

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.

ROBERT INGERSOLL and CURT FREED, Respondents,

v.

ARLENE'S FLOWERS, INC. d/b/a ARLENE'S FLOWERS
AND GIFTS, and BARRONELLE STUTZMAN, Appellants.

**MOTION FOR LEAVE TO FILE BRIEF FOR CHRISTIAN LEGAL
SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS
INTERNATIONAL, AND NATIONAL ASSOCIATION OF
EVANGELICALS AS *AMICI CURIAE* SUPPORTING APPELLANTS**

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RELIEF REQUESTED

Pursuant to Washington State Court RAP 10.6(a), the Christian Legal Society, the Association of Christian Schools International, and the National Association of Evangelicals respectfully move for leave to file the attached brief as *amici curiae* in support of Appellants. Appellants have consented to this filing, as have both the state Respondent and the private Respondents. The filing of this motion is unopposed, as counsel for Appellants and Respondents have stated they do not oppose its filing.

APPLICANTS' INTEREST AND GROUP REPRESENTED

The **Christian Legal Society** (“CLS”) has long believed that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their speech. For that reason, CLS was instrumental in the passage of the Equal Access Act of 1984, 20 U.S.C. §§ 4071-4074 (2013), which protects the rights of all students to meet for “religious, political, philosophical or other” speech on public secondary school campuses. 20 U.S.C. §4071(a). *See* 128 *Cong. Rec.* 11784-85 (1982) (Senator Hatfield statement recognizing CLS’s contribution). The Act has protected both religious and LGBT student groups seeking to meet for disfavored speech. *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA requires

access for religious student group); *Straights and Gays for Equality v. Osseo Area School No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA requires access for LGBT student group). CLS is proud of its work over four decades to protect free speech for all citizens.

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 law schools. Since 1975, CLS's legal advocacy arm, the Center for Law and Religious Freedom, has promoted religious liberty through its work in the courts, the legislature, and the public square. The Center works to protect religious beliefs and practices, as well as to preserve the autonomy of religious organizations. As the Declaration of Independence acknowledges as a "self-evident truth," all persons are endowed with rights by their Creator that no government may abridge. Among such inalienable rights are religious liberty and freedom of speech.

CLS is no stranger to filing *amicus curiae* briefs in the Washington Supreme Court. CLS has filed such briefs in several earlier cases, including: *State of Washington v. Martin*, 137 Wn.2d 774, 975 P.2d 1020 (1997) (*en banc*); *Maylon v. Pierce County*, 131 Wn.2d 779, 935 P.2d 1272 (1995) (*en banc*); and *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 840 P.2d 174 (1992) (*en banc*). CLS has no direct interest, financial or otherwise, in the outcome of this case. CLS's interest here

arises from its mission to promote religious liberty and to protect individuals' religious beliefs and practices. This case is of significant concern to CLS because it implicates the First Amendment's protection of individuals' religious liberty.

The **Association of Christian Schools International** (“ACSI”) is a non-profit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the United States. ACSI accredits Protestant pre-K-12 schools, provides professional development and teacher certification, and offers member schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong conscience protections.

The **National Association of Evangelicals** (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well

as numerous evangelical associations, missions, non-profits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately-organized evangelical ministries. NAE believes that religious liberty is a God-given right that is recognized in and protected by the First Amendment and other federal laws, and that church-state separation is a part of our nation's constitutional structure designed to safeguard the autonomy of religious organizations.

APPLICANTS' FAMILIARITY WITH THE ISSUES INVOLVED IN THE REVIEW AND THE SCOPE OF THE ARGUMENT PRESENTED BY THE PARTIES

Amici are familiar with the issues under review and have followed this case for some time. CLS is an expert on religious liberty issues, particularly the free exercise of religion and freedom of speech. Furthermore, *amici* have read the briefs of the parties to this case, understand the arguments they are advancing before this Court, and have minimized any overlap among the arguments being made.

