No. 19-333

In the Supreme Court of the United States

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

PETITIONERS,

V.

STATE OF WASHINGTON,

RESPONDENT.

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

PETITIONERS,

V.

ROBERT INGERSOLL AND CURT FREED,

RESPONDENTS.

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

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Suite 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

October 14, 2019

QUESTION PRESENTED

Whether courts "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," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), by requiring artists to create works expressing ideas they oppose.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to help 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*.

Reason Foundation is a national, nonpartisan, nonprofit think tank founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports.

The **Individual Rights Foundation** ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit organization. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights.

This case interests *amici* because it implicates the rights of free people not to be forced to pay lip service to ideas with which they disagree. *Amicus* Cato is the

---

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel; no person or entity other than *amici* funded its preparation or submission.

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).

SUMMARY OF ARGUMENT

This case is merely another chapter in this Court's long history of defending the right to be free from compelled speech. Although the right to speak includes the right to be silent, the Washington Supreme Court ruled that an artist may be forced to create art in support of ideas she opposes. This Court must step in to clarify this area of law, whether regarding same-sex weddings or other political and cultural controversies.

This Court has long held that the government is not the arbiter of orthodox thought. In *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court recognized that the government may not force a person to express an ideal, even one as noble as loyalty to the flag and nation it represents. *Wooley v. Maynard*, 430 U.S. 705 (1977), recognized that compelled acquiescence to a government view was unacceptable. And *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2459–60 (2018), recognized that compelled monetary support of union speech infringed the First Amendment. Simply put, the government may not force a person to speak, no matter how far removed she is from the message. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), affirm that even so noble a goal as public accommodation does not obviate the First Amendment.

Art is of course a type of expression protected by the First Amendment—and floristry is a type of art.

The court below relied on a cramped view of expression that appears limited to words and pictures, a holding contrary to this Court's precedent. *Hurley* held unanimously that abstract expressive conduct, there a parade, is protected by the First Amendment. Floristry is one such unconventional art form. Teachers of floristry treat their work as art, which in turn is recognized by international art institutes. Western floristry traces its roots to Michelangelo, while eastern floristry has an even older historical pedigree as an artform.

The state government here seeks to get around the prohibition on compelled speech by giving artists a message and telling them they have a choice in how to get there. But that is no less an offence to the First Amendment than a single compelled script. Allowing "freedom" in how to convey a state-directed message does not attenuate the original compulsion.

Finally, this issue is ready to be settled. There is a split among the lower courts. The Eighth Circuit recognizes the artistry inherent in wedding videography and found that expression to be protected by the First Amendment against public accommodation-related compulsions. The Arizona Supreme Court recently ruled likewise regarding wedding calligraphy. The New Mexico Supreme Court had earlier ruled against a similar challenge brought by a wedding photographer—and now Washington regarding floristry. None of these are necessarily high art, but they are all, nevertheless, protected by the First Amendment.

This Court must step in to settle the split and guide the lower courts. This case provides the Court a rare opportunity to draw a clear line in an area of law that keeps generating similar controversies.

ARGUMENT

I. THE FIRST AMENDMENT FORBIDS THE COMPELLED CREATION OF FLORISTRY

The people of the United States are free to speak their minds; it is one of this country's virtues that they do so often and loudly. Since the nation's inception, Congress has been prohibited from interfering with this right. "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Nor can the states abridge that freedom. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) ("The First Amendment, which the Fourteenth makes applicable to the states . . . ."). The Court has characterized its "zealous adherence to the principle that the government may not tell the citizen what he may or may not say" with a quote from Voltaire, who said: "I disapprove of what you say, but I will defend to the death your right to say it." *Young v. Am. Mini Theatres*, 427 U.S. 50, 63 (1976) (quoting S.G. Tallentyre, *The Friends of Voltaire* (1907)). Implicit in the right to speak is the right to decline to do so. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). That right must be zealously protected.

And the right to stay silent applies to floristry, an art form protected by the First Amendment. Accordingly, the law may not compel the creation of floristry.

