

No. 17-108

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
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF *AMICI CURIAE* THE WASHINGTON
STATE CATHOLIC CONFERENCE, JEWS FOR
RELIGIOUS LIBERTY, IMAM SHAHIN, AND
THE ETHICS & RELIGIOUS LIBERTY
COMMISSION IN SUPPORT OF PETITIONERS**

John J. Bursch
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley
Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for *Amici Curiae*

QUESTIONS PRESENTED

1. Whether the creation and sale of custom floral arrangements to celebrate a wedding ceremony is artistic expression, and if so, whether compelling their creation violates the Free Speech Clause.

2. Whether the compelled creation and sale of custom floral arrangements to celebrate a wedding against one's religious beliefs violates the Free Exercise Clause.

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INTEREST OF *AMICI CURIAE*¹

The Washington State Catholic Conference is the public policy voice of the Bishops of the State of Washington, who include the Catholic Bishops of the Archdiocese of Seattle, the Diocese of Spokane, and the Diocese of Yakima. The Conference's mission is rooted in the Catholic community's belief in the inviolate dignity of the human person, its tradition of service to the most vulnerable of society, and its firm commitment to a just and peaceful world.

Jews for Religious Liberty is an unincorporated cross-denominational group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. *Amicus's* members have each written extensively on the role of religion in public life. Representing members of the legal profession, and as adherents of a minority religion, *amicus* has a unique interest in ensuring that Free Exercise jurisprudence enables the flourishing of religious viewpoints and practices in the United States, including for communities of traditional faith.

Imam Omar Ahmed Shahin is a Fellow of the Graduate Theological Foundation, Director of Islamic Studies, and Ibn Taymiyya Professor of Islamic Law. Omar Shahin serves on the Board of Trustees for the

¹ Consistent with this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of the *amici's* intent to file this brief, and correspondence consenting to the filing of this brief has been submitted to the Clerk.

North American Imam Federation, a consortium of 587 Imam members that supports the Imam's sacred mission.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

All of these amici, though representing different faith traditions, are directly impacted by the increasing number of attacks by state and local governments on people of faith who sincerely and congenially seek to exercise their religion in the manner they live their faith in the public square, particularly the workplace. As detailed below, government compulsion of speech in violation of a proprietor's religious beliefs violates the Free Speech and the Free Exercise Clauses of the First Amendment.

INTRODUCTION

The United States includes millions of individuals in faith communities who believe in an afterlife and that our conduct matters toward eternal salvation. The government has never felt it necessary to deny such citizens the ability to exercise their beliefs or to force them to be complicit in what they consider to be sin. Yet that foundational principle of our pluralistic society is precisely what is at stake in this case.

Petitioner Barronelle Stutzman has designed floral arrangements in Richland, Washington, for 39 years. Her hallmark is getting to know her customers as friends and creating custom designs to celebrate special events. For nearly 10 years, she served her customer and friend, Respondent Robert Ingersoll, with that same artistic intensity. Barronelle knew Robert was in a relationship with a man, and Robert suspected Barronelle was a Christian. But that made no difference in how they treated each other.

Things changed when Robert asked Barronelle to design something special to celebrate his upcoming wedding. If Robert had asked simply for prearranged flowers, or flowers to celebrate his partner's birthday, Barronelle would have had no problem. But as a Christian, Barronelle believes that marriage has a sacred meaning, that the creation of custom floral wedding arrangements and associated activities is a form of participation in a religious ceremony, and that using her artistry to participate in a same-sex wedding ceremony would violate Christ's law. Her choice was to say no to her friend Robert, or to forgo her sincerely held belief and participate in the wedding ceremony, something she believed to be against God's will.

Barronelle chose the former. She took Robert's hands, told him she loved him, and explained that her relationship with Jesus Christ did not allow her to celebrate his wedding. Robert assured Barronelle that he understood; she recommended three nearby florists who would do an excellent job; and the two friends parted. Barronelle's decision did not stem from any animus but rather from her refusal to engage in expression that she considered against God's will.

It used to be a common American value that everyone has the freedom to live out one's faith without government coercion. But that value apparently does not extend to a person of faith who respectfully exercises her beliefs in the public square. Based on the lower-court decisions in this case, Barronelle will be forced to express the government's message or lose her business and personal assets. That is a stunning result for the millions of business owners and workers who believe they have the responsibility to practice their faith in their business vocation by refraining from activities that violate their religious beliefs.

