No. 19-333

IN THE
Supreme Court of the United States

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

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

Petitioners,

v.

ROBERT INGERSOLL AND CURT FREED,

Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICI CURIAE* CONCERNED WOMEN FOR AMERICA, NATIONAL LEGAL FOUNDATION, PUBLIC JUSTICE INSTITUTE, AND INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS

in support of Petitioners

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INTERESTS OF *AMICI CURIAE*[1]

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Washington, seek to ensure that those with a religiously based view of marriage continue to be free to express those views without being compelled to express the opposite view by state-

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[1] No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief. All Parties have consented to the filing of this Brief. *Amici* mistakenly notified The Parties of their intent to file this brief eight days before the due date, that day being the first business day after the tenth day. All Parties acknowledged receipt of notification, and as stated, consented to the filing of this Brief.

enforced association with those holding that opposite view.

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold traditional views of marriage and family. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel.

SUMMARY OF THE ARGUMENT

The Petition in this case presents issues well worthy of review by this Court. As is obvious from the proliferation of similar cases, these issues demand this Court's prompt attention.

The central fact of this case is that a marriage ceremony is a communal, expressive event. Thus, this case is principally about what the brides or grooms

(and the State) are communicating when they get married. It is about the marriage event, and the message that event publishes to the community. Thus, the question of whether the application of Washington's civil rights law violates the vendors' free speech and free exercise rights is inextricably bound up with another aspect of that law, the consideration of which is required for the resolution of this case: the State is compelling the vendors to associate with, and facilitate, the message of their customers that the vendors find offensive.

Does a law prohibiting religious discrimination require a Jewish restauranteur to cater a Muslim gala with the announced purpose of fundraising for those fighting for the abolition of the State of Israel? It does not, because the restauranteur objects, not to Muslims per se, but to their message of the gala, a message with which he does not want to associate or facilitate. So it is here. Vendors may be engaged in doing something artistic like arranging flowers or decorating cakes. Other vendors may be involved in something menial like providing rental tables and chairs. While those engaged in artistic endeavors will also have their free speech and free exercise rights violated by Washington laws, all vendors, artistic and non-artistic, including the florists here, will have their speech and associational rights violated whenever the vendor has a sincere objection to supporting the message being communicated by the recipient of the services. No vendor may be compelled to join that assembly and associate with that message.

The most relevant speech in this case is that proclaimed from the altar by the wedding participants (and the State) that a same-sex marriage is a type of

marriage that should be celebrated and approved. Those who disagree with that message, especially if they disagree from a religious perspective like the florist here, may not constitutionally be compelled to assemble for the purpose of joining or facilitating that message or face being punished for refusing to do so.

ARGUMENT

The florist in this case does not object to serving homosexuals, including those already in a same-sex relationship. (Pet. at 3.) Rather, she objects to associating with and facilitating a same-sex marriage ceremony and the message that ceremony conveys. (Pet. at 4.) Her objection in this instance is based on sincerely held religious convictions that it would be ethically wrong for her to associate with and to help foster such a ceremony and its particular message. That is what is being objected to in this case, and whether her refusal to service an event because it communicates a message objectionable to her can be punished constitutionally is the key consideration that should be addressed and decided by this Court.

I. The Wedding Participants, and the State, Are Communicating a Message in the Same-Sex Marriage Ceremony.

By engaging in a marriage ceremony, both the same-sex wedding participants and the State are broadcasting a clear message. That message is not just that marriage, in the abstract, is a good and valued institution. The message is a more particular endorsement: that same-sex couples are entitled to

engage in such unions with the State's full blessing.

As this Court recounted in the various opinions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), whether same-sex marriage is a legitimate form of marriage is an issue that deeply divides the citizens of this country. A same-sex marriage ceremony is divisive *precisely because* it "makes a statement," just as the denial of the right to marry to same-sex couples communicated the message that such marriages were illegitimate. As the majority noted in *Obergefell*, without being able to marry with the sanction of the State, "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken." *Id.* at 2596. Moreover, same-sex couples were "burdened in their rights to associate." *Id.* Conversely, permitting same-sex couples to marry allows them to proclaim that their relationship is "sacred," at least by their own definition, *id.* at 2599, and to associate to the same extent as heterosexual couples.

