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.

BRIEF OF THE STATES OF ARKANSAS, ALABAMA, ARIZONA, KENTUCKY (BY AND THROUGH GOV. BEVIN), LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA AND THE GOVERNOR OF KANSAS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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I. Interest and Identity of Amici

Amici are 12 states and the Governor of Kansas sharing the same concerns that all citizens—especially those who are in political minorities—be free from forced speech and have the liberty to exercise their religion. Indeed, forced speech that requires citizens to violate their religious conscience implicates the very apex of constitutional rights held by our citizens.

Because this case presents important constitutional issues that will likely arise in other states, this case has nationwide importance. Mrs. Stutzman did not violate either the Washington Law Against Discrimination (WLAD) or the Consumer Protection Act (CPA) because she did not discriminate against Mr. Ingersoll based on his sexual orientation. Ms. Stutzman has served Mr. Ingersoll for years and would continue to serve him. Rather, she gently refused to participate in an event that, she believed, would require her to engage in artistic, expressive, and associative conduct that violated her religious and speech rights. If WLAD or CPA are interpreted in such a way as to make Mrs. Stutzman's conduct unlawful, those statutes are inconsistent with inalienable rights that have been considered the cornerstone of our pluralistic society since the founding.

II. Introduction

This case—and similar ones that will undoubtedly arise in other states—raises one core question: Can we, as a society, protect same-sex couples' liberty without also trampling others' free speech and free-exercise rights? The facts of this case and the applicable law indicate that the answer is a resounding "yes." But such balanced tolerance requires that serious weight be given to the rights of Mrs. Stutzman in addition to the rights of Messrs. Ingersoll and Freed. After all, the logic of this Court's decision in

this case will apply across a variety of situations far removed from the context of this case.

This amicus brief first addresses the history, importance, and scope of religious exemptions in the United States generally and among the several States. This shared background helps situate and resolve several disputes in this case. This brief next addresses the State's asserted interest in substantially burdening Mrs. Stutzman's religious beliefs and attempting to force her to engage in expressive conduct that she believes would violate her religion. As explained more fully below, the State has mislabeled its interest as "eradicating discrimination." The State's brief expends several pages on eradicating the harms to the dignity of customers who are turned away from services because of their sexual orientation. But dignitary harm—though real—cannot bear the weight of the State's argument. Finally, this amicus brief addresses the harmful consequences to others that will follow if the Court holds that Appellants' conduct violated the law and that they are not entitled to an exemption.

III. Statement of the Case

Amici adopt the Statement of the Case in the Appellants' Brief.

IV. Argument

A. Because this case presents many of the same problems that our forbearers confronted, a review of the history, importance, and scope of religious liberty—at both the national and state levels—will assist this Court.

1. Our states' shared histories with religious freedom reflect an increasing understanding of the necessity and utility of protecting citizens' rights to live out their religion.

As Professor Michael McConnell explains, the American colonies functioned as "laboratories for the exploration of different approaches to religion and government."

Accordingly, our states' shared history with religion and government "cannot be understood or appreciated without knowing what happened before." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990). Understanding the march toward freedom of religion and conscience in this country, the contours of this right, and the inescapable connection between this right and personal liberty and personal identity is critical to appropriately safeguarding the right in today's world.

a. The Colonial Period. The Colonial experience with religion fell into four main groups. First, there was the "Puritan approach." *Id*. at 1422–23. This approach—represented most vigorously in Massachusetts—heavily mixed church and state by establishing both "in accordance with their 'congregational' understanding of church polity." *Id*. at 1422. This model did not allow room for religious pluralism or even toleration. *Id*. In fact, Massachusetts saw violence in the active persecution of dissenting religious groups such as the Baptists and Quakers. *Id*.

Under the second approach, which started in Virginia, the Church of England was established as the official church and financially supported by the state. *Id*. at 1423–24. Like the Puritan model, the Virginia model was hostile to religious dissenters, even to the point of violence. Over time, Virginia's model "spread to Maryland and throughout the South, though with less violence toward dissenters." *Id*. at 1423.