This *amici* brief is in two parts. It begins by focusing on the obligations of a person of faith to integrate their beliefs and business practices. It then argues that if the Free Speech Clause fails to protect an individual from being compelled to express a message in violation of her faith, the Free Exercise Clause must surely do so. And to the extent the latter argument is foreclosed by *Employment Div. v. Smith*, 494 U.S. 872 (1990), then the Court should grant the petition and either narrow or overrule *Smith*. In no event should religious believers be forced to violate their beliefs in the marketplace.

STATEMENT

Barronelle and Robert

As explained in the petition, the facts in this case are not in dispute. Barronelle is a Christian, and her faith influences every aspect of her business. She refers to Arlene’s Flowers as “God’s business.” App. 349a. Her faith teaches her to love and respect all people whatever their sexual orientation. App. 313a. (Barronelle hires LGBT employees and serves LGBT customers on a regular basis, App. 306a–07a, 312a–13a; one of her LGBT employees describes her as “one of the nicest women [he] ever met,” App. 347a–50a.) And her faith also teaches her that celebrating a wedding that is not a “marriage” in God’s eyes—a spiritual union between one man and one woman—is contrary to God’s will, i.e., a sin. App. 321a; 340a–43a. As a result, when her good friend Robert asked Barronelle to design the flowers for his same-sex wedding ceremony, she felt that using her gifts to celebrate a marriage that was not between a man and a woman would damage her relationship with God. App. 319a–22a. To do otherwise would violate her religious beliefs, which Rob understands are “sincere.” App. 319a–21a; App. 322a, 401–21a.

The Attorney General of the State of Washington responded by suing Barronelle under the Washington Law Against Discrimination (WLAD) and Consumer Protection Act. For good measure, the ACLU filed suit on behalf of Robert and Respondent Curt Freed. Because of attorney-fee shifting, Barronelle faces the prospect of losing her business and undergoing personal bankruptcy.

Proceedings below

In the trial court, Barronelle explained that she happily serves all customers, regardless of sexual orientation but, because her faith teaches that only marriage between a man and a woman should be celebrated, she cannot use her artistic talents to participate in a same-sex wedding ceremony. If the government can force her to express a message that violates her sincere religious beliefs, she said, that would violate her rights under the Free Speech and Free Exercise Clauses of the First Amendment.

The trial court felt that even if Barronelle did not discriminate based on sexual orientation, “[t]he indirect discriminatory result flowing from [her] actions satisfies the WLAD and constitutes a violation.” App. 117a. And the Free Speech and Free Exercise Clauses could not provide a defense, said the court, because there is no free speech exception to public-accommodation anti-discrimination laws, and the WLAD is neutral and generally applicable. App. 125a, 126a–333a. The court issued a permanent injunction such that if Barronelle provided expressive services for opposite-sex wedding ceremonies, she had to provide them for same-sex ceremonies too. App. 61a–62a, 66a. The court required Barronelle to pay an undetermined amount of actual damages and attorney fees for roughly four years of litigation. App. 62a, 67a.

The Washington Supreme Court granted direct review and affirmed. App. 2a. Concluding that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), stands for the proposition that the denial of marriage to same-sex couples disrespects and subordinates them, the Washington Supreme Court said that any ‘[d]iscrimi-

nation based on same-sex marriage constitutes discrimination on the basis of sexual orientation” under the WLAD. App. 16a, 56a. The Court further decided that making custom floral arrangements is conduct, not speech, and that courts should not “be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from anti-discrimination laws.” App. 33a. The Court also agreed the WLAD is a neutral law of general applicability that serves a compelling state interest in eradicating discrimination in public accommodations, and it rejected any defense based on the “hybrid-rights claim” of a defendant invoking both free-speech and free-exercise protection. App. 53a–57a.

SUMMARY OF ARGUMENT

Individuals and religious organizations have never limited the way they express their faith to activities that take place in the home or a place of worship. To the contrary, one of the most fundamental ways to exercise religion is to live out one’s faith in the public square, including at work and while running a business. This Court has never conditioned an individual’s constitutional rights to free expression and free exercise on that person’s willingness to keep her faith beliefs under a bushel basket and not engage in commerce. And that condition is precisely what the Washington Supreme Court has imposed on Barronelle: design floral arrangements to celebrate a same-sex wedding ceremony, or else. The Court should grant the petition and recognize the fundamental role that faith plays in the workplace.

