No. 17-108

In the Supreme Court of the United States

ARLENE'S FLOWERS, INC.,
dba ARLENE'S FLOWERS AND GIFTS, *et al.*,
Petitioners,

v.

WASHINGTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF NORTH CAROLINA VALUES COALITION AND THE FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Sen. Rep. No. 103-111, 1st Sess. (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 12

Harlan Fiske Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253 (1919) 9

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886 (2001) 19, 21

INTEREST OF *AMICI*[1]

North Carolina Values Coalition and The Family Research Council, as *amici curiae*, respectfully urge this Court to grant the Petition and reverse the Washington Supreme Court decision. *Amici* concur with Petitioner's recommendation to consolidate this case with *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111, or hold the Petition pending disposition of that case. Pet. 37-38. These two cases present similar legal issues, and both demonstrate an unprecedented level of government coercion that crushes dissenting viewpoints by inflicting crippling legal penalties.

North Carolina Values Coalition is a nonprofit educational and lobbying organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* www.ncvalues.org. The Family Research Council is a non-profit organization located in Washington, D.C. that exists to advance faith, family and freedom in public policy and the culture from a Christian worldview. *See* www.frc.org. Both amici have an interest in ensuring that American citizens are free to live and work according to conscience and religious faith.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees religious liberty to citizens who participate in public life and conduct business according to their moral, ethical, and religious convictions.

The State of Washington uses its anti-discrimination laws to impose crippling penalties on entrepreneurs who refuse to set aside conscience and create visual art that violates the owners' faith and conscience. This application is a frontal assault on liberties Americans have treasured for over 200 years—liberties no person should ever be required to sacrifice as a condition for owning a business.

Some argue the law is necessary for LGBT persons to achieve equality and access to public goods and services. That rabbit trail diverts attention from issues at the heart of this case: liberty of conscience, integrity, freedom of speech and religion. Instead of prohibiting invidious discrimination, Washington creates it. Its ruling jettisons key values heralded by LGBT advocates—*tolerance, diversity, inclusion, equality*. Properly understood and applied, those values facilitate life in a free society and protect the rights of all Americans. But by crushing dissent, Washington promotes *intolerance, uniformity, exclusion, inequality*. The State demands uniformity of thought, belief, and action. It cements intolerance into state law. The result is an unconscionable inequality where people who hold traditional marriage beliefs are excluded from owning

a public business. All of this is anathema to the First Amendment.

ARGUMENT

I. THE WASHINGTON RULING CEMENTS *INTOLERANCE* INTO STATE LAW BY CRUSHING DISSENT.

The "personal choices central to individual dignity and autonomy" this Court recognized in *Obergefell*, "including intimate choices defining personal identity and beliefs," apply equally to the State's treatment of Petitioner. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589, 2597 (2015). Instead, Washington uses that opinion "to vilify Americans who are unwilling to assent to the new orthodoxy." *Id*. at 2642 (Alito, J., dissenting). This Court's concern about stigma is conveniently cast aside, "put[ting] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id*. at 2602. Washington refuses to tolerate citizens who disagree with the state-sanctioned view of marriage.

Secular ideologies increasingly employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. Religious liberty collapses in this toxic atmosphere. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 186-188 (1993). The First Amendment protects against government coercion to endorse or subsidize a cause, religious or otherwise. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The government is

constitutionally powerless to force a *speaker* to support or oppose a particular viewpoint. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). But that is exactly what Washington has done.

As the Sixth Circuit observed, "tolerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). So is dignity. Even though this Court has redefined marriage, same-sex couples have no corollary right to coerce an unwilling business owner to celebrate the new definition. Washington's anti-discrimination law demeans Petitioner by compelling her to become a de facto accomplice to a morally objectionable agenda. This is intolerance, and it is intolerable in a country devoted to liberty.

II. THE WASHINGTON RULING COMPELS *UNIFORMITY* OF SPEECH, BELIEF, AND THOUGHT CONCERNING THE NATURE OF MARRIAGE.

"Diversity" is an ongoing mantra for LGBT advocacy. America has always valued diversity, but Washington destroys it. The state essentially demands uniformity of speech, belief, and thought concerning the nature of marriage—and by silencing one side of a hotly contested issue, the state engages in forbidden viewpoint discrimination. In applying Washington's anti-discrimination law, the state court imposes a burden more onerous than the compelled speech in *Wooley v. Maynard*, where the *state* designed and created the license plate its citizens were required to display. Here, Petitioner must design and create expressive artwork. She is compelled to actively participate in a religious ceremony she finds

objectionable and to communicate a celebratory message she believes is false.