ISSUES TO BE ADDRESSED BY *AMICI CURIAE*

In this brief, *amici* will address several issues, including: (1) how Washington State's own Constitution, which has been interpreted by this Court to require that state and local governments make every effort to accommodate religious freedom, applies to protect an individual's religious

liberty in the context of specific applications of anti-discrimination laws; (2) how key arguments that led to the recognition of same-sex civil marriage also reinforce broad protection for religious objectors; (3) how the State lacks a compelling interest in denying small businesses an exemption confined to providing expressive services for a specific event – not for refusing to serve same-sex couples in general – when there is ready access to the services from others; and (4) how the claim that the “price of citizenship” requires individuals to surrender their religious freedom in their public lives betrays a fundamental misunderstanding of the Bill of Rights.

APPLICANTS’ REASONS WHY THIS BRIEF IS NECESSARY

Amici have read the briefs of the parties to this case and understand the arguments they are advancing before this Court. In this brief, *amici* discuss how the Washington Constitution, as interpreted by this Court, provides religious freedom with significant protection, including in the context of applying generally applicable laws, such as anti-discrimination laws. *Amici* have been long-time observers of the potential conflicts that may occur when the government recognizes same-sex marriage and yet must also respect the civil liberties of religious believers and organizations who object to participating in same-sex wedding ceremonies. *Amici* also address Washington State’s lack of a compelling interest in this particular case.

Finally, religious freedom is an issue of permanent national importance. *Amici*, along with the author of this brief, Professor Thomas Berg, bring a national perspective and expertise in the area of religious liberty. Religious freedom is a vital and guaranteed liberty, one that the State of Washington recognizes, and this Court must make every effort to protect.

For the foregoing reasons, *amici* respectfully request leave to file the attached *Amici Curiae* Brief in this case.

Respectfully submitted,

/s/ Mark John Holady

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

I. Under Washington’s Constitution, This Court Must “Make Every Effort” To Accommodate Religious Freedom, Including In The Context Of Anti-Discrimination Laws.....3

 A. Washington Recognizes Religious Freedom as a “Vital” Liberty.....3

 B. Article I, §11 Requires the Court to “Make Every Effort” to Protect Religious Freedom, while Also Recognizing Other Government Interests, in the Particular Case.....4

 C. Several Key Arguments that Led to the Recognition of Same-Sex Civil Marriage Also Call for Broad Protection for Religious Objectors.....7

II. The State Lacks A Compelling Interest In Denying Small Businesses An Exemption Confined To Providing Expressive Services For A Specific Event—Not For Refusing To Serve Same-Sex Couples In General—When There Is Ready Access To The Services From Others..10

 A. This Case Involves an Objection to Providing Expressive Services for a Specific Event with Religious Significance, Not to Serving Same-Sex Couples in General.....10

 B. In Addition, the State Lacks a Compelling Interest in Forcing a Religious Objector to Provide Services when There is No Denial of Access.....13

III. One Cannot Be Required To Surrender Religious Freedom In The Commercial Sphere As “The Price Of Citizenship”.....17

CONCLUSION.....20

CERTIFICATE OF SERVICE.....21

TABLE OF AUTHORITIES

Cases

<i>Attorney General v. Desilets</i> , 418 Mass. 316, 636 N.E.2d 233 (1994).....	14, 15
<i>Board of Education v. Barnette</i> , 319 U.S. 624 (1943).....	20
<i>Bolling v. Superior Court</i> , 16 Wn.2d 373, 133 P.2d 803 (1943).....	3, 4
<i>Boos v. Barry</i> , 485 U.S. 312 (1988).....	16, 17
<i>City of Sumner v. First Baptist Church of Sumner</i> , 97 Wn.2d 1, 639 P.2d 1358 (1982).....	5, 6
<i>Elane Photography LLC v. Willock</i> , 309 P.3d 53 (N.M. 2013).....	18, 19
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990).....	4
<i>First Covenant Church of Seattle v. City of Seattle</i> , 120 Wn.2d 203, 840 P.2d 174 (1992).....	3, 4, 5, 6, 8
<i>Hands-On Originals v. Lexington-Fayette Urban County Human Rights Comm’n</i> , Civ. Action No. 14-CI-04474 (April 27, 2015).....	12, 13, 15
<i>Jack v. Azucar Bakery</i> , Charge No. P20140069X (Colo. Civ. Rts. Div. Mar. 24, 2015).....	12, 13
<i>Munns v. Martin</i> , 131 Wn.2d 192, 930 P.2d 318 (1997).....	3
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990).....	15