The petition correctly explains that artistic expression is pure speech that the Free Speech Clause

protects, and that the Washington Supreme Court's contrary holding conflicts with numerous decisions of this Court as well as the Second, Sixth, Ninth, Tenth, and Eleventh Circuits. Pet. 17–32. The petition also rightly demonstrates that the Washington Supreme Court's decision exacerbates a circuit conflict regarding hybrid-rights claims under the Free Exercise Clause. Pet. 32–37. This brief will not repeat those arguments. But if the Court disagrees with these aspects of the petition, then it is necessary to readdress a more fundamental problem with this Court's jurisprudence: the idea that absent evidence of animus in enactment, facially neutral and generally applicable laws are *per se* constitutional against claims that a law violates a person's Free Exercise rights.

It cannot be the case that the government, over a religious objection, can force a Muslim grocer to serve pork, a Jewish website designer to develop a website for pornography, or a Christian floral designer to participate in a same-sex wedding ceremony simply because a facially neutral law says so. Yet that is the clear holding of the Washington state courts here, relying on *Employment Div. v. Smith*, 494 U.S. 872 (1990). Under that reasoning, a facially neutral law that prohibits the consumption of alcohol on Sunday mornings could even prevent churches from using wine in sacred liturgies. Accordingly, this Court should revisit *Smith* and either narrow or abrogate the decision to make clear that the Free Exercise Clause protects an individual's right to practice her faith and exercise her beliefs in the public square, including places of public accommodation.

ARGUMENT

I. This Court should grant the petition and reiterate that exercising one’s faith does not stop at the doorstep of one’s home or place of worship.

The practice of faith does not end when a religious believer leaves her home or place of worship. Rather, she is called to live out her faith—including fundamental beliefs about sex, marriage, and the family—in every aspect of her life, including work. To do otherwise, in petitioner’s view, is hypocritical and risks eternal damnation. *E.g.*, Psalm 11:7 (NASB): “For the Lord is righteous, He loves righteousness. The upright will behold His face.”

Christian, Jewish, and Muslim teachers have all emphasized the instruction that one’s faith beliefs should be fully integrated in every aspect of one’s life. For example, the Catechism of the Catholic Church instructs that “[b]y reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God’s will.” Catechism of the Catholic Church ¶ 898 (1997). Lay believers are called “to illuminate and order all temporal things with which they are closely associated” considering the Catholic faith. *Id.*

The Catholic Catechism’s teaching on this point echoes a dominant theme of the Second Vatican Council of 1962-65. The Council’s Pastoral Constitution of the Church in the Modern World instructed that “[t]he split between the faith which many profess and their daily lives deserves to be counted among the more

serious errors of our age. . . . The Christian who neglects his temporal duties, neglects his duties toward his neighbor and even God, and jeopardizes his eternal salvation.” *Gaudium et Spes*, ¶ 43 (1965).² Catholics are called to bring their faith in Christ “to all their earthly activities and to their humane, domestic, professional, social and technical enterprises,” by “gathering them into one *vital synthesis* with religious values, under whose supreme direction all things are harmonized unto God’s glory.” *Id.* (emphasis added). The goal of this synthesis of religious values with work is to “contribute to the sanctification of the world by fulfilling their own particular duties” in personal and professional life. *Christifideles Laici*, ¶ 15 (1988).³

This synthesis is not limited to teachings regarding marriage and sexuality. The Catholic Church offers specific directives for how believers should act in the market with respect to advertising, *e.g.*, Saint Pope John Paul II, *Centesimus annus*, #36 (1991), fair wages, *e.g.*, Saint Pope John Paul II, *Centesimus annus*, #8 (1991), Catechism of the Catholic Church, ¶ 2434, employee ownership of companies, *e.g.*, Saint Pope John XXIII, *Mater et magistra*, #77 (1961), and workplace hours, *e.g.*, Saint Pope John XXIII, *Rerum novarum*, #42 (1891). See generally *A Catechism for Business: Tough Ethical Questions & Insights from Catholic Teaching* (Andrew V. Abela, Joseph E. Capizzi, ed. 2014).