A. Washington Compels The Creation of Speech.

The Washington court criticized Petitioner's argument for a new "narrow" exception that would apply to "businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression as opposed to gift items, raw products, or prearranged [items]." *State v. Arlene's Flowers,* 389 P.3d 543, 559 (Wash. 2017). The court begrudgingly admits, in a footnote, that "a handful of cases protecting various forms of art"[2] appear to "provide surface support" to Petitioner's position. *Id.* at 559 n. 13. But the court refuses to look beneath that "surface" and simply dismisses Petitioner's argument that her custom designs are anything but unprotected conduct.

Petitioner's proposed exception is hardly new. Precedent in multiple jurisdictions confirms that her floral arrangements are visual art entitled to full First Amendment protection.[3] So is her personal labor

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[2] *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (music without words); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattoos); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 627-28 (7th Cir. 1985) (stained glass windows on display junior college art gallery).

[3] *See, e.g., Kaplan v. California*, 413 U.S. 115, 119-120 (1973) (pictures, films, paintings, drawings, engravings); *Anderson v. City of Hermosa Beach*, 621 F.3d at 1060-61 (tattoos); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (artist's original

creating the artwork. Washington ignores this Court's holding that First Amendment protection extends to "creating, distributing, or consuming" speech. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2734 n.1 (2011) (video game restrictions). As the Ninth Circuit explained, "the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection." *Anderson v. City of Hermosa Beach*, 621 F.3d at 1061-62. An appellate court in Texas expressed it well:

> Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting. In all of these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes.

Ex parte Thompson, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014). The same is true here. Petitioner's creation of custom floral designs and the end product are inseparable.

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painting); *Comedy III Productions v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (silk-screened t-shirts); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (painting, photography, prints, sculpture); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 82, 97 (2d Cir. 2006) (graffiti-painted clothing); *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 924 (6th Cir. 2003) (artist's prints of golfer Tiger Woods); *Univ. of Ala. Bd. of Trs. v. New Life Art*, 683 F.3d 1266, 1276 (11th Cir. 2012) (painting of football scenes with university team uniforms).

B. Washington Compels Uniformity Of Thought Concerning The Nature Of Marriage.

Freedom of thought undergirds the First Amendment:

> If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment.

Schneiderman v. United States, 320 U.S. 118, 144 (1943). The Constitution protects "both the right to speak freely *and the right to refrain from speaking at all*"—the right to advance ideological causes and "*the concomitant right to decline to foster such concepts*." *Wooley v. Maynard*, 430 U.S. at 714 (emphasis added). These complementary rights are components of "individual freedom of mind." *Barnette*, 319 U.S. at 637.

This Court should reaffirm these longstanding precedents in light of the grievous violations faced by Petitioner and others in comparable positions. *Obergefell* has triggered a series of similar cases across the nation, endangering the liberties of all Americans to think, speak, and live according to conscience. Even some LGBT advocates admit that:

> A court's insistence that the legal recognition of same-sex couples be designated "marriage" imposes an intellectual and social view that may not be held by a majority of citizens within its jurisdiction, and does so through the creation of not simply "a brand-new 'constitutional right'" but a disquieting new breed—a "right" to a *word*,

> an unprecedented notion having inauspicious potential for regulating speech and thought.

Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 599-600 (2012). The ominous First Amendment implications "impact countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555. Some of those "countervailing liberty interests" are at stake in this case. Washington uses its anti-discrimination law to punish dissenting views and force uniformity of thought about the nature of marriage.

C. Washington Compels Violation Of Conscience.

Freedom of thought is closely linked to conscience. Individuals hold the right to adopt a point of view "and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. at 715. This respect for individual conscience is deeply rooted in American history. The nation's legal system has traditionally respected conscience, as illustrated by many statutory and judicially crafted exemptions in other contexts. One case, acknowledging man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep

> in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965). It is hazardous for any government to systematically crush the conscience of its citizens. But that is exactly what this type of law does, breeding a nation of business owners who lack *conscience*—citizens who must set aside conscience, values, and religion to preserve their livelihood and participate in public life.

