland is earned after years of study and an exam. *What Makes a Master Florist*, FlowerSchool New York, http://www.flowerschoolny.com/about/master-florists/what-makes-a-master-designr.html. "A Master Florist is [a] floral designer who has a unique artistic vision combined with knowledge of how flowers grow . . . . [someone] who can visualize a look and make a creative statement that is unique to their own particularized vision." *Id.*.

Florists are not alone in seeing their work as art. The Arts Council of Great Britain has designated the Royal Horticultural Society's library "a collection of national and international importance." Royal Horticultural Society, Vision 13, available at https://www.rhs.org.uk/about-the-rhs/pdfs/about-the-rhs/mission-and-strategy/vision-document/rhs-vision.

The library "documents more than 500 years of gardening history, art and writing." *Id.* And, like other forms of art, floristry experiences trends over time. According to the International Academy of Floristry, around 2000, the floral-design world was "inspired by the French [and] Belgian floral masters on floral design with natural support [such that] contemporary minimal designs became new to the world—clean lines, bold flower, stunning [and] impressive designs." Floral Art Research, Int'l Academy of Floristry, http://www.iaf-floralartresearch.org/enu/research.asp.

Floristry exhibits all the characteristics of other expressive formats that the U.S. Supreme Court has recognized as constitutionally protected. To show that the Constitution protects even abstract expression, the Court identified the "painting of Jackson Pollock, the music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll" as "unquestionably shielded" by the First Amendment. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Although the Court has not yet considered floristry, 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).

Some of the circuit courts have addressed the First Amendment protections for still other types of artistic expression. The Ninth Circuit has held that all aspects of tattooing are fully protected. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010). In that court's words: "The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are . . . purely expressive activity fully protected by the First Amendment." *Id.* (emphasis in original). The court went on to hold that the tattooing process is "purely expressive activity" because the Supreme Court has never distinguished between pure speech and the process of creating pure speech. *Id.* at 1061–62 (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582 (1983)).

Other circuits that have specifically considered the application of the First Amendment to artistic expression agree with the Ninth Circuit that it is speech. For example, the Sixth Circuit held that "[t]he protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).

In *Piarowski v. Ill. Cmty. College Dist. 515*, 759 F.2d 625, 627–28 (7th Cir. 1985) (Posner, J.), the Seventh Circuit easily found that stained glass windows on display in an art gallery were protected speech. The

court stated that the First Amendment "embrace[s] purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of 'art,' such as . . . topless dancing . . .)." *Id.* at 628.

Similarly, in *Bery v. City of New York*, 97 F.3d 689, 691–92 (2d Cir. 1996), the court addressed a challenge to a municipal vendors law brought by artists who had been arrested and had their paintings, photography, and sculptures confiscated or damaged for selling these on city sidewalks without a license. That court also cited precedents extending the First Amendment beyond words and concluded that the art at issue was "entitled to full First Amendment protection." *Id.* at 694–96. The court also noted that "visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing" and that, in fact, art may be better able to reach people because it is not constricted by the variants of language. *Id.* at 695. "Visual artwork is as much an embodiment of the artist's expression as is a written text." *Id.*

The message a floral arrangement sends may not be as easily identifiable as that of verbal art forms, but the Court said in *Hurley* that "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. at 559. Furthermore, throughout history, people have debated what makes something art and who decides what is art and how to interpret it. Artists themselves have participated in these debates, often by

pushing the envelope of what is accepted as "art." Andy Warhol's pop art took advertisement and made it art. Jackson Pollock's drip painting made art out of paint dripped onto canvas or blown by giant fans.

Anish Kapoor's *Cloud Gate*—better known as the Chicago Bean—is art in the form of a giant metallic sculpture that reflects the Chicago skyline. Most people who take selfies in front of the Chicago Bean do not know any of Kapoor's themes, which include immateriality, spirituality, and the tension between the masculine and feminine. *The Cloud Gate by Anish Kapoor in 2004–2006*, What is Art? (May 10, 2011), http://whatisart4.blogspot.com/2011/05/cloud-gate-by-anish-kapoor-in-2004-2006.html. Pollock's work is even more open to interpretation, and yet the Supreme Court said in *Hurley*, 515 U.S. at 569, that it is "unquestionably shielded" by the First Amendment.