Great teachers of the Protestant tradition agree. Martin Luther “often speaks about specific

² <https://goo.gl/k1zvkv>

³ <https://goo.gl/xsvKm7>

occupations, but the purpose in doing so is not to restrict vocation to occupation but to affirm that even the most mundane stations are places in which Christians ought to live out their faith.” Marc Kolden, *Luther on Vocation*, 3 *Word & World* 382 (Oct. 1, 2001).⁴ Thus, as the Lutheran Church-Missouri Synod summarizes Luther, “Vocations are ‘masks of God.’ On the surface, we see an ordinary human face – our mother, the doctor, the teacher, the waitress, our pastor – but, beneath the appearances, God is ministering to us through them. God is hidden in human vocations.” Lutheran Church-Missouri Synod, *Life Library – Vocation*.⁵ “With the doctrine of vocation, everyday life is transfigured. We realize that the way to serve God is not by some extraordinary act of mystical devotion, but by serving our neighbors in the daily circumstances of life—in our families, our jobs, our church and our involvement in the community.” *Id.*

John Calvin likewise “regarded vocation as a calling into the everyday world. The idea of a calling or vocation is first and foremost about being called by God, to serve Him within his world.” Alister McGrath, *Calvin and the Christian Calling*, 1999 *First Things* 94 (July 1999).⁶ One’s daily occupations, including one’s work, are part of a fully integrated synthesis of one’s faith life: “Work was thus seen as an activity by which Christians could deepen their faith, leading it on to new qualities of commitment to God. Activity within the world, motivated, informed, and sanctioned by Christian faith, was the supreme means by which the

⁴ <https://goo.gl/oSQ1S9>

⁵ <https://goo.gl/b7vx9r>

⁶ <https://goo.gl/aEaFft>

believer could demonstrate his or her commitment and thankfulness to God.” *Id.*

Contemporary Protestant teachers continue to emphasize this doctrine. A prominent Baptist preacher aptly stated, “Our work, our jobs, our careers—those things are not just incidentals or necessary evils that we tack on to our spiritual lives. Our jobs are a massive arena in which God matures us as Christians and brings glory to himself.” Southern Baptist Convention, Ethics & Religious Liberty Commission, *The Gospel at Work: A Conversation with Greg Gilbert and Sebastian Traeger* (Jan. 15, 2014).⁷ Similarly, a former President of the ERLC stated: “As Southern Baptists, we believe God has endowed all people with the freedom to believe and express religious faith. . . . Americans should not have to check the freedom to exercise their faith at the door of their workplace.” Southern Baptist Convention, Ethics and Religious Liberty Commission, *SBC’s Richard Land Testifies in Support of Workplace Religious Freedom Act* (Nov. 10, 2005).⁸

The doctrine that one’s faith should be fully integrated into a believer’s daily life—including her job, occupation, and profession—has deep roots in non-Christian religions as well. For example, it is a central tenet of Judaism that, throughout one’s daily life, one should accept and act upon the great multitude of opportunities to improve one’s thoughts and behavior. Talmud, Makkos 23b; see also Rabbi Moshe Chaim Luzzato, *Derech Ha-Shem* §§ 1:2:1–5. These opportuni-

⁷ <https://goo.gl/n7SXtK>

⁸ <https://goo.gl/GMFwPG>

ties are “mitzvot,” or commandments, which constitute a complete set of civil and criminal laws that govern literally all aspects of Jewish life. The mitzvot apply as equally to commercial transactions as to a believer’s personal life:

- Because many Jews believe themselves prohibited from deriving any benefit from a cooked mixture of dairy and meat, such a Jewish store owner cannot sell a cheeseburger to any customer, Jewish or Gentile, and would not be allowed to profit from allowing one of his employees to cook meat and dairy together. *Why Not Milk and Meat*, Aish.com⁹; Exodus 23:19, 34:26, Deuteronomy 14:21, and Babylonian Talmud: Hullin 113b, 115b.
- Because of Sabbath day observances, a Jewish florist would face many religious restrictions that would restrict his ability to provide services to a formal wedding that occurred on the Sabbath or select holy day. Menachem Posner, *What is Shabbat?*, Chabad.org¹⁰; Exodus 16:26-30, 20:8-11, 23:12, 31:12-17, 34:21, 35:3, Leviticus 23:3, Deuteronomy 5:12-15, Isaiah 58:13-14, Amos 8:5, Haggai 1:8.
- Many Jewish florists would find it religiously transgressive to participate in creating floral arrangements for a ceremony in which a Jew was converting to another religion. Leviticus 20:26; Exodus 20:2.