American government has long respected conscience in other contexts. After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that: "Nothing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). The conscience and integrity of a private business owner is entitled to respect. Instead, Washington compels people of faith to personally participate in events they consider immoral.

Many state constitutions link religious freedom to "liberty of conscience." Washington is one of them:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Wash. Const. art. 1, § 11; *Arlene's Flowers*, 389 P.3d at 562-563. One Minnesota court ruled in favor of a religious deli owner who refused to deliver food to an abortion clinic, explaining that: "Deeply rooted in the constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993).

Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968):

> [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here: Washington requires Petitioner to violate her conscience and faith by participating in an event she

believes is immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

Religious entrepreneurs should never have to choose between allegiance to the state and faithfulness to God in order to remain in business. Like many successful free exercise cases, this case involves a conscientious objector—not civil disobedience. Conscientious objector claims are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). Prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), many winning cases involve conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61 (1946) (military combat); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *Barnette*, 319 U.S. 624 (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Many losing cases involve "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564 (2006). *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

This Court's decision has broad ramifications for others burdened by legal directives to act against conscience. In light of the high value that courts,

legislatures, and state constitutions have historically assigned to conscience and religious liberty, it is incumbent upon this Court to protect the right to live and work according to conscience, and decline to participate in morally objectionable events. America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. This Court expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. at 68. We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden LGBT rights. People of faith have not forfeited their right to conduct business according to conscience and convictions.

III. THE WASHINGTON RULING PUNISHES PERSONS WHO HOLD DISSENTING VIEWS BY FORCING THEIR *EXCLUSION* FROM BUSINESSES THAT SERVE THE PUBLIC.

The Constitution is an inclusive document, protecting the life, liberty, religion, and viewpoint of all within its realm. LGBT advocates trumpet inclusion as a key rationale for anti-discrimination provisions. Instead, the Washington ruling creates an intolerable danger of *exclusion* for free speech and artistic expression. If it stands, states will be allowed to punish persons who hold traditional marriage beliefs by *excluding* them from full participation in public life. Washington threatens to deprive Petitioner of her livelihood and personal assets—all because she refuses to sacrifice her conscience and faith on the altar of an agenda she cannot support. *See Arlene's Flowers*, 389 P.3d at 550 (trial court awarded permanent injunctive relief, monetary damages, and found Petitioner *personally* liable).

A. Washington Discriminates Against Business Owners Who Hold Conscientious Objections To Participating In Same-Sex Ceremonies.

There *is* discrimination in this case—not against LGBT consumers, but Washington's blatant discrimination against Petitioner and others who share her views about marriage. Washington imposes onerous financial penalties that threaten Petitioner's livelihood. But "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-

16 (1947). A citizen may not be excluded from a profession by unconstitutional criteria: "The First Amendment's protection of association prohibits a State from *excluding a person from a profession or punishing him* solely because he is a member of a particular political organization or *because he holds certain beliefs*." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (emphasis added); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor). This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The government must maintain neutrality so that each religious creed may "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005).

Following one's "chosen profession free form unreasonable governmental interference" is a benefit that "comes within the liberty and property concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). The Washington ruling grates against the Constitution. It is tantamount to a statement that "no religious believers who refuse to [celebrate same-sex relationships] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573. Crippling financial penalties will force Petitioner—and others who hold similar viewpoints about marriage—to shut down and cease business.

B. The Commercial Context Is Constitutionally Irrelevant.

Believers do not forfeit their constitutional rights in the commercial sphere. If religion is shoved to the private fringes of life, constitutional guarantees ring hollow. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176. Petitioner wishes to conduct her business with integrity, setting company policies consistent with her conscience, moral values, and religious faith. Not everyone shares those values, but cutting conscience out of the commercial sphere is a frightening prospect for business owners, employees, and customers. Customers expect businesses to operate with honesty and integrity.