In sum, floral arrangements are an expressive art form that should be given full First Amendment protection.

III. *WOOLEY* EXTENDS TO THE COMPELLED CREATION AND DISTRIBUTION OF SPEECH

First Amendment protections are not limited to pre-fabricated messages, but extend to the creation of speech as well as its dissemination, including when that creation is done in exchange for money. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that an author who writes for money is fully

protected by the First Amendment); *United States v. Stevens*, 559 U.S. 460, 465–70 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty, with no distinction between the ban on creation and the ban on distribution).

This equal treatment of speech creation and dissemination makes sense. Compelling the creation of speech interferes with the "individual freedom of mind" at least as much as—truly in all likelihood more than—compelling the dissemination of speech does.

To be sure, creation and dissemination are not identical. This case does not, for instance, involve the concern that Barronelle Stutzman is required to "use [her] private property as a 'mobile billboard'" for a particular message, *Wooley*, 430 U.S. at 715. But compelled creation and compelled dissemination are similar in that they both involve a person being required "to foster . . . concepts" with which she disagrees, *id.* at 714, and "to be an instrument for fostering public adherence" to a view of which she disapproves. *Id.* at 715. If anything, requiring someone to create speech is even more an imposition on a person's "intellect and spirit," *id.* (internal quotation marks omitted), than is requiring the person simply to engage in "the passive act of carrying the state motto on a license plate." *Id.*

Creating expression involves innumerable intellectual and artistic decisions. It also requires sympathy with the intellectual or emotional

message that the expression conveys, or at least absence of disagreement with the message. Requiring people to produce speech is more intrusive than requiring them to be a "conduit." As Solzhenitsyn noted, a person can rightfully insist that she should never "depict, foster or broadcast a single idea which [she] can see is false or a distortion of the truth, whether it be in painting, sculpture, [or] photography," Solzhenitsyn, *supra*—just as she can rightfully insist that she should never "take into hand nor raise into the air a poster or slogan which [she] does not completely accept." *Id.*

Consider the very sort of antidiscrimination law at issue here. As interpreted by the Superior Court, the law would apply not just to florists but to other contractors, such as freelance writers and singers. It would apply not just to weddings, but to political and religious events. *State v. Arlene's Flowers*, No. 13-2-00871-5 (consol. with No. 13-2-00953-3), at *39 (Wash. Sup. Ct. Dec. 19, 2014) ("Because anti-discrimination laws by their nature require equal treatment, they cannot be defeated by the claim that equal treatment requires communication or expression of a message with which the speaker disagrees. The Defendants offer no persuasive authority of a free speech exception (be it creative, artistic, or otherwise) to anti-discrimination laws applied to public accommodations.").

Thus a graphic artist who thinks Scientology is a fraud would violate Washington law—which bans religious discrimination—if he refused to

design flyers to be used at Scientologists' meetings. An actor would violate the law if he refused to perform in a commercial for a religious organization he dislikes. And since the same rule would apply to laws that ban discrimination on "political affiliation," *e.g.*, D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B), a Democratic freelance writer in such a jurisdiction would have to accept commissions to write press releases for Republicans.

Yet all such requirements unacceptably force speakers to "becom[e] the courier[s] for . . . message[s]" with which they disagree," *Wooley*, 430 U.S. at 717. All interfere with creators' "right to decline to foster . . . concepts" of which they disapprove. *Id.* at 714; *see also id.* at 715 (recognizing people's right to "refuse to foster . . . an idea they find morally objectionable"). And all interfere with the "individual freedom of mind" by forcing writers, actors, painters, and singers to express sentiments that they see as wrong. *Id.* at 714.