A. If the Right to Speak Freely Is Protected by the First Amendment, So Is the Right Not to Speak

The law may not force a person to affirm ideas he opposes. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Barnette* invalidated requirements that school children salute the flag. *Id.* at 642. In doing so, the Court rejected *Minersville Sch. Dist. v. Gobitis*,

310 U.S. 586 (1940) (holding a compulsory pledge of allegiance to the flag constitutional). It does not matter if the speech being compelled is the lowest propaganda or the noblest of values. It makes no difference whether the abstainer objects to the compelled speech based on religious or secular non-conformist grounds. *Barnette*, 319 U.S. at 636.

The mere fact that a speech restriction is for the public good does little to justify infringement of the First Amendment, as Justice Stone noted in his—historically vindicated—*Gobitis* dissent:

> History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection.

Gobitis, 310 U.S. at 604–05 (Stone, J., dissenting). Justice Stone was correct to fear a legislative curtailment.

For three-fourths of a century, *Barnette* has stood for the proposition that the Sir Thomas Mores of America will not face persecution for their silence. *See generally A Man for All Seasons* (Highland Films 1966). The Washington Supreme Court lost sight of *Barnette*'s fixed star:

> 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.

Barnette, 319 U.S. at 642. This Court has instead used *Barnette*'s star as a guide and zealously adhered to the principle that a person may not be forced to adopt orthodoxy even by association.

In *Wooley*, the petitioners objected to the requirement that they display the state motto, "live free or die," on their government-issued license plates and sought the freedom not to display the motto. 430 U.S. at 707–08, 715. Although 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 driver could not be forced to act as a courier for sentiments he does not support. *Wooley*, 430 U.S. at 717. By compelling passive support for an ideological message a speaker finds unacceptable, "the State '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. at* 715 (quoting *Barnette*, 319 U.S. at 642).

The notion that the government is not the final arbiter of what views are acceptable has remained strong. Just last year, this Court held that compelling a pro-life crisis pregnancy center—as a condition of continued licensing to operate—to read a state-drafted script instructing patients on how to obtain state-subsidized abortion was a government alteration of protected speech in violation of the First Amendment. *Nat'l Inst. of Family & Life Advocates v. Becerra*, (*NIFLA*), 138 S. Ct. 2361, 2371 (2018) (citing *Riley v. Nat'l*

Fed'n of Blind of N.C., Inc., 487 U. S. 781, 795 (1988)). In doing so, this Court rejected the notion that speech is unprotected simply because the speaker was designated a "professional." *Id.* at 2371. Whether speech is part of a commercial enterprise subject to licensing regimes, is irrelevant to the government's inability to regulate orthodoxy.[2] *Id.*

NIFLA identified only two instances where commercial speech could, by dint of being commercial, be compelled. The government may, in regulating commercial advertising, "require the disclosure of 'purely factual and uncontroversial information about the terms under which . . . services will be available,' the Court explained that such requirements should be upheld unless they are 'unjustified or unduly burdensome.'" *Id.* at 2372 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985)). Likewise, the government may compel speech incidental to regulation of professional conduct. *Id.* at 2373 (using the example of informed consent, which incidentally requires a medical practitioner to perform

---

[2] *Cf. State v. Arlene's Flowers, Inc.*, 441P.3d 1203, 1224 (Wash. 2019), which mistakenly states that "the United States Supreme Court [has] held that individuals who engage in commerce necessarily accept some limitations on their conduct as a result." The only support for this "holding" the court below could find is a concurrence in judgment by a lone justice disagreeing with the eight other members of the Court. *See United States v. Lee*, 455 U.S. 252 (1982) (holding that a statutory scheme which already took account of certain religious objections did not need to exempt Amish employers from social security taxes). The *Lee* majority did note that entering commerce exposes certain sects to statutory schemes in conflict with their beliefs. *Id.* at 261. That case, however, dealt with compelled taxation of an entire field of business rather than individual speech, and Congress had already narrowly tailored the tax to provide religious exemptions. *Id.*

the speech necessary to inform a patient). Both exceptions concern specific regulation of the professions, rather than a general lax standard for compelled speech in the marketplace. *See id.* at 2372 (discussing the allowed limitations only in the context of "professional" rather than "commercial" speech). Contrary to what the Washington Supreme Court suggests, offering speech for commercial gain has never rendered it beyond the protection of the First Amendment.