The third approach has been described as "benign neglect." *Id*. at 1424. This model, found especially in New York and New Jersey, represents a significant degree of religious toleration. *Id*. Like many places in America today, the area represented an

"extraordinary religious diversity." *Id*. For the most part, Protestants of all kinds, Quakers, and Jews were allowed to live freely and without persecution. *Id*.

The fourth approach was specifically designed to establish havens for certain religious dissenters who were unwelcome elsewhere. *Id*. at 1425. Maryland was initially established as a haven for persecuted Catholics. But as it progressed, Maryland became well known for religious persecution. *Id*. Rhode Island and Pennsylvania were also established as dissenters' havens. *Id*. Though the Carolinas were initially established to further John Locke's Enlightenment principles, they later "instituted a rigid establishment of the Church of England along lines parallel to Virginia's." *Id*.

b. The Revolutionary War Period. By the time the colonies began to confront the prospect of the Revolutionary War, the colonists were beginning to distill several lessons from the foregoing approaches to religion in public life. Most colonists held at least a common core of beliefs about the need for religious exemptions and the importance of protecting citizens' rights to freely exercise their religions. By the late 18th century, four groups (collectively) had the most influence on our constitutional tradition. The four groups were composed of two theological groups (Puritans and free-church evangelicals) and two political groups (enlightenment thinkers and civic republicans). John Witte, Jr., *The Essential Rights and Liberties in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 377–78 (1996). A brief review of their beliefs shows how, even in a pluralistic society, people can find common ground.

The two theological groups offered theological arguments for their favored view of the nature and limits of free exercise of religion. They agreed on the importance of the institutional separation of church and state, but they disagreed about the degree of that

separation and about the scope of free exercise. *Id*. at 378–82. To the congregational Puritans (represented by John Adams, Jonathan Edwards, and Cotton Mather), church and state were two separate associations, both of which were seats of God's authority in the community. *Id*. at 378–79. While the church and state should remain institutionally separate, they were to be "close and compact," each assisting the other. *Id*. at 379. The Puritans "left little room for individual religious experimentation." *Id*. at 380. The New England authorities "insisted on a general adherence to the creeds and canons of Puritan Calvinism." *Id*. Likewise, the free-church evangelicals (represented by Roger Williams, John Witherspoon, and John Wesley) advanced theological arguments for their view of religious rights and liberties. With many of the evangelicals having been in the religious and political minority, they sought greater protection "for the liberty of conscience of every individual and freedom of association of every religious group." *Id*. at 381.

In contrast, the two political groups offered political arguments for their views on the nature and scope of religious liberty. The enlightenment thinkers (represented by Thomas Jefferson and Benjamin Franklin) clashed with the civic republicans (represented by George Washington, John Adams, and Samuel Adams). *Id*. at 383–85. The two sides agreed on the need for liberty of conscience for all and on the need for pluralistic religion in each state. *Id*. at 386. But they disagreed on how "friendly" the state should be to religion in general. The enlightenment thinkers were profoundly skeptical of organized religion and sought to free the state from the church's influence. *Id*. at 383–84. But the civic republicans' view is summed up by George Washington, who said that "Religion and Morality are the essential pillars of Civil society." *Id*. at 386 (internal citation

omitted). They wanted the state to support and accommodate religious institutions, which were regarded as aides to a stable and flourishing society. *Id*.

C. The Basic Consensus. Despite their differences, these four groups generally agreed on what they called "the essential rights and liberties of religion." *Id*. at 388. Even the enlightenment thinker, Thomas Jefferson, had no hesitation in saying that the "free exercise of religion is the most inalienable and sacred of all human rights." *Id*. at 389 (internal citations omitted). The four groups were able to agree on general principles that most in our society still hold dear: liberty of conscience, free exercise of religion, pluralism, equality, and the institutional separation of church and state. *Id*. at 388.