⁹ <https://goo.gl/ymSYnr>

¹⁰ <https://goo.gl/83yxa6>

- Likewise, while a Jewish florist could contribute to a wedding between two Christians or two Muslims, or a Muslim and a Christian, many such florists would consider it inconsistent with their faith to contribute to an intermarriage between a Jew and a member of another religion. Deuteronomy 7:3; Babylonian Talmud: Yevamoth 23a.
- Many religious Jews would be unable to engage in work that would enhance a polytheistic festival. Babylonian Talmud: Avodah Zarah 6a; Code of Jewish Law: Yoreh De'ah 148:1.
- The Bible prohibits Jews from wearing garments made from mixtures of wool and linen. Jews who follow this commandment would require an accommodation exempting them from wearing a prison, school, or military uniform made from a mixture of these materials. And many Jewish tailors would find it religiously objectionable to create such a garment for a Jewish customer. *Shatnez-Free Clothing*, Chabad.org¹¹; Leviticus 19:19; Deuteronomy 22:9-11.

¹¹ goo.gl/RZRcSm

Similarly, “Islam regards it as meaningless to live life without putting [one’s] faith into action and practice,” and proclaims that living the central tenets of the faith “weaves [believers’] everyday activities and their beliefs into a single cloth of religious devotion.” Oxford Islamic Information Centre, *Five Pillars of Islam*.¹² Islam has strict rules forbidding the charging of interest, and an entire global industry (Islamic Finance) has been created to comply with these rules. See generally Muhammad Ayub, *Understanding Islamic Finance* (2007).

Indeed, some of the country’s largest businesses participate in the market yet still engage in religiously motivated practices, including closing on Sunday (Chick-fil-A, Inc.), printing Bible references on products (In-N-Out Burger), publishing Bibles and other Christian media (Tyndale House Publishers, Inc.), providing financial advice based on the Bible (Lampo Group, Inc.), producing and selling kosher foods (Empire Kosher), offering financial products consistent with Islamic teachings about usury (LARIBA American Finance House), placing Bibles and the Book of Mormon in all its hotel rooms (Marriott, Inc.), employing chaplains to provide spiritual counseling to employees (Tyson Foods, Inc.), and taking out full-page newspaper ads to evangelize (Hobby Lobby, Inc.).

In sum, for millions of believers, “freedom to embrace religion as a way of life isn’t an optional extra added on to practicing that way of life; freedom to embrace and hold onto religion *is a constitutive*

¹² <https://goo.gl/6Ywi8J>

component of a religion's way of life without which that very way of life is fundamentally compromised. For world religions, freedom of religion is a key substantive good.” Miroslav Volf, *Flourishing: Why We Need Religion in a Globalized World* 113 (2015) (emphasis added). And secular society benefits when it honors religious liberty and allows religious practices to flourish. See generally Angus J. L. Menuge, *The secular state's interest in religious liberty*, in *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives*, 89 (Angus J. L. Menuge ed., 2017).

Turning to the present case, Barronelle's compassionate response to Robert's request that she participate in his same-sex wedding ceremony reflected her deeply held religious belief that God ordained marriage as a sacramental and spiritual union between one man and one woman. She is not alone in that belief. *E.g.*, Thomas Aquinas, *Summa Theologica II-II*, Q. 154, art. 12 (Tr. 1920)¹³; *Summa Theologia* Suppl., Q. 41, art. 1 and Q. 44 art. 1 (Tr. 1920); Martin Luther, 3 *Luther's Works* 255 (1961) (non-marital sexual relations “depart[] from the natural passion and longing of the male for the female, which is implanted into nature by God.”); Rabbi Tzvi Hersh Weinreb, *Orthodox Response to Same-Sex Marriage* (June 5, 2006)¹⁴ (“Homosexual behavior between males or between females is absolutely forbidden by Jewish law,” as rooted in the procreative nature of male-female relations ordained in the Book of Genesis); Catechism of the Catholic Church ¶ 2357 (“Basing itself on Sacred Scripture, . . . tradition has always declared that ‘homosexual acts are