This logic is just as sound for florists as for these other kinds of speakers. Arranging flowers for a wedding—like writing a press release or creating a dramatic or musical performance—involves many hours of effort and a large range of artistic decisions. Brief of Appellants at 24–26. Clients pay a good deal of money for such arrangements, precisely because of the florists' expressive selection and decoration decisions.

Nor can *Rumsfeld v. FAIR*, 547 U.S. 47 (2004) justify the decision below. In *Rumsfeld*, the Court wrote that "[c]ompelling 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." 547 U.S. at 62. But that situation is distinct from *Barnette* and *Wooley* because requiring an institution to send scheduling e-mails does not interfere with anyone's "individual freedom of mind," *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637). As argued above, requiring an individual to personally create expressive works interferes with that "freedom of mind"—even more than requiring an individual to display a motto on his car. This case is thus governed by *Wooley*, not by *Rumsfeld*.

IV. THE FREEDOM FROM SPEECH COMPULSIONS EXTENDS TO FOR-PROFIT SPEAKERS

It also does not matter that Mrs. Stutzman was engaged in floristry for money. As was noted above, the First Amendment fully protects both the dissemination and the creation of material for profit. The compelled-speech doctrine applies to commercial businesses, both newspapers, *see, e.g., Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and non-media corporations, *see, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475

U.S. 1 (1986). And this protection is logical: A wide range of speakers, whether freelance writers or florists, earn a living from their speech.

This is the nature of our free-market system: The prospect of financial gain gives many creators of speech an incentive to create, and the money they make by selling their creations gives them the ability to create more. *United States v. Nat'l Treasury Emp. Union*, 513 U.S. 454, 469 (1995) (treating speech for money as fully protected, because "compensation [of authors] provides a significant incentive toward more expression").

If making money from one's work meant surrendering one's First Amendment rights to choose what to create, then a great many speakers would be stripped of their constitutional rights, including this country's most popular entertainers, authors, and artists.

V. THE FIRST AMENDMENT RIGHT NOT TO SPEAK CANNOT BE TRUMPED BY STATE LAWS CREATING COUNTERVAILING RIGHTS

The court below rejected Appellants' free-speech defense "[b]ecause anti-discrimination laws by their nature require equal treatment, they cannot be defeated by the claim that equal treatment requires communication or expression of a message with which the speaker disagrees." *Arlene's Flowers*, at *39. But state-law rights cannot trump the First Amendment, as *Hurley* and *Tornillo* show. See also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (distinguishing *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 657 (1984), because the law there did not substantially burden First Amendment rights).

Hurley, like this case, involved a state-law right to equal treatment in public accommodation, which the state's highest court interpreted as covering parades. *See Irish-American Gay, Lesbian & Bisexual Group. of Boston v. Hurley*, 636 N.E.2d 1293, 1298 (Mass. 1994). *Tornillo* likewise involved a law that created an equality right, namely "a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper." 418 U.S. at 243. In both cases, the First Amendment prevailed over the assertions of contrary state rights.

Indeed, the point of First Amendment protection is to trump legislative restrictions—"to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts," *Barnette*, 319 U.S. at 638. That is just as true for state laws aimed at securing equality rights as for other laws that impact free speech.

VI. CONSTITUTIONAL PROTECTION AGAINST COMPELLED SPEECH EXTENDS ONLY TO REFUSALS TO CREATE EXPRESSION PROTECTED BY THE FIRST AMENDMENT

The First Amendment protection offered by *Wooley* is limited in scope: It extends only to people who are being compelled to engage in expression. Under *Wooley*, florists' First Amendment freedom of

expression protects their right to choose which arrangements to create. But caterers, hotels, and limousine companies do not have a right on that ground to refuse to deliver food, rent out rooms, or provide livery services, respectively, for use in same-sex commitment ceremonies.