Of course these principles can sometimes find themselves in tension when they are applied to specific cases or when one tries to distill the principles into effective legislation. That is why we see the debates—at both the federal and state levels—over exactly how to word the protections for religious exercise. McConnell, *supra*. While the various disputants often disagreed on the wording of religious protections or on the underlying reasons for them, they all agreed on the necessity and utility of protecting religious exercise—not just belief.

2. Our forbearers teach us that protecting religious freedom is so important because, among other things, it reduces human suffering and enhances the state's social and political stability.

Why single out freedom of religion for such protection? Why were the Framers of the federal constitution—and, in time, nearly all state constitutions—so concerned to protect religious exercise? Professor Douglas Laycock answers these questions by explaining that protecting citizens' religious consciences reduces suffering and increases social and political stability. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contem.

Legal Issues 313, 316–17 (1996). "First, in a history that was recent to the American Founders," Professor Laycock explains, "governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies…." *Id*. at 317.

In addition to reducing human suffering, protecting religious dissenters increased social and political stability. Professor Laycock explains that "beliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for." *Id*. While referencing the suffering generated by governments' failures to exempt religious objectors, James Madison poignantly noted the social and political benefits of granting exemptions:

> Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the state.

Id. (internal citation omitted).

In summary, our country's history has been one of increasing protections for religious liberty, which include the practice of granting reasonable exemptions from laws that would otherwise force religious adherents to violate the tenets of their religion and thus act in a way they believe contravenes God's law. These reasonable exemptions reduce human suffering by ensuring that citizens are not presented with the terrible choice of either "incurring legal penalties or surrendering core parts of their identity." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 842

(2014). In addition, as James Madison observed above, the importance of protecting religious liberty as a key to social and political stability was a hard-learned lesson from failures of both Old World Europe and parts of colonial America.

Our country has long benefited from having learned this lesson. Today, Congress and 32 states protect free exercise of religion by granting reasonable exemptions from certain laws. *See id.* at 844, n.22, 845, n.26 (collecting citations). Further, both Congress and these many states almost always require laws that burden or substantially burden religious exercise to undergo some form of strict scrutiny. *Id*. These protections are just as important today. Indeed, they may even be more important today, as certain religious groups become a smaller section of the population with less political power and less societal influence.

3. Religious exercise had limits that were tested in several early free-exercise controversies.

As Professor McConnell explains, states have an extensive history of accommodating religious objectors by granting them exemptions from generally applicable laws. McConnell, *supra*, 103 Harv. L. Rev. at 1409. But do exemptions have limits? If an exemption undercuts a state's wider policy concerns, should the exemption be allowed? In Washington jurisprudence, the answer to these questions requires one to apply the strict-scrutiny test to determine whether the exemption is required. The application of this test—particularly with regard to what it means to have a "compelling interest"—can be informed by a brief examination of states' early (1) attempts to establish the limits of religious exemptions and (2) disputes about whether to grant religious exemptions.

One common experience among the early states was that they limited free-exercise rights by particular defined interests. *Id*. at 1461–66. Some states limited free-exercise rights (and necessary exemptions to accommodate those rights) to actions that were "peaceable" or that would not disturb the state's "peace" or "safety." *Id*. at 1461. Four states—like Washington several years later—expressly disallowed acts of "licentiousness or immorality." *Id*. Such limitations "may well have referred to public displays of immoral behavior." *Id*. at 1465.

