

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.

INGERSOLL AND 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 AND
BRIEF FOR THE CATO INSTITUTE
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS**

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**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN
SUPPORT OF APPELLANTS**

Pursuant to Rule of Appellate Procedure 10.6, the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* in support of Appellants. All parties have consented to this filing.

I. INTEREST OF AMICUS CURIAE

The Cato Institute (“Cato”) is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Robert A. Levy Center for Constitutional Studies was established in 1989 to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Cato’s interest here arises from its mission to advance and support the rights that the Constitution guarantees to all citizens. Cato has participated in numerous cases of constitutional significance before the U.S. Supreme Court and other courts—including this one at an earlier stage of this case—and has worked to defend the constitutional rights of businesses and individuals through its publications, lectures, public appearances, and other endeavors. This case concerns Cato because it implicates the First Amendment’s protection of individuals from compelled expressive activity.

II. FAMILIARITY WITH THE ISSUES

Amicus has read the briefs of the parties to this case and understands the arguments that they are advancing before this Court.

III. SPECIFIC ISSUES ADDRESSED BY AMICUS CURIAE

In its proposed brief, *amicus* discusses the First Amendment's application to this case via the compelled-speech doctrine.

IV. REASONS FOR ADDITIONAL ARGUMENT

Amicus believes that further argument is needed on this specific issue because it is one of Appellants' central arguments and one with powerful consequences which deserves additional explanation and consideration.

Amicus has no direct interest, financial or otherwise, in the outcome of this case. Its sole interest here is to ensure the protection of the First Amendment for those whose business is to create expressive material.

For the foregoing reasons, *amicus* respectfully requests to be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The Cato Institute hereby incorporates its statement of interest from its motion for leave to file this brief. Cato also notes that it is the only organization in the entire country to have filed in support of petitioners in both *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

STATEMENT OF THE CASE

Amicus incorporates by reference Appellants' Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Barronelle Stutzman owns and operates Arlene's Flowers, where she designs floral arrangements for a variety of occasions, including weddings. Mrs. Stutzman is also a practicing Christian; she believes that marriage is a spiritual union between a man and a woman, and therefore that wedding ceremonies are sacred events of great religious significance. In keeping with her faith, she cannot create floral arrangements for same-sex wedding ceremonies. For this reason, when Messrs. Ingwersoll and Freed asked Mrs. Stutzman to create floral arrangements for their wedding, she respectfully declined and referred them to several nearby florists.

To be clear, Mrs. Stutzman serves everyone. She gladly created Valentine's Day and anniversary floral arrangements for Messrs. Ingwersoll

and Freed for nearly a decade before this litigation, all the while knowing they were a same-sex couple. She just has a sincere religious objection to creating her expressive floral works for same-sex *weddings*.

The state of Washington fails to recognize the difference between discrimination based on sexual orientation—which is not constitutionally protected—and refusing to create messages that violate one’s conscience, which is an important First Amendment right that the Supreme Court has repeatedly affirmed. The First Amendment’s protection of free expression encompasses more than the mere speaking or writing of words, and in fact covers a broad range of artistic expression and symbolic activities.

Art is speech, regardless of the message, and the government cannot compel individuals to host messages with which they disagree. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the U.S. Supreme Court held that the government could not compel an individual to host a state motto—in this case New Hampshire’s “Live Free or Die”—on a license plate. Speech compulsions are thus as unconstitutional as speech restrictions. *Wooley*’s logic applies to compulsions to create floral arrangements and other works—including for money—not just to compulsions to display such works. *Wooley* should not be so easily dismissed.

This Court should equally consider the U.S. Supreme Court’s rulings in *Nat'l Inst. of Family & Life Advocates v. Becerra*, (NIFLA), 138 S. Ct. 2361

(2018) and *Janus v. Am. Fed'n of State, County, & Mun. Employees*, 138 S. Ct. 2448 (2018), which reaffirm its commitment to striking down laws that compel speech. Justice Thomas's concurrence in *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), also illustrates the unique danger of forcing someone to speak against his or her conscience.

A ruling for the Respondents here would produce startling results. Consider, for instance, a freelance writer who writes press releases for various groups, including religious ones, but refuses to write copy for a religious organization or event with which he disagrees. Under the Respondents' view of the law, such a refusal would violate the law—being a form of religious discrimination—much like Barronelle Stutzman's refusal to arrange the flowers for an event with which she disagreed. Yet a writer has the First Amendment right to choose which speech he creates, notwithstanding contrary state law. The same principle applies to florists.