<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	16
<i>United States v. Eichman</i> , 496 U.S. 310 (1990).....	16
<i>United States v. Lee</i> , 455 U.S. 252 (1982).....	4

Constitutional Provisions and Statutes

Wash. Const. art. I, §11.....	<i>passim</i>
International Religious Freedom Act, 22 U.S.C. §§6401-8481.....	19
HB 1963, §1(2)(e), 2011 Reg. Sess.....	10

Other Authorities

Douglas Laycock and Thomas C. Berg, <i>Protecting Same-Sex Marriage and Religious Liberty</i> , 99 Va. L. Rev. in Brief 1, 4 (2013).....	9, 10
Eugene Volokh, <i>Freedom of Speech and Workplace Harassment</i> , 39 UCLA L. Rev. 1791 (1992).....	10

SUMMARY OF ARGUMENT

The clash in this case between an anti-discrimination law and Barronelle Stutzman’s claim should not be framed—as it sometimes has been—as a clash between “civil rights and religious objections.” Stutzman asserts a claim of religious freedom, which itself is a civil right, and one of “vital importance,” in this Court’s words.

Article I, §11 of the Washington Constitution guarantees “absolute freedom of conscience,” and this Court has emphasized that under this provision courts must make “every effort” to protect religious conscience while also recognizing the competing interests underlying the state law that conflicts with religious freedom. This balance of competing interests is also appropriate for the conflict here because—as we will detail—the same premises that support protection of same-sex couples also support strong protection for religious freedom. Accordingly, when a statute conflicts with religious freedom, courts must not simply accept the statutory policy as conclusive—as the trial court essentially did here. This Court could easily “accommodate the competing interests” by recognizing a limited exemption, as Stutzman seeks, for a small businessperson to decline to provide expressive services for a particular expressive event—not to refuse to serve gays or lesbians in general—where the customers in question have ample alternative providers for the services.

It must be emphasized that this case involves an objection not to serving same-sex couples in general, but to providing expressive services for a specific event with expressive and religious significance. It is undisputed that Stutzman provided multiple other arrangements for Robert Ingersoll and Curt Freed. But for Stutzman, like many other people of good will, a wedding has specific expressive and religious meaning. In these circumstances, the state lacks a compelling interest in forcing an individual to provide services that violate her religious conscience. These circumstances make this case similar to several others that have upheld commercial providers' right to decline to provide goods or services expressing a message to which they objected: for example, declining to bake a cake with an anti-gay message, or declining to print T-shirts advertising a gay-pride festival.

Moreover, when access to alternative providers of service is available, religious freedom cannot be overridden based only on the argument that declining to provide services for an event "stigmatizes" the customer. Although such an interest may support the passage of an anti-discrimination law in the first place, it cannot justify a substantial burden on the "vital" right of religious freedom. It is essentially an interest in preventing the impact of the message that the religious objector disapproves of the event. Preventing the "communicative impact" of conduct—the message the

conduct sends—is insufficient to justify restricting conduct protected by the First Amendment, as the Court has held, for example, in striking down laws prohibiting the burning of the American flag.

ARGUMENT

I. Under Washington’s Constitution, This Court Must “Make Every Effort” To Accommodate Religious Freedom, Including In The Context Of Anti-Discrimination Laws

A. Washington Recognizes Religious Freedom as a “Vital” Liberty

Article I, §11 of the Washington Constitution guarantees “[a]bsolute freedom of conscience.” This Court has frequently said that “[t]his constitutional guaranty of free exercise is ‘of vital importance.’” *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 226, 840 P.2d 174, 187 (1992) (quoting *Bolling v. Superior Court*, 16 Wn.2d 373, 381, 133 P.2d 803 (1943)); *Munns v. Martin*, 131 Wn.2d 192, 200, 930 P.2d 318, 321 (1997).