Several early disputes over whether to grant religious exemptions tested these principles. Two widespread examples show how the foregoing history and principles were put into action: oaths in court and conscription to military service. The most common dispute about free-exercise exemptions arose regarding the issue of oaths. *Id*. at 1467. The requirement that witnesses in court take an oath was "the principle means of ensuring honest testimony and of solemnizing obligations." *Id*. Professor McConnell explains that at that time, "when perjury prosecutions were unusual, extratemporal sanctions for telling falsehoods or reneging on commitments were thought indispensable to society." *Id*. But Quakers and several other Protestant sects refused to take oaths, believing that oaths violated the teachings of Jesus. *Id*. Their refusal to take an oath meant that in a "regime requiring oaths prior to court testimony," the objectors were effectively precluded from "using the court system to protect themselves." *Id*. This obviously "left them vulnerable to their adversaries, who could sue them for property and never doubt the result." *Id*. (internal quotation omitted).

How did the states resolve this problem? They, like this Court today, had three options. First, the government could eliminate the offending requirement for everyone,

which would have made oath-taking voluntary. But this would have given up the important benefits, explained above, that they believed the oath requirement furthered. This was unacceptable. Second, they could have—like Respondents urge in this case—insisted on the oath requirement for all, which would have driven dissenters from court by "making it impossible for dissenters to give evidence in court or participate in civic activity involving an oath." *Id*. Revealingly, the colonies and early states did not take the tact offered by Respondents in this case. If the early states followed the tact suggested by Respondents, then the early states would have said something like this: "Quakers, this is problem of your own making. If you don't want to be taken advantage of in court, then just swear an oath. It's not that big of a deal. The oath requirement serves compelling interests that are harmed if even a single objector is allowed an exemption."

But the colonies and early states did not do that. Recognizing the dangers of assessing the merits or values of specific religious beliefs, they took the third option: namely, creating a religious exception to the oath requirement. *Id*. This is the origin of the now well-known phrase: "Do you swear or affirm that the testimony you are about to give is the truth…." *Id*.

But perhaps one will object that the oath example is not illuminating to the issues in this case, which involve alleged harms to others. This is where the second example—conscription to military service—is helpful. Several denominations—especially the Quakers and Mennonites—had religious objections to serving in war of any kind. *Id*. at 1468. The colonies all granted exemptions to the religious objectors. Thus Pennsylvania, where Quakers were most numerous, went without a militia until 1755, when one was organized on a voluntary basis. *Id*.

On July 18, 1775, the Continental Congress was about to confront one of the world's most powerful armies. Though out-manned and out-gunned, the Continental Congress exempted scores of religious objectors from military service in these words:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can [do] consistently with their religious principles."

Id. at 1469 (internal citation omitted).

This example is particularly illuminating. If ever there were an interest that qualifies as "compelling," it is the preservation of the entire government in times war—or, as the Continental Congress said, in times of "universal calamity." Yet even in this circumstance, our forbearers did not hesitate to grant religious objectors an exemption, despite the high costs to third parties from exempting whole segments of able-bodied citizens from fighting to preserve the government. As Professor McConnell summarizes these events, "The language as well as the substance of this policy…recognizes the superior claim of religious 'conscience' over civil obligation, even at a time of 'universal calamity,' and leaves the appropriate accommodation to the judgment of the religious objectors." *Id*. at 1468.

This shared history—characterized by a respect for those with different views and a desire to allow people to live according to their consciences—is the background for the free-exercise protections found in the various state constitutions.

