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.

STATE OF WASHINGTON, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE RESTORING RELIGIOUS FREEDOM PROJECT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Amici are academics and practitioners who write and work in the field of law and religion, whose interest is in making sure that the proper balance is struck in this complicated First Amendment issue. *Amici* support same-sex marriage, and yet also feel that the false dichotomy between "equality" and "religion" is dangerous for our country.

Mark Goldfeder is Senior Lecturer at Emory Law School, Senior Fellow at the Center for the Study of Law and Religion, Director of the Law and Religion Student Program, and the Director of the Restoring Religious Freedom Project at Emory, where he works with graduate fellows including Mr. Amin Sadri, JD, LLM. He is also adjunct professor of Religion at Emory University and an adjunct Professor of Law at Georgia State University. He has written extensively on law and religion topics.

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[1] *Amici curiae* affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person, other than *amici*, made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief as blanket consent was filed with the Court.

SUMMARY OF THE ARGUMENT

The State of Washington, in upholding its broad antidiscrimination provision, failed to give proper respect to the Petitioner's sincerely held beliefs and competing First Amendment defenses available in this case. By identifying the issue at stake to be a matter of identity based discrimination, the State of Washington attempts to create a loophole in this Court's First Amendment jurisprudence whereby statutory rights can trump constitutional guarantees so long as the claimant's alleged violation is worded through the lens of status discrimination. This goes against the very principles that this Court announced in *Obergefell,* guaranteeing that the First Amendment protects religious organizations and person from being made complicit in the celebration of same-sex marriage.

We ask this Court to correct this error and to incorporate the various First Amendment defenses available with respect to the Petitioner's sincerely held religious beliefs in this case, and in particular, the right to expressive association.

ARGUMENT

The Petitioner ("Mrs. Stutzman") owns and operates Arlene's Flowers, where she performs artistic services focusing primarily on "creating floral arrangement for special occasions, including weddings." *Brief of Appellants* at 4, 7, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2) ("Brief of Appellants"). She has never expressed nor harbored any animus towards the Respondents in this case, nor any member of the LGBT community. *Id*. at 9. She has served the Respondents "on nearly 30 previous

occasions and referred them [elsewhere] for only one event due to her sincere religious beliefs." *Id*. at 2. Mrs. Stutzman declined to provide her services in celebration of Respondents' wedding because she felt that in providing those services she would be endorsing their marriage, and that this form of moral complicity amounts to a sin.

Amici are not asking this Court to re-consider the merits of *Obergefell* or any of the other important same-sex equality cases. In fact, we ask the Court to uphold the very language of that decision in ensuring that the First Amendment protects religious organizations and person who "continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). Nor do Amici believe that the LGBT-community deserves to be discriminated against or feel again the weight of second-class citizenship. We simply ask that this Court reject the legal fiction of conflated "content/identity" discrimination, and keep each category separate. In doing so we hope the Court will recognize the competing First Amendment defenses that entitle Mrs. Stutzman to have her case reconsidered.

I. THE STATE OF WASHINGTON VIOLATED THIS COURT'S DOCTRINE ON SINCERITY BY REFUSING TO ACKNOWLEDGE THAT THERE IS A DISTINCTION BETWEEN IDENTITY AND CONDUCT BASED DISCRIMINATION.

In general, the Court is not supposed to judge or challenge the veracity of a claimant's belief. Anna Su, *Judging Religious Sincerity*, 3(1) OXFORD J. L. & REL.

28, 31 (2016). The Supreme Court in *United States v. Ballard* made clear that the "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *United States v. Ballard*, 322 U.S 78, 86 (1944) (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1872)); *see also Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) ("the [First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

The Supreme Court has reaffirmed this ideal again and again in subsequent cases. It has stated that the door of the Free Exercise Clause stands tightly closed to: government regulation of religious beliefs, punishment of doctrines the government finds false, question the centrality of a particular belief, nor condition a benefit on violating a religious tenet. *Sherbert v. Verner*, 374 U.S. 398, 402–03, 406 (1963); *Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 877 (1990); *Hernandez v. C.I.R.,* 490 U.S. 680, 699 (1989); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981). Professor Richard Garnett explained this well when he wrote that "public officials may inquire into the sincerity, but not the consistency, reasonableness, or orthodoxy of religious beliefs." Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 848 (2009).