The importance of religious freedom is a key reason this Court gave for adopting the religion-protective standard of strict scrutiny under Article I, §11, and rejecting the non-protective rule that the U.S. Supreme Court had adopted for the federal Constitution in *Employment Division v. Smith*, 494 U.S. 872 (1990). See *First Covenant*, 120 Wn.2d at 224-26, 840 P.2d at 186-87 (adopting strict scrutiny and rejecting *Smith*). This Court has said that it is “‘the most important dut[y] of our courts to ever guard . . . religious

liberty, and to see to it that these guarantees are not narrowed or restricted because of some supposed emergent situation.” *Id.* at 225, 840 P.2d at 186 (quoting *Bolling*, 16 Wn.2d at 385-86, 133 P.2d 803). Indeed, Washington “exhibits a long history of extending strong protection to the free exercise of religion.” *Id.* at 225, 840 P.2d at 187.

B. Article I, §11 Requires the Court to “Make Every Effort” to Protect Religious Freedom, while Also Recognizing Other Government Interests, in the Particular Case

In holding that the application of the Washington Law Against Discrimination (WLAD) here did not violate Article I, §11, the trial court essentially found conclusive the mere fact that the statute prohibits Stutzman’s act of declining to create floral arrangements to serve a wedding. Having concluded that the statute covered Stutzman’s conduct, the court asserted that it “should not substitute ‘[its] judgment for that of the [L]egislature with respect to the necessity of these constraints.’”. Mem. Dec. 50 (quotation omitted; brackets in original). The State, too, argues that the mere applicability of the statute is conclusive. It asserts that “‘the limits [believers] 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.’” State Br. at 2, 40 (brackets in original) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)); State Br. at 30 (asserting that Stutzman “freely chose to enter the Washington marketplace as a

florist, with *all of its* related benefits and *corresponding regulations*”) (emphases supplied).

This approach fundamentally departs from the analysis this Court has set forth under Article I, §11. This Court has made clear that to give religious freedom its proper strong weight when it conflicts with a statute, the policy of the statute cannot be conclusive: rather, courts must seek ways to accommodate both religious freedom and the statutory policy. For example, in *City of Sumner v. First Baptist Church of Sumner*, 97 Wn.2d 1, 639 P.2d 1358 (1982), this Court held that a church conducting a vacation Bible school could challenge the application of building safety regulations that would have imposed financial burdens on its ability to operate. Even though building codes generally serve “the compelling interest . . . in the safety of the children” at the school, *id.* at 9, 639 P.2d at 1363, this Court refused to accept that as conclusive. Rather, the Court required the city to show that “the state’s interest could not otherwise be satisfied in a way which would not infringe on religious liberty.” *Id.*¹ Because the case involved “more than the routine application of a building code”—that is, it affected religious liberty—the city could not prevail simply by establishing

¹ Although *Sumner* referred to the federal Constitution in applying the compelling interest test, this Court adopted *Sumner*’s principles under Article I, §11 in *First Covenant*, 120 Wn.2d at 226-27, 840 P.2d at 187.

“that it had a building code . . . with which the church had not complied.”

Id. at 10, 639 P.2d at 1363. When First Amendment rights are involved,

[the City] should not be uncompromising and rigid. Rather, it should approach the problem with flexibility. There should be some play in the joints of both the zoning ordinance and the building code. An effort to accommodate the religious freedom of appellants while at the same time giving effect to the legitimate concerns of the City as expressed in its building code and zoning ordinance would seem to be in order. The record does not disclose that such an effort was made by either the City or the trial court.