4. Three inferences from the foregoing history help resolve several issues in this case.

The foregoing history justifies at least three inferences. First, the fact that the colonies and early states set the limits of free-exercise rights at the disturbance of public safety and immorality "confirm[s] that the free exercise right was not understood to be confined to beliefs. Beliefs without more do not have the capacity to disturb the public peace and safety." *Id*. at 1462. This inference, when applied to the present case, directly addresses the scope of the Mrs. Stutzman's religious exercise. The right to free exercise of religion—as recognized in both the First Amendment and in Article 1, Section 11 of Washington's constitution—is not restricted to one's home or place of worship. Yet Respondents claim that religious persons forfeit their right to live out their beliefs when they open a business. (*See* State's Response Brief, p. 2.) Religious persons who own and operate businesses retain their free exercise rights. *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114, 1129–34 (10th Cir. 2013) (noting that U.S. Supreme Court has recognized that "*individuals* have Free Exercise rights with respect to their *for-profit businesses*."); *see also* Ronald J. Colombo, *The Naked Private Square*, 51 Hous. L. Rev. 1, 69–81 (2013). Respondents' attempt to create a religion-free zone belies their claims of inclusivity and tolerance and is out of step with our free-exercise history. Their attempt to drive a wedge between one's public and private lives would have shocked those who hammered out the religious-liberty principles described above. *See* Loren F. Selznick, *Running Mom and Pop Businesses by the Good Book: The Scope of Religious Rights of Business Owners,* 78 Alb. L. Rev. 1353, 1354–56 (2014).

Second, the various state constitutions—including Washington's—have built-in limitations on the religious-exercise rights. These limitations, such as the state's "peace"

and "safety," show that a religious person "has no license to invade the private rights of others….There is no free exercise right to kidnap another person for the purposes of proselytizing, or to trespass on private property—whether it be an abortion clinic or a defense contracting plant—to protest immoral activity." McConnell, *supra*, at 1464.

This inference, when applied to the present case, spoils the parade of horribles the State claims would follow if Mrs. Stutzman's religious rights were respected. The State advances an all-or-nothing approach when it claims that if this Court were to find "a substantial burden here," then "any time a business owner claims that a state regulation is contrary to her religious beliefs, the regulation would face strict scrutiny." (State's Response Brief, p. 32.) The State seems to be saying that if WLAD can substantially burden Mrs. Stutzman's religious rights, then so would every regulation of any business. This is hyperbole. The mere "claim" that the regulation infringes religious exercise is insufficient: the claimant's claim must be *sincere* and the law must *substantially burden* the claimant's religious exercise. *See generally City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 211 P.2d 406 (2009). Further, Mrs. Stutzman is only objecting to being forced to engage in an event that, she believes, would declare her support of that event. She is not objecting to every regulation of her business.

Third, the examples of early free-exercise conflicts show that the "peace and safety" limitations in the state constitutions are not "simple restatements of unbridled governmental supremacy in a clash with religious precepts." McConnell, *supra*, at 1466. When this inference is applied to the present case, one can see that Respondents are straining the limiting language in Article 1, Section 11 past the breaking point. (*See* State's Response Brief, p. 27.) The State implies that it is entitled to unbridled supremacy

when the offending law is enacted under the police power. In fact, the State seems to say that such a law could not, even in principle, substantially burden one's religious rights: "Washington courts have never imposed that standard [i.e. requiring a law to face strict scrutiny] when a business owner claims a religious exemption to a law enacted *under the legislature's police power*…." (*See* State's Response Brief, p. 32 (emphasis added)). This assertion turns free-exercise law on its head. The police power is a *source* of governmental authority—not a definitive *guarantee* of a statute's lawfulness. *See Black's Law Dictionary* 1345 (Bryan A. Garner, ed., 10th ed., West 2014) (defining *police power* as the "inherent and plenary power of a sovereign to make all laws necessary and proper to preserve security, order, health, morality, and justice."). Legislative power, which is derived from and subject to the people's inherent authority, is itself limited by the individual rights contained in the constitution—including religious rights. Thus, the State is misusing the language of Article 1, Section 11. The question is not whether the statute was enacted under the police powers. Rather, the question is whether the interest served by the statute is sufficient to justify the restriction of religious liberty.

B. When the State's asserted interest is properly labeled and assessed, the interest cannot overcome the Appellants' speech and religious rights.