Petitioner's refusal to create custom visual artwork is not the invidious, irrational, arbitrary discrimination the Constitution prohibits. It is hardly "discrimination" to decline to advance a politically charged agenda, particularly since no one has an unqualified right to demand that a *particular* florist craft a custom design for a *particular* event. Washington justifies its intrusion on Petitioner's rights by claiming that this Court has "held that individuals who engage in commerce necessarily accept some limitations on their conduct as a result. *See United States v. Lee*, 455 U.S. 252, 261 (1982) (Stevens, J., concurring in judgment)." *Arlene's Flowers*, 389 P.3d at 555. But *Lee* does not hold that believers forfeit all constitutional rights in the business world, especially when such forfeiture would exclude them from even operating a business. Note the context of the often cited language:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause,

> but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 261 (emphasis added). Religious freedom is not abrogated altogether in the world of commerce. Limitations on constitutional rights in this arena are narrow—not all-encompassing. The Free Exercise Clause may not trump every statutory scheme applicable to commerce, but neither do commercial regulations erase religious liberty.

The state actively regulates commerce but has minimal control over the internal affairs of religious entities. Consequently, conflicts between religion and regulation typically occur in commercial settings. Some claimants succeeded: *Sherbert v. Verner,* 374 U.S. 398 (and other unemployment cases); *Rasmussen v. Glass,* 498 N.W.2d 508 (food delivery); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (housing). Others did not: *Braunfeld v. Brown,* 366 U.S. 599 (1961) (Sunday closing); *United States v. Lee*, 455 U.S. 252 (Amish business); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (commercial association); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (payroll); *State ex rel. McClure v. Sports & Health Club, Inc.,* 370 N.W.2d 844, 853 (Minn. 1985) (hiring); *Swanner v. Anchorage Equal Rights Comm'n,* 874 P.2d 274 (Alaska 1994) (housing). The

"commercial" factor was only one element in the analysis. This case is an opportunity for this Court to clarify that the Constitution applies in public life. As Justice Alito 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.

Obergefell, 135 S. Ct. at 2642-43 (Alito, J., dissenting). Petitioner has unquestionably been "labeled as [a] bigot[]" and "treated as such" by the State of Washington.

IV. THE WASHINGTON RULING CREATES INVIDIOUS *INEQUALITY* BY PUNISHING A DISSENTING VIEW OF MARRIAGE.

Equality is a key "buzzword" for LGBT advocacy. The phrase "marriage equality" is often used to describe *Obergefell*. Legal advocates have not only achieved their goals, but far exceeded them. The LGBT community enjoys broad legal protection, including a wide array of options for employment and public services. Petitioner has a long record of employing and serving LGBT persons. *Arlene's Flowers*, 389 P.3d at 549 ("By the time he and Freed became engaged, Ingersoll had been a customer at Arlene's Flowers for at least nine years . . . .")

There is an "elephant" in the courtroom. The term "discrimination" needs a clear, consistent definition before this Court can determine whether Petitioner "discriminated" against her long-time gay customer.

Washington selectively plucks phrases from *Obergefell* to justify its punitive application of state law:

> [L]ast year, the Supreme Court likened the denial of marriage equality to same-sex couples itself to discrimination, noting that such denial "works a grave and continuing harm," and is a "disability on gays and lesbians [that] serves to disrespect and subordinate them." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

Arlene's Flowers, 389 P.3d at 553. And yet, Washington would "disrespect and subordinate" those who hold traditional marriage views, rendering them unequal, second-class citizens.

This case is not really about LGBT rights or discrimination. That smokescreen obscures the invidious *inequality* Washington has created. Citizens who graciously serve and interact with LGBT persons, but who oppose redefining the institution of marriage, are now treated as *unequal*. Washington imposes crippling penalties to punish a dissenting view of marriage. This blatant viewpoint discrimination wars against the First Amendment.

A. Anti-Discrimination Provisions Have Expanded To Cover More Places And Protect More Groups—Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Anti-discrimination principles have expanded over the years, increasing the potential encroachment on religious liberty. Commentators have observed the legal quagmire:

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts.

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001). *See also* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

Anti-discrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley*, 515 U.S. at 571. But Massachusetts broadened the scope to add more categories and places. *Id*. at 571-572. Similarly, *Dale* noted that the traditional "places" had expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Washington's expansive definition of "public accommodation" includes places maintained "for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services . . . ." RCW 49.60.040(2).

It is hardly "arbitrary" to avoid promoting a cause for reasons of conscience. Discrimination is arbitrary where an entire class of persons is excluded without justification. Where widespread refusals deny an entire group access to basic public goods and services, it is reasonable to enact protective measures. This Court rightly upheld the Civil Rights Act of 1964, which Congress passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement:

> With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant.