Id. at 9-10, 639 P.2d at 1363 (“[A]ccommodation between the competing interests must be the goal. Only if such accommodation is not possible should one legitimate interest override another.”). The Court reiterated the point in *First Covenant*, finding that a preservation ordinance could not, in some instances, be constitutionally applied to church buildings: “*Sumner* recommended that a municipality make every effort to accommodate religious freedom, rather than uncompromisingly enforce its ordinances.” *First Covenant*, 120 Wn.2d at 227, 840 P.2d at 188.

Similarly, in this case, the courts “should not “uncompromisingly enforce” the WLAD; they “should approach the problem with flexibility” and “make every effort to accommodate religious freedom” along with the competing interests. The trial court showed no such flexibility. But this Court could surely “accommodate the competing interests” by recognizing a limited exception, as Stutzman seeks, to decline to provide expressive

services for a particular expressive event—not to refuse to serve gays or lesbians in general—where the customers in question have ample alternative providers for the services.

This flexible approach to accommodation does not change because Stutzman seeks to follow her religious conscience while running a small business. There is no exception making Washington’s compelling-interest test inapplicable in cases involving commercial activity. Under the State’s position, if Stutzman were an Orthodox Jew who ran a convenience store and the state required her to stay open on Saturdays to increase customers’ convenience, she would have to accept that statute as a given and violate her Sabbath or else exit the business. Such a restricted right is not the “[a]bsolute freedom of conscience” guaranteed by Article I, §11.

C. Several Key Arguments that Led to the Recognition of Same-Sex Civil Marriage Also Call for Broad Protection for Religious Objectors

There is another reason to “make every effort” to protect religious freedom in the context of laws against sexual-orientation discrimination. The very arguments that underlie protection of same-sex marriage also support strong protection for the religious freedom of those who dissent from it.

1. First, the State and the trial court have both rejected Stutzman’s argument that her refusal to provide flower arrangements fell outside the

WLAD’s prohibitions because it rested on “opposition to conduct (same-sex weddings), rather than opposition to or discrimination against gay and lesbian individuals generally (the status of sexual orientation).” Mem. Dec. 28; see State Br. at 13. The trial court rejected the distinction between status and conduct, holding that a statute that prohibits discrimination based on sexual orientation “similarly protects conduct [marriage] that is inextricably tied to sexual orientation.” Mem. Dec. 29 (quotation omitted).

But if status and conduct are tied together for the same-sex couple, they surely are also tied together for the religious believer. Religious freedom includes not just the right to believe, but the right to act on one’s belief—as this Court has emphasized under Article I, §11. In confirming that the compelling interest test governs Washington free exercise claims, this Court reasoned that “[t]he text of the state constitution focuses both on belief and on conduct, as evidenced in the terms ‘worship,’ ‘acts,’ and ‘practices.’ Article 1 clearly protects both belief and conduct.” *First Covenant*, 120 Wn.2d at 224, 840 P.2d at 186. In short, Washington’s protective approach to religious freedom rests on the recognition that the core of religion includes conduct, not merely religious status or belief.

This is as it should be. No less than same-sex couples, religious objectors argue that certain conduct is fundamental to their identity, and that they should be able to engage in it free from unnecessary state interference

or discouragement. “[B]elievers cannot fail to act on God’s will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things constitutive of their identity.” Douglas Laycock and Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 Va. L. Rev. in Brief 1, 4 (2013). Having extended this respect to same-sex couples, the State should not turn around and deny it to religious freedom claimants.

2. Moreover, to eliminate religious freedom claims in the public sphere, including the workplace, as the trial court did here—to confine such claims to the church sanctuary or the home—is another form of selective sympathy. “Both same-sex couples and religious dissenters . . . seek to live out their identities in public.” Laycock and Berg, *supra*, at 4. In successfully arguing for access to civil marriage, “same-sex couples claim[ed] a right beyond private behavior in the bedroom: they claim[ed] the right to participate in the social institution of civil marriage.” *Id.* Washington, in recognizing this right, determined that it is inadequate to tell same-sex couples that they can pursue their relationship in private. For example, a proposed marriage-recognition bill, parallel to the one enacted, emphasized that civil marriage gives couples “the opportunity to express mutual dedication” in a public way. HB 1963, §1(2)(e), 2011 Reg. Sess.