The 10th Circuit summarized these principles nicely in its *Hobby Lobby* decision when it wrote that the claimants had "drawn a line at providing coverage for

drugs or devices they consider inducing abortions, and it is not for us to question whether the line is reasonable." 723 F.3d at 1114, 1141 (2013), *accord Thomas*, 450 U.S. at 715. This does not mean that judges cannot hold orthodox beliefs, but it does mean that in the arena of judicial decision-making, judges are to refrain from deciding questions relating to orthodoxy. *Cf*. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property,* 98 COLUM. L. REV. 1843, 1844 (1998) ("[g]overnment must keep out of internal problems of religious bodies when those problems concern religious understandings").

However, courts are given some latitude to distinguish a sincerely held religious belief with a sham purpose or pretext in an effort to obtain the benefits of the statute. Su, *supra*, at 32; *see also Cutter v. Wilkinson*, 544 U.S. 709, 725 n. 13 (2005) ("prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic"); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("threshold question of sincerity" is whether a belief is "truly held"); *Burwell,* 134 S. Ct. at 2774 n. 28 ("a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail"). Looking again to the 10th circuit, the court in examining a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA) summarized this discretion well when it wrote that sincerity requires determining whether a claimant "is seeking to perpetrate a fraud on the court" or "whether he actually holds the beliefs he claims to hold." *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014); *Davila v.*

Gladden, 777 F.3d 1198, 1204 (11th Cir. 2015) (same). In extreme cases, a court can also refuse to acknowledge a "claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas*, 450 U.S. at 715; *see also Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819 at 824 (D. Neb. 2016) (court ruled that FSMism [i.e. Flying Spaghetti Monster] is beyond the protection of RLUIPA); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (eating cat food was not a religious belief entitled to constitutional protection).

The State of Washington ignored the sincerely held beliefs of Mrs. Stutzman by conflating her refusal to provide a service in celebration of a same-sex wedding (conduct) with a refusal to serve the customer on the basis of that customer's sexual orientation (identity). *State v. Arlene's Flowers, Inc.,* 187 Wash. 2d 804, 825, 389 P.3d 543, 553 (2017). In doing so, the court invoked a familiar string of citations that purvey the doctrine of refusal to make status/conduct distinction when the conduct is "fundamental to the status of the person" *and* asserted that this Court in *Obergefell* agreed with this line of reasoning by "liken[ing] the denial of marriage equality to same-sex couples itself to discrimination." *Id*.

There are a number of problems with this approach that need resolution. First, Mrs. Stutzman is not denying the couples their right to get married, she is refusing to be complicit in the underlying conduct, because her system of belief refuses to accept the ideological basis for the wedding. As this Court pointed out, a traditional view on marriage can be held "based on decent and honorable religious or philosophical

premises[.]" *Obergefell*, 135 S. Ct. at 2602. The State of Washington, instead, says her views are rooted in bigotry. The dissenters in *Obergefell* predicted this much when they noted that the disparaging remarks of the majority tends to lay an indictment "on the character of fair-minded people" and moves us farther away from a simple right to protect same-sex marriage, into the arena portraying everyone who does not share the majority's "better informed understanding" as bigoted. *Id.* at 2626 (Roberts, J., dissenting).

Second, this Court also connected individual dignity with a constitutional right to freedom of religion. *Burwell*, 134 S. Ct. at 2785 (2014) (Kennedy, J., concurring) ("In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity"). If we borrow the Court's own logic, denying Mrs. Stutzman her sincerely held beliefs appears to be tantamount to denying her very dignity. The dissenters in *Obergefell* also expressed these concerns. For example, Justice Robert notes that the majority "suggests that religious believers may continue to 'advocate' and 'teach' their views on marriage," while conspicuously failing to affirm the right to act (or exercise) on those beliefs. 135 S. Ct. at 2625 (Robert, J., dissenting). Professor Epstein illustrates this well when he points out that it is "odd to posit some 'humiliation and dignitary harm' as a trump on the side of a disappointed customer, without recognizing that the mandated services now impose humiliation and dignitary harm on business proprietors who are also human beings[.]" *Supra*, at 1283.