¹³ <https://goo.gl/igLDKn>; <https://goo.gl/7AGBGr>

¹⁴ <https://goo.gl/u4zjbd>

intrinsically disordered.’ They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from genuine affective and sexual complementarity.”); *Amoris Laetitia* (The Joy of Love), ¶ 52 (Mar. 19, 2016)¹⁵ (“absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family”); Lutheran Church-Missouri Synod, *LCMS Views – Marriage/Human Sexuality* 10 (“*LCMS Views*”)¹⁶ (“[h]omosexual behavior is prohibited in the Old and New Testaments as contrary to God’s design,” and “on the basis of Scripture, marriage is the lifelong union of one man and one woman.”); National Association of Evangelicals, *God Defined Marriage* (June 26, 2015)¹⁷ (“As first described in Genesis and later affirmed by Jesus, marriage is a God-ordained, covenant relationship between a man and a woman. This lifelong, sexually exclusive relationship brings children into the world and thus sustains the stewardship of the earth.”); Church of Jesus Christ of Latter-day Saints, *The Divine Institution of Marriage*, Newsroom (Aug. 13, 2008)¹⁸ (reaffirming the Mormon Church’s declaration that marriage is the lawful union of a man and a woman”); *Islamic Perspective on Same-Sex Marriage* (July 7, 2015)¹⁹ (noting what Islamic commentators on The Qur’an have concluded is a clear prohibition on same-sex relations); see also App. 336a–46a.

¹⁵ <https://goo.gl/qUvEsB>

¹⁶ <http://www.lcms.org/faqs/lcmsviews>

¹⁷ <https://goo.gl/zX43BB>

¹⁸ <https://goo.gl/FrW51s>

¹⁹ <https://goo.gl/UZjCTT>

And the State of Washington should not be permitted to punish Barronelle for attempting to live her life and run her business consistent with her faith beliefs. This does not require Washington to endorse discrimination; the record is clear that Barronelle faithfully served Robert and made personalized floral arrangements for him and his partner over many years. But it does require the State to respect that Barronelle cannot solemnize, celebrate, or publicly endorse a marriage ceremony that violates her sincere religious convictions. Two principles counsel strongly in favor of granting that respect.

1. Plainly, the teachings of Judaism, Christianity, and Islam are not rooted in bigotry or animus. For example, describing “the attitude toward homosexual individuals prescribed by the Jewish tradition,” Rabbi Weinreb directs that “tolerance for individuals who manifest homosexual tendencies is certainly a Jewish value.” *Orthodox Response to Same-Sex Marriage, supra*. Likewise, Rabbi Dr. Nachum Amsel comments that “[w]e do not and cannot reject people as Jews and as individuals because of a particular sin.” Rabbi Dr. Nachum Amsel, *Homosexuality in Orthodox Judaism* 5.²⁰

Similarly, Christian teaching on marriage is founded on a divinely ordained understanding of human sexuality, and Christian churches condemn *any* rejection of individuals. The Catechism of the Catholic Church directs that all persons with homosexual inclinations “must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in

²⁰ <https://goo.gl/r2bvXR>

their regard should be avoided.” Catechism of the Catholic Church ¶ 2358. Pope Francis confirmed this instruction in *Amoris Laetitia*, stating that “[w]e would like before all else to reaffirm that every person, regardless of sexual orientation, ought to be respected in his or her dignity and treated with consideration. . . .” *Amoris Laetitia* ¶ 250.

Protestant authorities emphasize the same point. The Lutheran Church-Missouri Synod instructs that “[t]he redeeming love of Christ, which rescues humanity from sin, death, and the power of Satan, is offered to all through repentance and faith in Christ, regardless of the nature of their sinfulness.” *LCMS Views*, at 11. The National Association of Evangelicals likewise emphasizes that “[a]s witnesses to the truth, evangelicals should be gracious and compassionate to those who do not share their views on marriage.” *God Defined Marriage, supra*.