Again, this consideration surely applies with equal force to religious believers. They “likewise claim a right to follow their faith not just in worship services, but also in the charitable services provided through their religious organizations and in their daily lives.” Laycock and Berg, *supra*, at 4. They claim the right to live with integrity not just in private aspects of their lives, but in the public places of civil society, including the workplace, where people “spend more of their waking hours than anywhere else except (possibly) their homes.” Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1849 (1992).

II. The State Lacks A Compelling Interest In Denying Small Businesses An Exemption Confined To Providing Expressive Services For A Specific Event—Not For Refusing To Serve Same-Sex Couples In General—When There Is Ready Access To The Services From Others

For several reasons, there is no compelling interest in this case in forcing Stutzman to provide expressive arrangements that celebrate a wedding to which she objects on religious grounds.

A. This Case Involves an Objection to Providing Expressive Services for a Specific Event with Religious Significance, Not to Serving Same-Sex Couples in General

It must be emphasized that this case involves an objection not to serving same-sex couples in general, but to providing expressive services for a specific event with expressive and religious significance. It is undisputed that Stutzman provided multiple other arrangements for Ingersoll and Freed.

But for Stutzman and many other people of good will, a wedding has expressive and religious meaning, since for them marriage is a religious institution, and the ceremony perhaps even a religious sacrament. For them, assisting with a marriage ceremony has religious significance that commercial services, like serving food or driving taxis, do not. They, like Stutzman, have no objection generally to providing services to same-sex couples, but they object to directly facilitating a wedding.

The trial court here concluded that Stutzman’s willingness to serve Ingersoll and Freed in other contexts did not constitute compliance with the WLAD. The court reasoned that discriminating concerning some services, while providing others equally, still violated the statute. Mem. Dec. 29. But our point concerns not whether the statute prohibits Stutzman’s action, but whether, given the fundamental constitutional right involved, that prohibition is the least restrictive means of serving a compelling state interest. Those are two very different questions under this Court’s case law, which—as noted—directs courts to “make every effort” to accommodate religious freedom instead of “uncompromisingly or rigidly” applying a statutory rule. See *supra* pp. 4-7. The WLAD can remain applicable in the vast majority of situations even as Article I, §11 requires an exception in specific cases to preserve the “vital” right of religious conscience.

The focus here on the wedding service and its religious significance makes this case very similar to other recent cases that upheld commercial providers' right to refuse to provide goods or services expressing a message to which they objected. For example, in *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civ. Rts. Div. Mar. 24, 2015), *available at* <http://perma.cc/5K6D-VV8U>, the state civil rights agency held that a bakery was not liable for discrimination based on religious creed when it refused to create cakes inscribed with derogatory messages about gays. And in *Hands-On Originals v. Lexington-Fayette Urban County Human Rights Comm'n*, Civ. Action No. 14-CI-04474 (April 27, 2015), a Kentucky court held that a T-shirt printing company (HOO) could decline, on grounds of free speech and religious freedom, to print T-shirts advertising a gay pride festival. See <https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/04/HandsOnOriginals.pdf>. The court found that HOO and its owners had refused to print the shirts not because of the sexual orientation of the festival's organizers, but "because of the MESSAGE advocating sexual activity outside of a marriage between one man and one woman." *Id.* at 13 (caps in original).

This case is similar enough to *Hands-On* and *Azucar Bakery* that there cannot be a compelling interest in forcing Stutzman to provide her services to design artistic, expressive arrangements celebrating a wedding. There

cannot be a compelling interest in prohibiting conduct that is so close to other conduct that is permitted. As with the situations in *Hands-On* and *Azucar*, Stutzman declined to provide flowers not because her clients were gay—she had been willing to do other arrangements for them—but because she believed the marriage event expressed a message she could not participate in affirming with her own expression. See *Arlene’s Flowers Br.* at 4-7 (describing the expressive nature of her arrangements).