Respondents assert that the State has a compelling interest in "eradicating discrimination" on the basis of sexual orientation.[1] As noted above, far from invidiously discriminating against Mr. Ingersoll due to his sexual orientation, Mrs. Stutzman considered him a friend and the two maintained a lengthy professional relationship. Rather, she objected to participating in (and using her artistic and expressive talents to

[1] As Appellants have made clear, the two categories are distinct. *See* Appellants' Reply Brief, p.34, n.7 and accompanying text.

support) a religious event because she believed doing so would violate her religion. Respondents repeatedly and incorrectly claim that refusing to support same-sex marriage is equivalent to sexual-orientation discrimination. (*See, e.g.*, State's Response Brief, pp. 12–13, 17.) In what follows, however, we will accept (*arguendo*) the Respondents' framing of this case as discrimination on the basis of sexual orientation. As shown below, even under that lens, the State has failed to show that it has a compelling interest.

When the state asserts that it has a compelling interest in "eradicating discrimination" and that the WLAD serves that interest, what, exactly, is the State asserting? Scholars have examined the type of claim that the State makes here and divided the potential interests into preventing "material harms" and "dignitary harms" to LGBT customers. *See generally*, Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale L.J.F 369 (2015). In this context, a "material harm" occurs when the LGBT customer is unable obtain to the goods or services at all. To the extent any material harm occurred in this case, it is minimal because Mrs. Stutzman arranged for another florist to provide the services. A "dignitary harm" is the harm to the customer's dignity when he or she is turned away. It is the harm to the potential customer who knows that the conscientious objector thinks the customer's proposed conduct is immoral and objects to being made part of it. *Id*. at 376.

The State's briefing shows that the State has mislabeled its interest. While the State broadly labeled its interest as "eradicating discrimination," the State's briefing expends several pages on the dignitary harms it asserts are prevented by WLAD's application to every business. For example, the State refers to "social stigma" (State's

Response Brief, p. 35) and uses several parentheticals to focus on "dignitary harms." (State's Response Brief, pp. 34–37.)

But dignitary harm cannot bear the weight that the State's argument requires. This is true for several reasons. First, these dignitary harms are generated by the objector's constitutionally protected expressive conduct. When the religious objector respectfully and civilly turns down a request to take part in (and create art for) the objectionable event, the religious objector is engaged in expressive conduct. The U.S. Supreme Court has repeatedly held that the "communicative impact" of expressive conduct (and pure speech) cannot be grounds to regulate the speech. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001); *Texas v. Johnson*, 491 U.S. 397, 411–12, n.7 (1989); and *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (requiring the government's asserted interest to be "unrelated to the suppression of free expression"). Professor Laycock summarizes these cases by noting that a State's attempt to prevent dignitary "harms cannot be a compelling interest that justifies suppressing someone else's individual rights….That your religion offends me is not a sufficient reason to suppress it." Laycock, *supra*, 125 Yale L.J.F. at 376.

Second, our society makes at least some dignitary harms unavoidable. We live in a pluralistic and diverse society, something which Respondents say they want to preserve and promote while seeking to silence or punish those with whom they disagree. The truth is that "mutual moral disapproval is inherent in a morally pluralistic society….and neither side can be protected from encountering it on occasion." *Id*. at 376–77.

Third, though dignitary harms are certainly real and often painful for many people, they are often incorrectly linked to the enormous material and dignitary harms

that occurred in the segregated South. As one scholar observes, "The present situation is nothing like that in the segregated South, when African-Americans were routinely turned away by a dominant majority that controlled political and economic power and public opinion." *Id*. at 376. "It is rather different," he continues, "to be turned away by a member of a shrinking minority whose views are regarded by dominant opinion as profoundly wrongheaded." *Id*.

Fourth, the State's reliance on dignitary harm never acknowledges the dignitary harm to the religious objector. Some objectors believe that they are being asked to do something that might irreparably damage their relationship with their God and that could trouble their consciences forever. Some even think that they might go to Hell forever. These are very serious harms to the dignity of the religious objector—harms that the religious-exemption history detailed above was specifically designed to avoid. As Professor Laycock notes, the "compelling interest test…is ultimately a balancing test with a substantial thumb on the scale in favor of religious liberty." *Id*. at 378. Though there are dignitary harms on both sides, he continues, when the harms are viewed "in purely secular terms," "the emotional harm to potential customers…cannot compellingly outweigh the emotional harm to" the religious objector. *Id*.