In the absence of a "profession" to be regulated, the Court has guarded commercial speech with the same zeal as any other speech. *See*, *e.g.*, *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 bans on creation and distribution); *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). One need not be starving to be an artist. The fact that an artist sells work has no effect on the protection guaranteed to that work.

Nor may the government sidestep the protection against compelled speech by regulating conduct far removed from the speech in question. In *Janus*, the Court held that public workers could not be forced to subsidize union speech with which they disagreed. 138 S. Ct. at 2448, 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.

Anti-discrimination is not a sufficient interest to contravene this cardinal constitutional commandment

and force one private party to adopt the speech of another. *See*, *e.g.*, *Boy Scouts*, 530 U.S. 640; *Hurley*, 515 U.S. 557. Nor is religiosity a necessary motive for refusal to speak. *Barnette*, 319 U.S. at 636.

Hurley held that a state could not, under the auspices of a public accommodations law, order the inclusion of members of a group in a parade. *Hurley*, 515 U.S. at 559–61. Each year, on March 17, the South Boston Allied War Veterans Council received a permit to hold a Saint Patrick's Day parade. *Id.* at 560. In 1992, a group of gay, lesbian, and bisexual Irish Americans, sought to join the parade and were rejected, and brought suit to require their inclusion. *Id.* Speaking for a unanimous court, Justice Souter reasoned, "[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id.* at 572–73.

Similarly, the Boy Scouts, a private organization, cannot be forced to accept an adult member who is gay and is a gay rights activist. *Boy Scouts*, 530 U.S. at 643–45. The speech in question is the stated mission of the Boy Scouts: "To instill[] values in young people." *Id.* at 649 (citing the Boy Scouts' mission statement and oath). The Boy Scouts' values included being "morally straight," so the admission of a gay scout master—in accordance with public accommodation laws—would change the "virtues" the group sought to communicate. *Id.* at 650–51. *Boy Scouts* firmly restated this fundamental principle of the First Amendment: "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.* at 651.

The principles set out in *Barnette*, and confirmed in *Wooley*, emphatically reject any attempt by the Washington courts and attorney general from dictating politically correct views. *NIFLA* rejects any attempt to diminish the protection of the First Amendment when people choose to exercise their rights for profit. *Janus* affirms that people may not be coerced into affirming a message by circuitous means. And, per *Hurley* and *Boy Scouts*, no matter how laudable a goal, no matter how righteous the purpose, and how noble the aim of public accommodation laws, those laws may not be enforced at the cost of that fixed star in our constitutional constellation. As Justice Stone cautioned, "[h]istory teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good." *Gobitis*, 310 U.S. at 604–05 (Stone, J., dissenting). *Amici* sympathize with the plaintiff couple here and wish more people would accept their marriage. But it is not the government's place to tell citizens what beliefs they must profess.

B. *Wooley*'s Protections from Compelled Speech Extend to the Creation of Speech

First Amendment protections are not limited to pre-fabricated messages, but extend to the creation of speech. If *Barnette*, *Wooley*, and *NIFLA* forbid the government to write a script to which citizens must pay lip service, surely the First Amendment must forbid the government from requiring a person to create speech. Such a requirement would be an even more egregious imposition on a person's "intellect and spirit." *Wooley*, 430 U.S. at 715.

Wooley and *Janus* protect individuals from being forced to endorse speech with which they disagree.

Having the ability to choose the specific words of endorsement is irrelevant—and indeed the requirement to advance a dictated message "in your own words" is even more antithetical to the First Amendment, because at least with a government script (or license plate), the audience recognizes that the speaker has no choice in the matter. The government has corrupted only one choice: to speak or not to speak. But when the government mandates the creation of expression, the artist is left with a million artistic decisions corrupted by the need to reach the forced result.

Furthermore, the requirement that the artist create the speech and pass it off as her own negates the single virtue of a script, the obvious compulsion. In these cases, it is not merely the artists mouth enslaved to a government message, but her mind. The government cannot force people even to passively carry a message, so it is egregious to force them to create one.