McConnell, *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 187.

Political and judicial power can be used to squeeze religious views out of public debate about controversial social issues such as marriage. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal convictions that shape the way people of faith live their daily lives in public and private. Government has no right to legislate a novel view of sexual morality and demand that religious citizens facilitate it.

The clash between anti-discrimination rights and religious liberty "places a complex legal question involving competing societal values squarely before the courts." Vaitayanonta, *In State Legislatures We Trust?*, 101 Colum. L. Rev. at 887. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Anti-discrimination rights, whether created by statute or derived from equal protection principles, may conflict with core rights to religious liberty. *Fundamental Rights in Conflict*, 77 N.D. L. Rev. at 27, 29.

The growing conflict between religion and anti-discrimination principles emerges in many contexts. Protection of one group may alienate another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But while private sexual conduct is generally protected from government intrusion, that protection does not trump the First Amendment rights of those who cannot conscientiously endorse it—*let alone create custom artwork to celebrate it*. Washington's law extends far beyond the "meal at the inn" promised by common law and encroaches on Petitioner's right to conduct a business free of legal mandates to violate her conscience.

B. Where "Discrimination" Is Integrally Related To The Exercise Of A Core Constitutional Right, It Is Not Arbitrary, Irrational, Or Unreasonable.

Action motivated by conscience or faith is not arbitrary, irrational, or unreasonable. In the unemployment cases, this Court warned that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). Here, Washington exhibited hostility toward religion by characterizing Petitioner's religiously motivated conduct as unlawful "discrimination."

Other contexts exemplify the importance of motivation. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet refuses treatment on religious grounds, does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). Killing another person in self-defense is justifiable homicide. But the same act—premeditated with malice aforethought—is first degree murder. The former carries no legal penalties, while the latter warrants severe consequences.

Washington equates things that are inherently unequal, ignoring the distinction between a refusal to serve all LGBT customers and declining to participate in a single event. But this "equality" creates an unconscionable inequality between LGBT customers—who are granted a universal right to

custom artwork—and the artists whose rights to free speech and religion are buried in the dust with a crumbling Constitution.

V. IRONICALLY, THE WASHINGTON RULING WEAKENS CONSTITUTIONAL PROTECTION FOR EVERYONE—INCLUDING LGBT PERSONS.

Proponents of LGBT rights have accomplished dramatic social and political transformation in just a few years by exercising their rights to free speech, press, association, and the political process generally. These changes were possible because the Constitution guarantees free expression and facilitates the advocacy of new ideas. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 232. But no advocates can demand for themselves what they would deny to others—otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Washington uses anti-discrimination law as a sword, so that statutory LGBT rights trump the protected liberties of those who—while willing to serve and employ them—hold a different view about the nature of marriage.

This Court needs to preserve the constitutional liberties guaranteed to *all* citizens. Americans who want to expand their own civil rights must grant equal respect to opponents—not crush them with debilitating legal penalties: "The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." *United States v. Ballard*, 322 U.S. 78, 95 (1944). Washington may characterize Petitioner's views as "rubbish," but that

does not give the state a right to compel her to create visual artwork to promote a message that to her is offensive:

> *If Americans are going to preserve their civil liberties...they will need to develop thicker skin*. One price of living in a free society is toleration of those who intentionally or unintentionally offend others. The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination." ... Preserving liberalism, and the civil liberties that go with it, requires a certain level of virtue by the citizenry. Among those necessary virtues is tolerance of those who intentionally or unintentionally offend, and sometimes, when civil liberties are implicated, who blatantly discriminate. *A society that undercuts civil liberties in pursuit of the "equality" offered by a statutory right to be free from all slights will ultimately end up with neither equality nor civil liberties*.

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. at 245 (emphasis added).

This principle cuts across all viewpoints and all constitutional rights. The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976).

Justice Black said it well in a case about the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972). *Healy* is about association rights rather than speech or religion. But upholding the Washington ruling will not ultimately advance the cause of any group seeking enhanced constitutional protection. On the contrary, the liberty of all Americans will suffer irreparable harm if the government is empowered to coerce creative services that communicate its preferred message. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches the First Amendment rights of others.

CONCLUSION

This Court should grant the Petition and reverse the Washington Supreme Court.

Respectfully submitted,

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