While *Wooley* provides important constitutional protection, it also offers an important limiting principle to that protection: Although florists, writers, singers, actors, painters, and others who create First Amendment-protected speech must have the right to decide which commissions to take and which to reject, this right does not apply to others who do not engage in protected speech. This Court can rule in favor of Arlene's Flowers on First Amendment grounds without blocking the enforcement of

antidiscrimination law against denials of service by caterers, hotels, limousine service operators, and the like.¹

This Court should reconsider its previous judgment. The government should not be allowed to persecute expressive professionals for declining to create the government's preferred messages.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS BOTH THE RIGHT TO SPEAK FREELY AND THE RIGHT NOT TO SPEAK

More than 70 years ago, in *W. Va. State Bd. of Educ. v. Barnette*, the U.S. Supreme Court established that people could not be forced to promote a message they disagree with, even if that message is saluting the American flag or saying the Pledge of Allegiance. 319 U.S. 624, 642 (1943). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” *Id.* In other words, when the government endorses a principle, people cannot be compelled to spread that message.

Since then, the Court has numerous times reaffirmed that the First Amendment prohibits compelled speech as well as speech restrictions. “The right to speak and the right to refrain from speaking are complementary

¹ *Amicus* takes no position regarding defenses that *non-expressive* businesses may have.

components of the broader concept of ‘individual freedom of mind.’” *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

In *Wooley*, the petitioners objected to having to display the state motto on their government-issued license plates and sought the freedom not to display the motto. *Id.* at 707–08, 715. Surely no observer would have understood the motto—printed on government-provided and -mandated license plates—as the driver’s own words or sentiments. *Cf. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015). The Court nonetheless held for the petitioners. *Wooley*, 430 U.S. at 717.

The Court reasoned that a person’s “individual freedom of mind” protects his or her “First Amendment right to avoid becoming the courier” for the communication of speech that he or she does not wish to communicate. *Id.* at 714, 717. People have the “right to decline to foster . . . concepts” with which they disagree, even when the government is merely requiring them to display a slogan on a state-issued license plate. *Id.* at 714.

Even “the passive act of carrying the state motto on a license plate,” *id.* at 715, may not be compelled, because such compulsion “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* (quoting *Barnette*, 319 U.S. at 642). Requiring drivers to display the motto made them “an instrument for fostering public adherence to an ideological point

of view [they] find[] unacceptable.” *Id.* This reasoning applies regardless of the compelled slogan’s content. *See, e.g., Ortiz v. New Mexico*, 749 P.2d 80, 82 (N.M. 1988) (*Wooley* protects drivers from displaying the non-ideological slogan “Land of Enchantment”).

The U.S. Supreme Court elaborated on the dangers of compelled speech in recent cases such as *Nat'l Inst. of Family & Life Advocates v. Becerra*, (*NIFLA*), 138 S. Ct. 2361 (2018). The Court in *NIFLA* explained that business professionals “might have a host of good-faith disagreements” about all sorts of ideas, including important moral issues, yet “the people lose when the government is the one deciding which ideas should prevail.” *Id.* at 2374–75. Justice Kennedy further stated that “[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief.” *Id.* at 2379 (Kennedy, J., concurring).

The Court reaffirmed its stance on compelled speech yet again in *Janus v. Am. Fed'n of State, County, & Mun. Employees*, 138 S. Ct. 2448 (2018). There the Court held that public workers could not be forced to subsidize union speech with which they disagreed. *Id.* at 2459–60. “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command” laid out in *Barnette* and reiterated in *Wooley*. *Id.* at 2463. As Justice Alito wrote, “most of our free speech cases

have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.” *Id.* at 2464. “[I]ndividuals,” he explained, should not be “coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.” *Id.* In his *Masterpiece Cakeshop* concurrence, Justice Thomas similarly defended expressive conduct against laws that compel speech: “Once a court concludes that conduct is expressive, the Constitution limits the government’s authority to restrict or compel it.” 138 S. Ct. at 1742 (Thomas, J., concurring in part and in judgment). Allowing public accommodation laws like the one at issue in *Masterpiece* (and here) to prevail over First Amendment concerns “would justify virtually any law that compels individuals to speak.” *Id.* at 1740.

This understanding of “individual freedom of mind” makes considerable sense. Democracy and liberty rely on citizens’ ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, including that which they “foster” and for which they act as “courier[s],” is consistent with their beliefs. Thus, freedom of conscience is perhaps the most precious liberty in a liberal, democratic society. It forms a foundation on which the dignity of the individual rests.