That the State is also communicating its own message by prohibiting or sanctioning a same-sex marriage ceremony was also emphasized by this Court in *Obergefell*, as well as in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Stated negatively, this Court held that, when the Federal Government only recognized heterosexual marriages, it "impermissibly disparaged those same-sex couples 'who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.'" *Obergefell*, 135 S. Ct. at 2597 (quoting *Windsor*, 133 S. Ct. at 2689). Stated positively, this Court recognized that, during a marriage ceremony, "just as a couple vows to support each other, so does society pledge to support the

couple, offering symbolic recognition and material benefits to protect and nourish the union." *Id.* at 2601. "The right to marry [with legal sanction] thus dignifies couples who 'wish to define themselves by their commitment to each other.'" *Id.* at 2600 (quoting *Windsor*, 133 S. Ct. at 2689). Simply put, this Court recognized that the marriage ceremony is both an individual and a societal statement most fundamental.

II. The Vendors Have a Sincere Objection to the Message of the Wedding Ceremony.

This Court in *Obergefell* also recognized that many in our country do not agree with these messages that same-sex marriage is either morally permissible or good social policy. This Court noted, "Marriage, in their view, is by its nature a gender differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.* at 2594. And, again, the *Obergefell* majority observed, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Id.* at 2602.

It is not disputed in this case that the florist is among those who sincerely believes that same-sex marriage is wrong and that, by facilitating such a ceremony, she would associate with and be announcing her support for it, contrary to her convictions. (Pet. at 4.) *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that a court may not judge the reasonableness of a

sincere religious belief). She comes to that belief "based on decent and honorable religious or philosophical premises." *Obergefell*, 135 S. Ct. at 2602. But, unlike this Court, which took pains in *Obergefell* not to disparage such beliefs and in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018), took pains to assure that decision makers did not do so either, the lower tribunals here have both disparaged and punished the florist for her holding and acting upon her beliefs by refusing to participate in a same-sex marriage ceremony. Whether that is constitutionally permissible is the question presented on these facts, important questions previously identified as such by this Court.

III. The Vendor Is Not Discriminating on the Basis of "Sexual Orientation."

The record is clear in this case that the florist did not discriminate against the wedding participants because of their sexual orientation. She was quite willing to serve them, despite being aware of their sexual orientation, in a non-marriage context. The florist had no objection to serving homosexuals, even those already in a same-sex relationship, but only to participating in a same-sex marriage ceremony. (Pet. at 3-4.) Such participation by assisting the ceremony with her services, just like the State's licensing of the event, would send a message to others of acceptance and approval, "offering symbolic recognition and material benefits to protect and nourish the union." *Id*. at 2601.

And it does that in a way that is not present in the mere exchange of goods and services disassociated

from the ceremonial event. This would be similar to an African-American restauranteur serving Caucasians regularly in his restaurant, but refusing to cater their Ku Klux Klan banquet. In this situation, the restauranteur's refusal is tied not to the race of the customer, but to the message that will be communicated at the event. It is not a rejection of all Caucasians, but a refusal to become associated with or to facilitate a racist ideology. Indeed, as this Court pointed out in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission recognized this important distinction in several other contexts. 138 S. Ct. at 1740 (Thomas, J., concurring), *id.* at 1734 (Gorsuch, J., concurring). And the United Kingdom Supreme Court, presented with an analogous case involving bakers refusing to prepare a cake celebrating a same-sex marriage, recently recognized that this refusal was not based on sexual orientation discrimination, but on being unwilling to participate in the message it conveyed.[2]

The same is true here. The florist only refused to participate in the message communicated during the same-sex marriage. She did not refuse service on the basis of sexual orientation, but on the basis of the desire (indeed, the ethical imperative in her case) not to become associated with, or to assist in communicating, a message with which she disagreed and that would, in her view, directly indicate their support for that message in violation of her religious scruples.