This simply reflects the fact that the First Amendment does not extend to all human endeavors, but only to expression. For instance, the state may create a monopoly on catering, restrict the operation of dance halls, set up a medallion system to limit the number of limousine drivers, or require a license for such businesses that the state had the discretion to grant or deny. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding a ban on new pushcart vendors that allowed only a few old vendors to operate); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding a ban on businesses that engage in "debt adjusting"); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding a law that barred dance halls that cater to 14-to-18-year-olds from letting in adult patrons).

But it would be an unconstitutional prior restraint for the government to require a license before someone could publish a newspaper or write press releases, or to give certain painters a monopoly on that form of expression. *Cf.*, *e.g.*, *City of Lakewood*, 486 U.S. 750 (1988) (striking down newspaper-rack licensure); *Mahaney v. City of Englewood*, 226 P.3d 1214, 1220 (Colo. Ct. App. 2009) (striking down wall-mural licensure).

Courts routinely police the line between expression and non-expressive behavior: Restrictions on expression trigger First Amendment scrutiny; restrictions on non-expressive conduct do not. Precisely the same line can be drawn—and with no greater difficulty—when it comes to compulsions.

If an activity may be banned, limited to certain classes of people, or subject to licensing without violating the First Amendment, then it may likewise be compelled without violating the First Amendment.[2] But if an activity is protected by the First Amendment, it may not be compelled.

Upholding the right against compelled speech that is implicated here would ultimately inflict little harm on those who are discriminated against. A florist who views same-sex marriage as immoral would be of little use to the people engaging in such a ceremony; there is too much risk that the floristry will, even inadvertently, not be as well suited to the couple's vision as those created by a florist whose heart was in the work.

Those engaging in such a ceremony—or, say, entering into an interfaith marriage or remarrying after a divorce—would likely benefit from knowing that a prospective florist disapproves of the ceremony, so they could then turn to a more enthusiastic florist. According to the Society of American Florists, as of 2010 there were approximately 16,000

[2] Of course, other constitutional (and statutory) rights may be implicated here.

florists in the United States.[3] A YellowPages.com query for "florist" near Richland, Washington, where Arlene's Flowers is located, yielded 51 results.[4] Most florists would be happy to take anyone's money.

In this respect, discrimination by these narrow categories of expressive commercial actors is much less damaging and restrictive than other forms of discrimination. Employment discrimination can jeopardize a person's livelihood. Discrimination in education can affect a person's future, as can discrimination in housing. Discrimination in many places of public accommodation has been historically pervasive, to the point that mixed-race groups might have been unable to find any suitable hotel or restaurant. But protecting the First Amendment rights of writers, singers, and florists would come at comparatively little cost to those denied such inherently expressive and personal services by specific providers.

Of course, when a florist tells a couple that she does not want to handle the floral arrangements for their wedding, the couple may understandably be offended by this rejection. But the First Amendment does not treat avoiding offense as a sufficient interest to justify restricting or compelling speech. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971).

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[3] Floral Industry Facts, Society of American Florists (last updated July 2014), https://safnow.org/trends-statistics/floral-industry-facts/#US.

[4] Yellowpages.com query, http://www.yellowpages.com/search?search_terms=florist&geo_location_terms=Richland%2C+WA (search performed Feb.3, 2016).

The First Amendment right to sing, write, and the like also rebuts the notion that people who choose to arrange flowers for some ceremonies may on that basis be required to do them for all others. Creating expressive works—unlike delivering food, renting out ballrooms, or driving limousines—is a constitutional right. States thus cannot impose new burdens on creators as a result of their having exercised this right.

Tornillo illustrates that point. There, the Court struck down a law that required newspapers to publish candidate replies to the extent that they published criticisms. 418 U.S. at 243. The paper's publication of the initial criticism could not be the basis for compelling it to publish replies. Likewise, a person's choice to create constitutionally protected artistic expression cannot be the basis for compelling her to engage in artistic expression that she does not wish to create.

CONCLUSION

For the foregoing reasons, this Court should reverse the court below.

Respectfully,

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I hereby certify that on February 4, 2016, I caused the foregoing document to be served on the following counsel of record:

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Dated this 4th day of February, 2016.

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