In the dark days of Soviet repression, Solzhenitsyn implored his fellow Russians to “live not by lies”: to refuse to endorse speech they believed

false. Aleksandr Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26. Each person must resolve never to “write, sign or print in any way a single phrase which in his opinion distorts the truth,” never to “take into hand nor raise into the air a poster or slogan which he does not completely accept,” never to “depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music.” *Id.* Solzhenitsyn noted that Soviet domination of conscience extended even—some would say especially to—religion. “You can pray freely. But just so God alone can hear.” Aleksandr Solzhenitsyn, *The Gulag Archipelago* 37 (1973) (quoting Tanya Khodkevich, who received 10 years in prison for writing those sentences).

People whose consciences require them to refuse to distribute expression “which [they do] not completely accept,” *id.*, are constitutionally protected. “[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and to refrain from speaking at all.” *Wooley*, 430 U.S. at 714.

II. *WOOLEY APPLIES TO FLORISTRY, AN EXPRESSIVE ART*

The Superior Court previously ignored U.S. Supreme Court precedent to hold that floristry is not inherently expressive, instead focusing on Mrs. Stutzman’s “conduct” in refusing to design an arrangement. App. Br. at 16 (No. 91615-2). As Appellants argue, floral designs are art.

Numerous schools of floristry art exist throughout the world—FlowerSchool New York, the Floral Art School of Australia, and the Academy of Floral Art (in Great Britain), among the most notable. They offer a wide variety of courses, including ones tailored to weddings. The Jane Packer School, in London, offers a course called “The Foundation Bridal.” *The Foundation Bridal*, Jane Packer, <https://bit.ly/2EyiMdv>. In it, students “[l]earn how to create a variety of bridal bouquets, bridesmaids’ bouquets, accessories and buttonholes in Jane’s *signature style*. [The course] equip[s] all students with the skills and confidence to tackle simple wedding requests with style. [The school] then encourages [its] students to *develop their own style* with the guide of Jane’s philosophy to produce all aspects required of a wedding.” *Id.* (emphasis added).

Some countries recognize the title of Master Florist, which in Holland is earned after years of study and an exam. *What Makes a Master Florist*, FlowerSchool New York, <https://bit.ly/2IAieb1>. “A Master Florist is [a] floral designer who has a unique artistic vision combined with knowledge of how flowers grow . . . [someone] who can visualize a look and make a creative statement that is unique to their own particularized vision.” *Id.*

Florists are not alone in seeing their work as art. The Arts Council of Great Britain has designated the Royal Horticultural Society’s library “a collection of national and international importance.” Royal Horticultural

Society, Vision 13, <https://bit.ly/2EesJwd>. The library “documents more than 500 years of gardening history, art and writing.” *Id.* And, like other forms of art, floristry experiences trend over time. For example: “As Michelangelo’s works and teachings travelled across Europe, they stuck particularly fast in Holland and Belgium That’s when the Flemish style of art and floral design took hold and ran in parallel with the Baroque.” *The Comprehensive History of Flower Arranging*, Flowers Across Melbourne (Dec. 28, 2015), <https://bit.ly/2CNU2xW>.

The U.S. Supreme Court has recognized that the Constitution protects all sorts of expression, even abstract expression. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Although the Court has not yet considered floristry, it has identified numerous forms of art as speech. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (dance); *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (movies). Floristry exhibits all the characteristics of other expressive formats and should likewise be protected.

The message a floral arrangement sends may not be as easily identifiable as that of verbal art forms, but the Court said in *Hurley* that “a narrow, succinctly articulable message is not a condition of constitutional

protection.” 515 U.S. at 559. Throughout history, people have debated what makes something art and how to interpret it. Artists themselves have participated in these debates, often by pushing the envelope of what is accepted as “art.” Andy Warhol’s pop art took advertisement and made it art. Jackson Pollock made art out of paint dripped onto canvas or blown by giant fans. Yet the Supreme Court said in *Hurley*, 515 U.S. at 569, that even Pollock’s paintings are “unquestionably shielded” by the First Amendment.

In sum, floral arrangements are an expressive art form that should be given full First Amendment protection.

III. *WOOLEY* EXTENDS TO THE COMPELLED CREATION AND DISTRIBUTION OF SPEECH

First Amendment protections are not limited to pre-fabricated messages, but extend to the creation of speech as well as its dissemination, including when that creation is done in exchange for money. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that an author who writes for money is fully protected by the First Amendment); *United States v. Stevens*, 559 U.S. 460, 465–70 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty, with no distinction between the ban on creation and the ban on distribution).