A number of prominent religious liberty scholars have pointed out the false-comparison between status and conduct based discrimination in this case. Professor Carlos A. Ball noted that it is false to label unequivocally "all business owners who refuse on religious grounds to provide goods and services to same-sex couples [as bigots]," especially if that owner (like Mrs. Stutzman) is otherwise willing to serve the gay couple in a different context (i.e. request). *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 642 (2016). An amicus brief signed by nearly thirty of today's leading First Amendment scholars on both sides of the marriage debate has also taken the position that a proper distinction must be made between Mrs. Stutzman's religious objection in celebrating a same-sex marriage and her particular *non-objection* to serving same-sex customers. *Brief of Legal Scholars in Support of Equality and Religious and Expressive Freedom as Amici Curiae* at 3, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2). By failing to make this distinction, the brief argues that the lower courts undervalued her "constitutional rights by misinterpreting her religious convictions as offensive and invidious." *Id.* at 4. While the brief points out instances of discriminatory practices based on secondary justifications (i.e. refusing entrance to black customers for fears of being robbed)—without which antidiscrimination laws could not survive—it distinguishes the facts in this case because the justification offered by Mrs. Stutzman for her refusal was unrelated to the couple's sexual orientation. *Id.* at 6. While it is possible that Mrs. Stutzman and others will use some pretense as a cover for bigotry, the State of Washington cannot simply assume that into the record and must delve deeper into the sincerity of the

claim. *Id.* Instead, this oversimplified conflation clouded the State's determination of "*prima facie* liability" and its "dismissive treatment of [Mrs. Stutzman's] constitutional defenses." *Id.* at 10.

Finally, the issue of sincerity further implicates Establishment Clause concerns. This Court has announced repeatedly that the Establishment Clause demands that states remain neutral on the question of faith: neither favoring nor inhibiting religion. *See, e.g., Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669, (1970). As per Justice O'Connor's endorsement test infringement can happen when government either endorses or disapproves of religion thereby sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 1367, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring). In *Lemon v. Kurtzman*, this Court prohibited a state's entanglement with religion, noting that the "objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." 403 U.S. 602, 614 (1971). This idea is further expanded by Justice O'Connor when she wrote about the problem when "government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 883

(2005) (O'Connor, J., concurring). Mrs. Stutzman is clearly being made to feel like an outsider here. In addition, under *Lee v. Weisman*, this Court proscribed indirect government coercion in an instance where an individual's religion forbade them from passively taking part in what they considered to be a religious aspect of a secular ceremony. *Lee v. Weisman*, 505 U.S. 577 (1992).

This Court should clarify the constitutional issue regarding sincerity and the distinction between discrimination based on identity (as exemplified in cases dealing with, e.g., race or gender) and that based on ideological disagreements.

II. THE STATE OF WASHINGTON IGNORED VIABLE FREEDOM OF ASSOCIATION DEFENSES

The First Amendment guarantees the freedom of association. Erwin Chemerinsky, Constitutional Law: Principles and Policies 1198 (4th ed. 2011); *see also Roberts v. Jaycees,* 468 U.S. 609, 618 (1984) ("[F]reedom of association receives protection as a fundamental element of personal liberty . . ."). It extends First Amendment solicitude for free speech to include the liberty of individuals to gather together to advance a common purpose, declare a common belief, engage in common worship, or petition the government for common relief, without state interference and irrespective of one's religious or secular beliefs. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 565 U.S. 171, 189 (2012)*; Roberts*, 468 U.S. at 622; *New York State Club Ass'n v. New York*, 487 U.S. 1, 13 (1988); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 308, 132 S. Ct. 2277, 2288 (2012); *City of*

Bremerton v. Widell, 146 Wash. 2d 561, 575, 51 P.3d 733, 740 (2002). It emerged historically in the context of protecting the right to hold unpopular views—which Amici believe include those espoused by Mrs. Stutzman—and remains a stepping stone towards a "full promise of liberty." *See Obergefell*, 135 S. Ct. at 2600.

This Court has long recognized that there exist "certain kinds of personal bonds" that play "a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs" and provide for "critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 618–19. Freedom of association protects not merely the bond between people joining together under the auspices of some common purpose or selective affiliation, but also the very dignity of striving to "define one's identity." *Id.* at 619–620. By virtue of this right, the government is enjoined from "prohibit[ing] the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox,* 567 U.S. at 309.