All of these instructions reflect that the historic doctrine of marriage is not rooted in animus, but in the divinely ordained procreative potential of male-female unions. In 2015, dozens of prominent Catholic and Protestant theologians joined this statement: “Throughout history and across all cultures, marriage has been understood to be the union of male and female and is organized around the procreative potential of that union.” Evangelicals and Catholics Together, *The Two Shall Become One Flesh: Reclaiming Marriage*, First Things (March 2015).

Muslim scholars similarly instruct that Muslims are to treat homosexual persons, both Muslim and non-Muslim, with the same respect due to all other people. For example, the Islamic Shura Council of Southern

California instructs that “[p]eople practicing something immoral according to Islamic values still deserve the basic respect and rights of any other human being. . . . Muslims should not discriminate and/or harass anyone.” *Islamic Perspective on Same-Sex Marriage, supra*.

2. While uniformly and consistently upholding marriage between a man and a woman as divinely ordained and while condemning prejudice or animus against any person, teachers in Judaism, Christianity, and Islam counsel against any public witness or activity that would seem to celebrate, endorse, or condone same-sex weddings. In the wake of the recent creation of same-sex marriage, many Jewish, Christian, and Islamic leaders have called for believers to engage in respectful public witness supporting the historic understanding of marriage.

For example, the former chief Rabbi of Great Britain, Lord Rabbi Jonathan Sacks, has called for respectful and courteous public witness in support of the historic understanding of marriage. In a famous 2014 speech to a Vatican conference, Rabbi Sacks instructed that “our compassion for those who choose to live differently should not inhibit us from being advocates for the single most humanizing institution in history [*i.e.*, male-female marriage].” Lord Rabbi Jonathan Sacks, *Humanum* Colloquium on Complementarity (Nov. 17, 2014).²¹

Likewise, the President of the Southern Baptist Convention’s Ethics & Religious Liberty Commission has publicly stated that “[a]ll of us must stand together

²¹ <https://goo.gl/oKvhhH>

on conserving the truth of marriage as a complementary union of man and woman. . . . [T]here is a distinctively Christian urgency for why the Christian churches must bear witness to these things.” Rev. Dr. Russell D. Moore, *Man, Woman, and the Mystery of Christ: An Evangelical Protestant Perspective*, Touchstone (Nov. 18, 2014).²² And the National Association of Evangelicals counsels that “[e]vangelicals and other followers of the Bible have a heightened opportunity to demonstrate the attractiveness of loving Christian marriages and families.” *God Defined Marriage, supra*.

The Mormon Church has made a similar statement, urging its members as “responsible citizens” to publicly promote adherence to the historic understanding of marriage: “We call upon responsible citizens and officers of government everywhere to promote those measures designed to maintain and strengthen the family as the fundamental unit of society.” *Divine Institution of Marriage, supra*.

In 2015, Catholics and Evangelicals agreed: “As Christians, it is our responsibility to bear witness to the truth about marriage as taught by both revelation and reason. . . . Christians have too often been silent about biblical teaching on sex, marriage, and family life. . . . If we are to remain faithful to the Scriptures and to the unanimous testimony of the Christian tradition, there can be no compromise on marriage.” Evangelicals and Catholics Together, *The Two Shall Become One Flesh, supra*.

²² <https://goo.gl/BucZqn>

Islamic authorities concur: “Sexual behavior within a society is not a purely private concern but rather affects all the people living in that society. Islam does not forcefully impose its teachings upon people of other faiths and persuasions. Nonetheless, it draws certain moral lines to make sure that the entire society is not affected negatively.” *Islamic Perspective on Same-Sex Marriage, supra*.

Many believers interpret these calls for positive public witness as necessarily meaning that believers should not publicly contradict their churches’ teachings on marriage, including by participating in the celebration of same-sex marriages. Thus, to be responsible public witnesses for their beliefs on marriage, there are many millions of faithful citizens who reasonably conclude that publicly witnessing to their belief in marriage as the union of man and woman requires refraining from participating in same-sex wedding ceremonies. Regardless of the circumstances, the government should never force individuals—or the faith communities to which they belong—to choose between violating their deeply held beliefs or withdrawing from the public square entirely, see *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), including the market for public accommodation.