C. If this Court rules in Respondents' favor, then far-reaching and harmful consequences will follow.

This Court's opinion will have consequences for all businesses. For example, suppose that, at some point in the near future, someone places an order with a small company that designs and prints t-shirts. And suppose that the company is owned and operated by a gay couple. The prospective customer would like 100 t-shirts with a novel

design bearing the message, "You shall not lie with a male as with a woman. It is an abomination. Leviticus 18:22." Or suppose the shop owner is a woman and the prospective customer would like the t-shirts to say "Wives have the same rights as the husbands have on them in accordance with the generally known principles. Of course, men are a degree above them in status. Quran, Sura 2:228." Or suppose the shop owner is a devout Catholic and the prospective customer, a Satanist, would like the t-shirts to display an artistic design or picture that denigrates Mary. Should these shop owners be forced to design these shirts and fulfill these orders?

Under the logic of the State's argument, the answer to that question is "yes." The WLAD prohibits all places of "public accommodation"—which is defined to include the t-shirt shop[2]—from engaging in any act that "directly or indirectly" causes a person of any "creed"[3] to be "treated as not welcome, accepted, desired, or solicited." RCW 49.60.040(14), 49.60.030(1).

But *forcing* those shop owners to either stop selling t-shirts or to fulfill those orders would be a terrible result—one that the vast majority of Americans would no doubt like to avoid. If we want to foster a culture of diversity and pluralism, then we have to find a way to live together. The shop owners—just like Mrs. Stutzman—should be allowed to kindly and professionally decline to engage in compelled speech that contravenes dearly held beliefs.

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[2] RCW 49.60.040(2) (defining "any place of public…accommodation" to include "any place…for the sale of goods, merchandise, services, or personal property….").

[3] Though WLAD does not define "creed," the Washington State Human Rights Commission says that the term includes and goes beyond "traditional religion": "A religion or creed is defined broadly and includes observance, practice, and belief.…The beliefs can include sincerely held moral and ethical beliefs as to what is right and wrong." *Guide to Religion and Washington State Nondiscrimination Laws* (March 2008, updated July 2015) available at http://www.hum.wa.gov/media/dynamic/files/99_Religion%20and%20non-discrimination.pdf.

V. Conclusion

In conclusion, this case is about whether same-sex couples can protect their liberty without also trampling others' speech and religious rights. Our country has an extensive—and in many ways unique—tradition of valuing and accommodating religious objectors. Objectors—whether the t-shirt business owners above or Mrs. Stutzman—engage in protected speech when they decline to promote messages with which they disagree. There is no doubt that such speech generates dignitary harms. But simply because one is offended by another's religious beliefs—whether that is the hypothetical t-shirt shop owners above or Respondents—that is no basis to suppress the speech or refuse to grant an exemption.

Our states' have shared histories that respect religious objectors by granting them exemptions to ensure they are not compelled to violate their consciences. This shared history informs the present. Millions of people today follow their religions with the same fervency as their predecessors in the colonies and early states. As we have tried to show, the lessons from the 17th and 18th centuries can help resolve the present conflict.

Respondents, who ignore much of this history, laudably want to preserve and promote diversity and inclusivity. But they are attempting to do that by silencing and punishing those with whom they disagree. This glaring inconsistency indicates that Respondents seem to mean something very different from those terms' common meanings. Our history encourages a public square with many voices, all trying to persuade others of their views. But Respondents want all the voices either to agree on one view or to be silent. Because that runs counter to America's history of free speech and

religious exemptions—which are embedded in Washington's Constitution—Amici respectfully urge this Court to rule in Appellants' favor.

Respectfully submitted this 29th day of September 2016.

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