As in *Barnette*, the religious nature of petitioners' deeply held convictions is irrelevant, because the First Amendment protect speech regardless of source. The Washington Supreme Court's reasoning, if applied evenly, would force a gay florist to create art for a wedding presided over by the Westboro Baptist Church. Members of the Court might remember that unpleasant creed from *Snyder v. Phelps*, 562 U.S. 443 (2011), where the Court found that the First Amendment protected their right to protest the funerals of American soldiers with homophobic signs, notwithstanding society's near-universal condemnation of the message. The Washington public accommodations statute at issue here forbids discrimination based on "creed." Wash. Rev. Code § 49.60.010. Provided a Westboro couple were on their best behavior when dealing with the florist, our gay florist would be forced by Washington law

to create art for a group that despises him. This deplorable potentiality can be avoided here and now. This Court must state plainly what is already clear: artists have a constitutional right not to be forced to create a message against one's conscience.

C. *Wooley* Applies to Floristry, an Expressive Art

In the studio, the artist is at work. Each moment is spent painstakingly defining the edges of a stem. The artist spends what feel like ages staring at the pallet, judging what mixture is needed to show, perfectly, the subtle dancing of light on a leaf. The vase is carefully brushed to match the body of the plant. *See*, *e.g.*, Vincent Van Gogh, Still Life with Irises (1890). No one could deny that a Van Gogh's depiction of a beautiful flower arrangement is art, but the court below believes that an artist who puts the same effort into shaping a beautiful floral arrangement is not a real artist. But art is broader than a parochial view of creative materiel. This is a court of law, not of art criticism, so the only determination the Court may make is that all art is protected by the First Amendment.

Florists, by dint of artistic training and historical pedigree, create expressive art protected by the First Amendment. This Court should disabuse lower courts of the view that art is limited to composition of "words, realistic or abstract images, symbols, or a combination of these." *Arlene's Flowers*, 441 P.3d at 1227 n.19 (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (2010)). The court below used that narrow definition of art even though this Court has recognized numerous artforms as expressive. *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). The Washington Supreme Court apparently holds these art forms to be beyond First Amendment protection.

The lower court's view runs contrary to the unanimous opinion in *Hurley*, which reaffirmed that the First Amendment applied to "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569.

The belief that floristry is not art would come as a surprise to the numerous schools of floral art across the globe. Many have taken their artistic pedigree seriously. Notably, New York's Flower School, Australia's Floral Art School, and Britain's Academy of Floral Art, serve as training grounds for floral artists.

These schools know that art is practical as well as beautiful and tailor some of their curricula for aspiring artists hoping to have their work displayed at weddings. London's Jane Packer School offers a course called "The Foundation Bridal." *The Foundation Bridal*, Jane Packer, https://bit.ly/2EyiMdv. Bridal floristry students:

> Learn 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.

Nor is floristry reliant on the opinion of florists to support its artistic pedigree. The Art 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. This designation was in recognition of the society's 500-year history. *Id.* In fact, the development of the Flemish style of floristry is rooted in Michelangelo's work as it travelled to Holland and Belgium. *The Comprehensive History of Flower Arranging*, Flowers Across Melbourne, Dec. 28, 2015, https://bit.ly/2CNU2xW. Flemish floristry "ran in parallel with the Baroque." *Id.*

The historical pedigree of floral expression is not limited to the West. In fact, the Baroque Flemish style of floristry is in its infancy compared to *ikebana*—Japanese flower art. Dating to the influx of Chinese Buddhist thinking in the sixth century, *ikebana* grew into a major art form in Japan by the 17th century—when Flemish floristry was first taking hold in Europe. Ministry of Foreign Affairs, *Ikebana*, Japan Fact Sheet 1, https://bit.ly/2lwCZtz. And *ikebana* is now enjoying a revival. *The Rise of Modern* Ikebana, N.Y. Times Style Mag., Nov. 6, 2017, https://nyti.ms/2zlBaSk. Like Western floristry, *ikebana* is more than just commercialized plants. Toshiro Kawase, an *ikebana* artist, describes his work as "the whole universe . . . contained within a single flower." *Id.*

Of course, the average wedding bouquet is not in the same league as masterwork *ikebana*. But the courts should not judge First Amendment protection by virtue of artistic prowess.