This equal treatment of speech creation and dissemination makes sense. Compelling the creation of speech interferes with the “individual freedom

of mind” *at least* as much as—truly much more than—compelling the dissemination of speech does. Requiring someone to create speech is even more an imposition on a person’s “intellect and spirit,” *Wooley*, 430 U.S. at 715 (cleaned up), than is requiring the person simply to engage in “the passive act of carrying the state motto on a license plate.” *Id.* Creating expression involves innumerable intellectual and artistic decisions, so requiring people to produce speech is much more intrusive than requiring them to be a “conduit.” The government cannot force people even to passively carry a message, so it is egregious to force them to *create* one.

Consider the sort of antidiscrimination law at issue here. As interpreted by the Superior Court, the law would apply not just to florists but to other contractors, such as freelance writers and singers. It would apply not just to weddings, but to political and religious events. Given that the Washington law bans religious discrimination, a graphic artist who dislikes the traditional Christian stance on same-sex marriage would be forced to design flyers for a church. And since the same rule would apply to laws that ban discrimination on “political affiliation,” *e.g.*, D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B), a Democratic freelance writer in such a jurisdiction would have to write press releases for Republicans.

That logic likewise applies to florists. Arranging flowers for a wedding—like writing a press release or creating a dramatic or musical performance— involves many hours of effort and a large range of artistic decisions. Clients pay a lot of money for such arrangements, precisely because of the florists’ expressive selection and decoration decisions.

Nor can *Rumsfeld v. FAIR*, 547 U.S. 47 (2004) justify the decision below. In *Rumsfeld*, the Court wrote that “[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die,’ and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.” 547 U.S. at 62. That situation is distinct from *Barnette* and *Wooley* because requiring an institution to send scheduling e-mails does not interfere with anyone’s “individual freedom of mind,” *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637). As argued above, requiring an individual to personally create expressive works interferes with that freedom of mind. This case is thus governed by *Wooley*, not by *Rumsfeld*.

The compelled-speech doctrine also applies to commercial businesses, both newspapers, *see, e.g.*, *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and non-media corporations, *see, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1 (1986). Justice Thomas’s concurrence in *Masterpiece*

Cakeshop likewise reminds us that speakers do not lose First Amendment protection when they earn money: “[T]his Court has repeatedly rejected the notion that a speaker’s profit motive gives the government a freer hand in compelling speech.” 138 S. Ct. at 1745 (Thomas, J., concurring in part and in judgment). Justice Thomas further cites *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, where the Court declared it “‘beyond serious dispute’ that ‘[s]peech . . . is protected even though it is carried in a form that is ‘sold’ for profit.’” *Id.* (citing 425 U.S. 748, 761 (1976)).

And this protection is logical: A wide range of speakers, whether freelance writers or florists, earn a living from their speech. If making money from one’s work meant surrendering one’s First Amendment rights to choose what to create, then a great many speakers would be stripped of their constitutional rights, including this country’s most popular entertainers, authors, and artists.

IV. CONSTITUTIONAL PROTECTION AGAINST COMPELLED SPEECH EXTENDS ONLY TO REFUSALS TO CREATE PROTECTED EXPRESSION

The First Amendment protection offered by *Wooley* is limited in scope: It extends only to expressive conduct. Under *Wooley*, artists’ First Amendment freedom of expression protects their right to choose which art and messages to create, because art is protected by the First Amendment. But caterers, hotels, and limousine companies do not have such a right to

refuse to deliver food, rent out rooms, or provide transportation services, respectively, for use in same-sex marriage ceremonies.

This logic simply reflects the fact that the First Amendment does not extend to all human endeavors, but only to expression. For instance, the state may, without running afoul of the First Amendment, create a monopoly on catering, restrict the operation of dance halls, or set up a medallion system to limit the number of limousine drivers. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding a ban on pushcart vendors that allowed only a few old vendors to operate); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding a law that barred dance halls that cater to 14-to-18-year-olds from letting in adult patrons). But it would be an unconstitutional prior restraint to require a license before someone could publish a newspaper or write press releases, or to give certain writers, painters, or calligraphers a monopoly and bar others from engaging in such expression. *Cf. City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988) (striking down licensure of newspaper racks); *Mahaney v. City of Englewood*, 226 P.3d 1214, 1220 (Colo. Ct. App. 2009) (striking down licensure of wall murals).

Courts routinely police the line between expressive and non-expressive activity when they evaluate conduct restrictions. That line is clear, administrable, and protects a relatively narrow range of behavior: that

which involves the creation of constitutionally protected expression. If a person's actions are not protected expression, then it may be regulated in certain ways without violating the First Amendment. But if an activity is protected by the First Amendment—for instance because it involves floral design—then it likewise may not be compelled.