To use government power and the courts to enforce such compulsion, as the State of Washington has done, is to needlessly penalize people of faith, to wound the country’s long tradition of celebrating and protecting religious exercise, and to depress the fundamental pluralism that motivated our country’s founding. This Court should grant the petition and safeguard the

right of all people to exercise their faith in the public square, including places of public accommodation.

II. This Court should grant the petition and reconsider the scope of *Employment Division v. Smith*.

With that background, there are a multitude of ways this Court could affirm Barronelle’s right to live out her faith beliefs in the business that she owns and operates. One way would be to grant the petition, resolve the circuit split regarding the standard that should apply when a government law regulates artistic expression, and hold that the Free Speech Clause protects Barronelle’s constitutional right to be free from expressing the government’s message. Pet. 17–32. Accord, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (“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.”).

A second way would be to grant the petition, resolve the circuit split regarding the hybrid-rights theory of the Free Exercise Clause, and hold that this theory likewise protects Barronelle from being coerced to express the government’s message. Pet. 32–37.

The third—and perhaps most straightforward—path would be for the Court to grant the petition and reconsider the scope of *Smith*, which various Justices of this Court have long criticized as overly restrictive of the free-exercise right. Pet. 35–36 (citations omitted). Such a reexamination is long overdue and essential to restore the original meaning of the Free Exercise Clause.

Smith essentially holds that the Free Exercise Clause does *not* confer a freedom shielding religious believers from laws and regulations that impair the believers' ability to exercise their faith. Provided a law is facially neutral (and absent evidence that a law's object was to infringe on practices because of their religious motivation, see *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)), *Smith* says it is entirely acceptable for government to enact and enforce laws that restrict the exercise of any sincere religious conviction. In other words, according to *Smith*, the protection of the "free exercise" of "religion" is entirely illusory, because religious beliefs are no different than any other beliefs or preferences opposed to a government policy. Per *Smith*, the Free Exercise Clause is nothing more than a non-discrimination rule that bars the government from intentionally treating religion less favorably than other subjects. A neutral law that bans circumcision is constitutional, even if it interferes with the brit milah. Addressing an analogous argument (that the Free Exercise Clause provides no greater protection than general freedom of association), this Court recently found the position "untenable." *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012).

Smith also flies in the face of the First Amendment's text, which expressly singles out religion for special treatment. U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof . . .*" (emphasis added)). More important, the lower courts' interpretation of *Smith* renders the Free Exercise Clause a virtual nullity: absent evidence of animus,

targeting, or selective enforcement, the Constitution does not protect the exercise of religious beliefs.

Before *Smith*, laws that restricted an individual's exercise of her religious beliefs were governed by the two-part test articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* involved a Seventh-Day Adventist who had been discharged from her job because she would not work on Saturday, the Sabbath Day of her faith. *Id.* at 399. When the plaintiff applied for unemployment benefits, South Carolina denied them under the South Carolina Unemployment Act because her refusal to work on Saturday disqualified her as a worker who failed to accept suitable work when offered by the employer. *Id.* at 400–01. This Court held that the denial violated the Free Exercise Clause because, though facially neutral, the law substantially burdened the plaintiff's free exercise of her religion and did not satisfy strict scrutiny. *Id.* at 404–06.

By applying strict scrutiny to the plaintiff's Free Exercise claim, the Court in *Sherbert* recognized that the First Amendment does more than enforce a non-discrimination principle. The Court correctly acknowledged that the Free Exercise Clause is a substantive defense to a neutral state law, a defense that may not prevail in every circumstance, but one that does provide an exemption in some cases, to ostensibly neutral rules.

Nearly 30 years after *Smith*, the right to freedom of religious exercise is being trampled by state and local governments in cases like *Barronelle's*. And due to the implications of *Smith*, the broader the government reach into private affairs, the smaller the space

for religion to be exercised. This is a backwards reading of a constitutional provision intended to single out religion for special treatment and protection. The Court should grant the petition, revisit *Smith*, and reimpose the *Sherbert* rubric, thus balancing the rights of believers in the way the Free Exercise Clause intended.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

John J. Bursch
Counsel of Record
Bursch Law PLLC
9339 Cherry Valley
Ave SE, #78
Caledonia, Michigan 49316
jbursch@burschlaw.com
(616) 450-4235

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Attorney for *Amici Curiae*