Recent trends show that views towards sexual morality are changing, particularly with the younger generation and in no small part due to the contribution of this Court. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?,* 4 OXFORD J. L. & RELIGION 373 (Oct. 2015); Margaret E. Tankard and Elizabeth L. Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitude*, PSYCHOLOGICAL SCI. (July 31, 2017) (studies show that

Obergefell ruling increased social norms in support of gay marriage). Several noteworthy companies and public figures have joined in celebrating these trends in an effort to create an associative mutual consensus that embraces members of the LGBT-community. *See, e.g.,* Kay Steiger, *The Growing Backlash Against Indiana's New LGBT Discrimination Law,* THINK PROGRESS (Mar. 27, 2015), https://thinkprogress.org/the-growing-backlash-against-indianas-new-lgbt-discrimination-law-68727eff4f02/; Jackie Wattles, *Georgia's 'anti-LGBT' bill: These companies are speaking out the loudest*, CNN MONEY (Mar. 25, 2016), http://money.cnn.com/2016/03/25/news/companies/georgia-religious-freedom-bill/index.html. Others have chosen to retain their traditional belies on marriage "based on decent and honorable religious or philosophical premises[.]" *Obergefell*, 135 S. Ct. at 2602. Both views protected by the First Amendment and the freedom of association is there to prevent the majority from imposing their views on a group that would prefer to hold other ideas. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000).

Mrs. Stutzman, while holding to a traditional views, remains deeply committed to serving the LGBT-community in all areas where her participation does not create the semblance of endorsing a pattern of sin. Her own words corroborate that her decisions is irrespective of Respondent's sexual orientation: "For me, it's never about the person who walks into the shop, but about the message I'm communicating when someone asks me to 'say it with flowers.'" Barronelle Stutzman, *I'm a florist, but I refused to do flowers for my gay friend's wedding*, WASH. POST (May 12, 2015), https://www.washingtonpost.com/posteverything/wp/

2015/05/12/im-a-florist-but-i-refused-to-do-flowers-for-my-gay-friends-wedding/. While *amici* believe Mrs. Stutzman's views on marriage may be incorrect, that is largely irrelevant. The First Amendment is adamant that the individual right to speech and association entail a right to believe differently from others and a right to join in associating with others who hold unpopular beliefs. *See Boy Scouts*, 530 U.S. at 651 ("not the role of the courts to reject a group's expressed values because they disagree with those values"); *Democratic Party of United States v. Wis. ex rel. La Follette,* 450 U.S. 107, 124 (1981) ("as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); *Thomas*, 450 U.S. at 714 ("religious beliefs need not be acceptable, logical, consistent, or comprehensible . . . in order to merit First Amendment protection"). Michael McConnell reminds us that in "the liberal tradition, the government's role is not to make theological judgments but to protect the right of the people to pursue their own understanding of the truth, within the limits of the common good." *Why Protect Religious Freedom?,* 123 YALE L. J. 770, 781 (2013). As this Court has rightly pointed out, "protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622.

To compel Mrs. Stutzman to provide the particular services at issue here is to compel her to join a group of speakers she deems antithetical to her faith. If the State of Washington wishes to do this, they must show a "compelling state interest, unrelated to the

suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. It is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"—state action that has "the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958); *see also City of Tacoma v. Luvene*, 118 Wash. 2d 826, 841, 827 P.2d 1374, 1382 (1992) ("First Amendment right of expressive association encompasses association to engage in political and nonpolitical speech . . .").

The court below dismissed this issue by arguing that this Court "has never held that a commercial enterprise, open to the general public, is an 'expressive association' for purposes of First Amendment protections[.]" *Arlene's Flowers*, 187 Wash. 2d at 853, 389 P.3d at 567 (2017). This mirrors the language in Justice O'Connor concurrence where she noted that "[p]redominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law." *New York State Club*, 487 U.S. at 20. This also mirrors attempts made in this Court's *Hobby Lobby* decision where for-profit corporations where deemed beyond the protections of RFRA "because the purpose of such corporations is simply to make money." *Burwell*, 134 S. Ct. at 2770, an argument this Court rejected by noting that "corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so." *Id.* at 2771; *see also Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425

U.S. 748, 761 (1976) ("Speech . . . is protected even though it is carried in a form that is 'sold' for profit"); *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("[A] speaker is no less a speaker because he or she is paid to speak.").