Moreover, upholding the First Amendment right against compelled speech that is implicated here would ultimately inflict little harm on customers. A florist who views same-sex marriage as immoral would be of little use to an engaged same-sex couple; there is too much risk that the floristry will, even inadvertently, not be as well suited to the couple's vision as those created by a florist whose heart was in the work.

The government's interest in preventing discrimination does not justify restricting Barronelle Stutzman's First Amendment rights. *Hurley*, like this case, involved a state-law right to equal treatment in public accommodation, which the state's highest court interpreted as covering parades. *See Irish-American Gay, Lesbian & Bisexual Group. of Boston v. Hurley*, 636 N.E.2d 1293, 1298 (Mass. 1994). *Tornillo* likewise involved a law that created an equality right, namely “a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper.” 418 U.S. at 243. In both cases, the First Amendment prevailed over the assertions of contrary state rights.

Indeed, the point of First Amendment protection is to trump legislative restrictions—“to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts,” *Barnette*, 319 U.S. at 638. That is just as true for state laws aimed at securing equality rights as for other laws that impact free speech.

To be sure, the U.S. Supreme Court has held that antidiscrimination laws “do not, as a general matter, violate the First . . . Amendment[],” in part because, in their usual application, they do not “target speech” but rather target “the act of discriminating against individuals.” *Hurley*, 515 U.S. at 572. However, as Justice Thomas said in his *Masterpiece Cakeshop* concurrence, “When a public-accommodations law ‘ha[s] the effect of declaring . . . speech itself to be the public accommodation,’ the First Amendment applies with full force.” 138 S. Ct. at 1741 (Thomas, J., concurring in part and concurring in judgment) (citation omitted).

An artist’s refusal to create expression thus should not be viewed the same as discrimination based on characteristics such as sexual orientation, a practice that can be as harmful as it is arbitrary. Unlike refusing to design a wedding invitation, employment discrimination can jeopardize a person’s livelihood. Discrimination in education can affect a person’s future, as can

discrimination in housing—especially when desirable housing is scarce. The same is not true for floral arrangements.

This is exactly the type of logic the Supreme Court relied on in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), when it held that a hotel could not refuse to offer accommodations to African-Americans based on race. Due to rampant discrimination “often [African-Americans] have been unable to obtain accommodations, and have had to call upon friends to put them up overnight.” *Id.* at 252. People suffered major inconveniences, and had trouble finding even the most basic services.

According to the Society of American Florists, there were 13,188 florist shops in the United States in 2016.² A Yellowpages.com search for “florist” around Richland, Washington, where Arlene’s Flowers is located, yields 40 results.³ Unlike the hotel in *Heart of Atlanta*, Mrs. Stutzman is not being asked to simply offer a place for travelers to rest; nor is Arlene’s Flowers one of a select few shops in Richland that create floral arrangements. Instead, she faces “financial devastation” because she refused to participate in one ceremony, despite a long history of serving Messrs. Ingersoll and Freed for almost a decade’s worth of Valentine’s Days and anniversaries. App. Br. at 1 (No. 91615-2). Meanwhile, same-sex couples are free to

² Flower Industry Overview, Society of American Florists, <https://bit.ly/2NbAW7v>.

³ Yellowpages.com query, <https://bit.ly/2XarOVo> (search performed Feb. 24, 2019).

choose one of the many area shops that would no doubt gladly create floral arrangements for their weddings. After all, Messrs. Ingersoll and Freed have received enough support “from florists that [they] could get married about 20 times and never pay a dime for flowers.” *Id.* at 12.

Of course, when a florist tells a couple that she cannot design their wedding’s floral arrangements, the couple may understandably be offended. But avoiding offense is not a sufficient interest to justify restricting or compelling speech under the First Amendment. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971).

Further, the Supreme Court’s decision in *Tornillo* illustrates that states cannot impose new burdens on creators as a result of their having exercised the fundamental right to create expression. There, the Court struck down a law that required newspapers to publish candidate replies to the extent that they published criticisms of the candidates. *Tornillo*, 418 U.S. at 243. The newspaper’s publication of the initial criticism could not be the basis for compelling it to publish replies that it did not wish to publish. Likewise, a person’s choice to create constitutionally protected artistic expression—like floral arrangements—cannot be the basis for compelling her to engage in artistic expression that she does not wish to create.

CONCLUSION

For the foregoing reasons, and those stated by the Appellants and other *amici*, this Court should reverse the court below.

Respectfully,

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