Even in those contexts where courts judge the artistic merit of a work, the threshold is the absolute

minimum of artistic value. In the context of obscenity, the Court has judged expression based on its artistic merit. *Miller v. California*, 413 U.S. 15 (1973). In particular, a work can only be considered obscene if, "taken as a whole," the work "lacks serious literary, artistic, political, or scientific value." *Id.* at 24. In that context, where the court must judge artistic merit, the standard is met when there is even a scintilla of artistic value; the artistic merit must be entirely lacking for a ban of a work to pass constitutional muster.

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

II. THE LOWER COURTS ARE SPLIT ON THE PROPER STANDARD TO APPLY

Although this Court did not clarify speech protections in *Masterpiece Cakeshop*, the lower courts have not stood waiting. A split has developed allowing accidents of geography to dictate how speech protections apply in the context of public accommodations laws.

On one side, the court below ignored *Masterpiece Cakeshop* and reasserted its previous opinion nearly verbatim. *Arlene's Flowers*, 441 P.3d at 1210 n.1 (citing *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017)) ("The careful reader will notice that starting here, major portions of our original (now vacated) opinion are reproduced verbatim."). The court took a narrow view of art that omits many forms of expression. It also found that an expressive objection cannot overcome the state's interest in preventing sexual-orientation discrimination (even though the florist serves gay clients, just not with respect to their weddings).

The Washington court's decision echoes a ruling issued earlier this decade by the New Mexico Supreme

Court, in the case of a wedding photographer. *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014). While the issue of whether photography is protected by the First Amendment wasn't contested, the court found creative or expressive professions not to be exempt from anti-discrimination laws in this context. *Id*. at 71–72.

On the other side, the decision contradicts a recent Eighth Circuit ruling that held wedding videos to receive full First Amendment protection. *Telescope Media Group v. Lucero*, 936 F.3d 740, No. 17-3352, 2019 U.S. App. LEXIS 25320 (8th Cir. 2019). *Telescope* concerned videographers dedicated to making videos showing the "sacrificial covenant between one man and one woman." *Id.* at *6. It relied on the Court's consistent recognition of the speech value of motion pictures. *Id.* at *12 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952)). It was immaterial that the videographers in question were not creating feature films; all that mattered was that the videos were a medium of communication. *Id.* at *12–13. Most wedding videos are not the opening wedding scene of *The Godfather* (Paramount Pictures 1972), but that does not diminish their protection.

The issue has continued to evolve even in the brief time since Barronelle Stutzman filed her petition. The Arizona Supreme Court just last month recognized that wedding invitations are protected on speech and expression grounds under both the U.S. and Arizona Constitutions. *Brush & Nib Studios, LC v. City of Phoenix*, No. CV-18-0176-PR, 2019 Ariz. LEXIS 280 (Ariz. Sept. 16, 2019). *Brush & Nib* cuts to the heart of the matter: "Struggles to coerce uniformity of sentiment in support of some end thought essential to their

time and country have been waged by many good as well as by evil men, but, inevitably those bent on its accomplishment must resort to an ever-increasing severity." *Id.* at *7–8 (cleaned up) (quoting *Barnette*, 319 U.S. at 640). The creation of custom wedding invitations requires painstaking calligraphic choices, original and unique artwork, and other decisions, *id.* at *40, just as floristry requires myriad artistic choices. Neither type of artist can be forced by the state to create expression that advances its preferred message.

Of course, just as wedding floristry is not *ikebana*, wedding photographers are not Ansel Adams or Dorothea Lange, and wedding videos are not *The Godfather*, wedding calligraphy is not the ancient Confucian art of writing. *See*, *e.g.*, *Chinese Calligraphy*, China Online Museum, https://bit.ly/2lp531F. Nevertheless, all are artistic expression.

The Court has an opportunity in this rapidly developing area of law to clarify the inclusion, under *Wooley*, of artistic expression within the ambit of the First Amendment's prohibition on compelled speech.

CONCLUSION

The Court should resolve the issues presented here.

Respectfully submitted,

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Suite 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

October 14, 2019