In this respect, the Washington tribunals acted

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[2] *Lee v. Ashers Baking Co.*, [2018] UKSC 49 (appeal taken from N. Ir.).

inconsistently with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). There, this Court held that, when parade organizers refused to let LGBT individuals march with them, it was not because they wished "to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner," expressing an unwanted message at the event. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (summarizing and quoting *Hurley*, 515 U.S. at 574-75). Ditto here: the florist refused to service the same-sex marriage not because the grooms were homosexual, but because of the message the marriage communicated.

IV. Non-discrimination Laws Used in This Way Unconstitutionally Compel Speech and Assembly by Forcing the Vendor to Associate with and Facilitate the Ceremony's Message or Punishing the Refusal to Do So.

Even assuming that it violated the nondiscrimination laws for a black restauranteur to refuse to cater a Ku Klux Klan banquet, the restauranteur would have a valid defense to being punished for his refusal. That is because he would be exercising his own constitutional rights not to associate with or to facilitate racist messages. By requiring such association and facilitation on pain of monetary damages, the State would unconstitutionally compel speech and assembly.

The same is true here for this florist. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (holding that conditioning a grant on

compelled speech is unconstitutional). This Court in *Obergefell* took pains to explain that it understood the very situation in which these bakers find themselves and that, by ruling that States could not deny homosexual couples a marriage license, it did not intend to infringe on the First Amendment rights of those who would object for religious or other sincere reasons:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

135 S. Ct. at 2607.

Like the liberty interest to define one's own identity that this Court found controlling in *Obergefell*, *id.* at 2593, 2599, individuals have a liberty interest, founded both in the First and Fourteenth Amendments, not to be compelled to propagate or advocate a message they find ethically objectionable. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The florist here could service

the same-sex marriage ceremony "only at the price of evident hypocrisy. " *All. for Open Soc'y*, 133 S. Ct. at 2331. Laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). Indeed, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves . . . . The First Amendment protects 'the decision of both what to say and what not to say.'" *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (quoting *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)).

The freedom of assembly, although a freestanding right, is a close cousin of the freedom of speech. Quite commonly, individuals exercise their freedom of speech by gathering in groups. Conversely, by restricting the access of individuals to each other, their rights to free speech can be restricted or eliminated altogether. The two rights, then, often do their essential work in tandem.[3] Furthermore, the

[3] *See NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("this Court has more than once recognized . . . the close nexus between the freedoms of speech and assembly"); *Thomas v. Collins*, 323 U.S. 516 (1945) (noting that rights of the speaker and audience are "necessarily correlative"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the result) ("without free speech and assembly discussion would be futile"), *majority opinion overruled on other grounds*, *Brandenburg*

right of association is also implicated in the outworking of these rights: "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

The State, through its non-discrimination laws, is trying to force an individual with religious objections to facilitate and support a ceremony with great symbolic significance. Just as the parade organizers objected to associating with those wishing to espouse an unwanted message in *Hurley*, 515 U.S. at 568-81, the florist here objects to being associated with a marriage she considers improper because it implies her consent to, and approval of, the message of the event. The First Amendment freedoms of speech and assembly "deny those in power any legal opportunity to coerce that consent." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). No officials may "force citizens to confess by word or act" the "orthodox" position in "religion[ ] or other matters of opinion." *Id.* at 642.

CONCLUSION

A Jewish Community Center cannot constitutionally be punished for racial or national origin discrimination for its refusal to rent its hall for a PLO fundraiser. Nor can this florist properly be compelled to associate with and foster a wedding ceremony she finds morally objectionable, or be penalized for refusing to do so. This Court should grant the petition and reverse. The issues raised are

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v. Ohio, 395 U.S. 444 (1969).

both fundamental and far-reaching.

Respectfully submitted,
this 14th day of October 2019,

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