B. In Addition, the State Lacks a Compelling Interest in Forcing a Religious Objector to Provide Services when There is No Denial of Access

Moreover, it is unquestioned that the individual plaintiffs easily obtained access to the same services from another source. They secured another florist to provide the arrangements, at a cost of “\$7.91 in out-of-pocket expenses.” Mem. Dec. 9. Courts have held, under the same compelling interest test that governs in Washington, that small businesspersons cannot be required to provide personal services in violation of their religious beliefs, at least when there is ready access to the services from other providers. When customers can readily access the service by other means, both religious freedom and access to goods and services can be safeguarded.

For example, in *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994), the Massachusetts Supreme Judicial Court, applying the

compelling interest test under the state constitution, reversed a grant of summary judgment against a landlord whose religious convictions led him to decline to rent an apartment to an unmarried couple living together outside of marriage. Rejecting the very same argument that the State makes here, the Massachusetts court held that “[t]he general objective of eliminating discrimination of all kinds referred to in [state law] cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants’ right to free exercise of their religion.” *Id.* at 325, 636 N.E.2d at 238. In contrast to the trial court here, *Desilets* held that “simple enactment of the prohibition against discrimination based on marital status” could not alone justify overriding religious freedom: “[t]he analysis [under the compelling interest test] must be more focused.” *Id.* at 329, 636 N.E.2d at 240, 238.

The key question under the compelling interest test, *Desilets* says, is whether customers have access to goods and services: that is,

whether the rental housing policies of people such as the defendants can be accommodated, at least in the [relevant] area, without significantly impeding the availability of rental housing for people who are cohabiting or wish to cohabit. Market forces often tend to discourage owners from restricting the class of people to whom they would rent. On the other hand, discrimination of the sort challenged here may present a significant housing problem if a large percentage of units are unavailable to cohabitants.

Id. at 329, 636 N.E.2d at 240.²

Likewise, in *Hands-On*, *supra* p. 12, the court found that there was no compelling interest in forcing Hands-On to print T-shirts, because the company had offered to refer the festival organizers “to another printing company to do the work for the same price” and the organizers were “able to obtain [the] printing” at that price. *Id.* at 15.

When access to other services is available, the only remaining rationale for punishing Stutzman is that by declining to provide her services, based on an objection to the event, she communicated an unacceptable message to the customers and to others. See Mem. Dec. 49 (rejecting free exercise claim on the ground that discrimination is “stigmatizing” toward the citizens affected). That interest is indeed sufficient to support the passage of an anti-discrimination law in the first place. But it cannot justify a substantial burden on the “vital” right of religious freedom. When (as here) the refusal of service causes no material denial of access to services, the State’s asserted interest is essentially in preventing the impact of the message that the religious objector disapproves of the event. Preventing that message is

² In a similar case, Minnesota’s Supreme Court also applied its constitution to uphold the landlord’s right to decline, on religious grounds, to rent to an unmarried couple living together. *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990). The court rejected the argument, made by the State here as well, that the religious believer gave up her free exercise rights by choosing to be in the particular business. *Id.* at 8 (“Economic necessity may require [the landlord] to seek rental income and this may be . . . critical to him.”).

not a permissible reason for restricting activity protected by the First Amendment. The Supreme Court has made clear, for example, that “expressive conduct,” such as the burning of the American flag, cannot constitutionally be prohibited when the law in question is ““directed at the communicative nature of [the] conduct.”” *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (emphasis and quotation omitted). A government action is unconstitutional if it suppresses First Amendment conduct “out of concern for its likely communicative impact.” *United States v. Eichman*, 496 U.S. 310, 317 (1990).