O'Connor's "predominately commercial" test has been rightly criticized for, among other reasons, creating a "false dichotomy between commercial and expressive associations [since] associations can be both commercial and expressive." John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 188 (2010). But even if we accept her model, O'Connor readily acknowledges the difficulty in "[d]etermining whether an association's activity is predominantly protected expression . . . because a broad range of activities can be expressive," including protected expression involving a form of "quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). In the end, she recommends "distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter." *Id.* at 638.

Similar concerns revolving around Mrs. Stutzman's business where products and services cannot both be so readily assumed to possess a predominantly commercial or expressive character. However, as Appellant's brief below acknowledges, while Mrs. Stutzman's "sells gift items and raw flowers, the business of Arlene's Flowers consists *primarily* of creating floral arrangements." *See* Brief of Appellants, at 4. While the raw items she sells over the counter

certainly possess a purely commercial character and rightfully subject to antidiscrimination provisions that trump purported rights of association, her primarily service is one dealing with artistic services which is predominantly noncommercial. While the quality of her service is certainly connected to the commercial incentive for more customers, it does not predominate over the artistic purposes of her service as "an art form, with creativity and emotional investment in each piece she designs." Brief of Appellants, at 1; s*ee also United States v. Nat'l Treasury Emp.'s Union,* 513 U.S. 454, 469 (1995) ("Publishers compensate authors because compensation provides a significant incentive toward more expression"); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

The Washington Supreme Court conflated these categories in its facts by suggesting wrongful conduct based on the fact the Respondent's "did not have a chance to specify what kind of flowers or floral arrangements he was seeking before" being rejected. *Arlene's Flowers*, 187 Wash. 2d at 816. This is irrelevant because Mrs. Stutzman has conceded that she has no problems selling raw product to any same-sex member of the community (purely "commercial"), but does have objections to the artistic coalescence of these flowers, regardless of *kind* or *arranged*, in their future celebratory use ("hybrid").

At the very least, if the Washington Court refused to distinguish between conduct and identity discrimination based on their inextricability, it should have also refused to distinguish the commercial and

expressive elements of Mrs. Stutzman services, (which this Court has done in the context of speech,) and required the State to pass strict scrutiny in order to uphold its antidiscrimination law. *Id*. at 823–25; *Riley*, 487 U.S. at 796. Further, as Appellants noted in their lower court Brief, "[w]hen a law infringes upon two or more fundamental rights, strict scrutiny applies under the hybrid rights doctrine." *Brief of Appellants* at 40. As demonstrated above, in the discussions of the freedoms of religion, speech, and association, the standard that the Court should have used in this case is strict scrutiny.

CONCLUSION

The idea of combining freedom of association with for-profit ventures is evidenced by the nearly two dozen businesses and business associations—including Amazon, Expedia, and Microsoft—that joined in supporting the Respondents in this case. They saw this case as an opportunity to join likeminded individuals for the purpose of expressive association in favor of upholding antidiscrimination laws without exception. *See Washington Businesses Amicus Curiae in Support of Plaintiffs-Respondents*, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2). These organizations are not bound by a common membership or common articles of incorporation, but by a common ideology, increased in its volume by the coalescing of common interests.[2]

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[2] *Cf. Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive

What this Court noted in the context of the free exercise of religion should be noted in the context of expressive association, "a law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." *Burwell*, 134 S. Ct. at 2770 (citing *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). Discounting the First Amendment in its aggregate protection of speech, religion, and association by punishing small businesses will not allay the broader concerns of a nation divided.

The burden on Mrs. Stutzman is evidenced here in the form of looming monetary consequences placed on her for a failure to disassociate. She refuses to be complicit in underlying conduct she finds inconsistent with her religious beliefs, and maintains her conviction that the act of providing certain services compels her to participate.

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association is the creation of a voice, and the selection of members is the definition of that voice.").

Respectfully submitted,

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