To prohibit First Amendment activity solely on the ground that it allegedly sends a message about the dignity of another is also inconsistent with *Boos v. Barry*, 485 U.S. 312 (1988). There the Supreme Court struck down a federal law that prohibited displaying signs, within 500 feet of a foreign embassy or consulate in the District of Columbia, that would “intimidate, coerce, or bring into public odium any foreign government” or its officers or “bring [their acts or views] into public disrepute.” The government defended the statute based “on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments.” *Id.* at 321. The Court held that “[t]his justification focuses *only* on the content of the speech and the direct impact that speech has on its listeners.” *Id.* (describing this as “[t]he emotive impact

of speech on its audience”). As a result, the Court found the law content-based, subject to strict constitutional scrutiny, and invalid.

When the only harm to a couple refused service is dignitary—rather than any loss of any material access to services—the case cannot be distinguished from harms to the dignity of foreign diplomats or the American flag. Like the defendants burning the flag, Stutzman is engaged in conduct with significant First Amendment implications when she declines, for reasons of religious conscience, to provide expressive arrangements for a wedding that she cannot affirm.

III. One Cannot Be Required To Surrender Religious Freedom In The Commercial Sphere As “The Price Of Citizenship”

Finally, *amici* wish to address one judicial argument that has received substantial attention as a ground for refusing to accommodate religious freedom in the commercial sphere. The individual plaintiffs-respondents, in support of their argument that no religious-freedom exemption should even be considered in this context, have relied on *Elane Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013). See Br. of Respondents Ingersoll and Freed at 44. But *Elane Photography* did not reject the wedding photographer’s claim on the merits under the compelling interest test: it held that the test was inapplicable because New Mexico’s Religious Freedom

Restoration Act “is inapplicable [in cases where] the government is not a party.” *Elane Photography*, 309 P.3d at 59, 76-77.

Only one judge in *Elane Photography* reached the merits, and he offered a particularly blunt rationale for refusing to consider accommodation for persons facing conflicts of religious conscience in operating their small businesses. Justice Bosson, specially concurring, wrote: “This case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others.” *Id.* at 79. While “[t]he Huguenins are free to think, to say, to believe, and lead their personal lives] as they wish,” he wrote, for this protection “there is a price, one that we all have to pay somewhere in our civic life”:

In the [w]orld of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. ... In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.

Id. at 80. This passage reflects two serious mistakes.

First, the compelling interest test provides the means to “leave space” for *both* religious objectors and same-sex couples to live out their beliefs and identities. Surely it is important to ensure that couples have access to

wedding services, so they have space in which to express their relationship. But when a couple has faced no meaningful impediment to obtaining wedding services, they have space. It is the religious objector who is denied space when she is forced to violate her beliefs or quit her business activity.

More fundamentally, Justice Bosson's rhetoric ignores the importance of religious freedom to full citizenship. A crucial premise of religious freedom is that the state that respects its citizens' loyalty to a higher power will earn their full loyalty and gratitude; a state that refuses to respect those other loyalties will not only impose suffering on citizens but will make them resentful. For this reason, United States policy, pursuant to the International Religious Freedom Act, 22 U.S.C. §§6401-6481, is to "[p]romote freedom of religion and conscience throughout the world as a fundamental human right and as a source of stability for all countries." U.S. Dept. of State, *Religious Freedom*, <http://www.state.gov/j/drl/irf/>.

When the U.S. Supreme Court protected Jehovah's Witnesses from having to salute the American flag, it recognized that citizens' loyalty to government is strengthened when the government respects and protects their other loyalties. "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and, by making us feel safe to live under it, makes for its better support." *Board of Education v. Barnette*, 319 U.S. 624, 636 (1943). Governments in this country will make a terrible mistake

in forcing religious citizens to contravene their beliefs for less than the most pressing purposes. To do so will only foment fear and jealousy of government—and miss the lessons of history that led this State, and this nation, to guarantee religious freedom in the first place.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 7, 2016, I served the Motion for Leave to File Brief For Christian Legal Society, Association of Christian Schools International, and National Association of Evangelicals As *Amici Curiae* Supporting Appellants and the Brief of Christian Legal Society, Association of Christian Schools International, and National Association of Evangelicals As *Amici Curiae* Supporting Appellants via email to the following:

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