Supreme Court No. 91615-2
Benton County Superior Court Nos. 13-2-00953-3 and 13-2-00871-5

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT INGERSOLL, et al.
Plaintiffs-Respondents,
v.
ARLENE FLOWERS, INC., et al.
Defendants-Appellants.

STATE OF WASHINGTON
Plaintiff-Respondent,
v.
ARLENE FLOWERS, INC., et al.
Defendants-Appellants.

BRIEF OF RESPONDENTS INGERSOLL AND FREED

HILLIS CLARK MARTIN & PETERSON P.S.
Michael R. Scott, WSBA #12822
Amit D. Ranade, WSBA #34878
Jake Ewart, WSBA #38655
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
Margaret Chen, WSBA #46156
901 Fifth Avenue, Suite 630
Seattle, WA 98164

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Elizabeth Gill (Admitted *pro hac vice*)
ACLU Foundation
LGBT & AIDS Project
39 Drumm Street
San Francisco, CA 94111

Attorneys for Plaintiffs-Respondents
Robert Ingersoll and Curt Freed

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I. INTRODUCTION

For more than 125 years, Washington has prohibited discrimination in places of public accommodation, recognizing that discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."[1] Businesses open to the public cannot refuse to serve customers because of the customers' race, creed, color, national origin, sexual orientation, sex, military status, breastfeeding status, or disability. Under Washington law, nobody can be turned away from a business simply because of who they are or whom they love.

Washington law is not unique. For more than a century, anti-discrimination statutes have been upheld time and again by courts across the country. Nor is this case unique. Litigants historically have claimed that their personal religious beliefs justify discrimination based on race, religion, sex, and other protected characteristics. Courts have consistently rejected those claims, and have continued to do so when businesses have refused to provide goods and services to same-sex couples for their weddings or commitment ceremonies. No court has *ever* held that religious objections or free speech principles entitle businesses open to the public to disobey anti-discrimination laws.

This Court should rule no differently in this case. When Arlene's Flowers and its owner, Mrs. Stutzman, refused to serve Robert Ingersoll

[1] Washington Law Against Discrimination, RCW 49.60.010.

and Curt Freed because of their sexual orientation, they violated Washington law. The trial court properly granted summary judgment in favor of Mr. Ingersoll and Mr. Freed, and rightly entered an injunction prohibiting Defendants from discriminating in the sale of goods and services they choose to offer the public. The trial court's ruling is consistent with Washington statutes, the state and federal constitutions, and court decisions around the country uniformly enforcing public accommodation laws. The Court should affirm the trial court's decision in its entirety.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court properly applied the Washington Law Against Discrimination (WLAD) and Consumer Protection Act (CPA) to prohibit Defendants from discriminating, on the basis of sexual orientation, in the sale of any goods and services they choose to offer the public.

2. Whether, in light of longstanding case law, the trial court properly held that the WLAD and CPA are constitutional restrictions on business conduct, and do not violate Defendants' free speech rights.

3. Whether, in light of longstanding case law, the trial court properly held that application of the WLAD and CPA do not violate Defendants' free exercise rights under the state and federal constitutions.

4. Whether the trial court properly held that the freedom of association provided by the state and federal constitutions has no application here.

5. Whether the trial court properly applied longstanding Washington law to hold Mrs. Stutzman personally liable for the WLAD and CPA violations at issue.

III. STATEMENT OF THE CASE

A. Factual Background

The material facts in this case are simple and undisputed. Plaintiffs-Respondents Robert Ingersoll and Curt Freed are gay men who have been in a committed relationship since 2004. CP 350. In December 2012, soon after Washington began recognizing the freedom to marry for same-sex couples, Mr. Freed proposed marriage to Mr. Ingersoll, and the two became engaged. *Id.*

The wedding Mr. Ingersoll and Mr. Freed originally planned was supposed to take place on their nine-year anniversary, September 19, 2013. *Id.* The couple envisioned a ceremony followed by a reception with over 100 guests at the Bella Fiori Gardens in Kennewick, a well-known wedding venue. CP 322-24. The couple were excited about planning their wedding, and intended to buy flowers for the wedding from Defendant-Appellant Arlene's Flowers. CP 350. The couple were very familiar with Arlene's Flowers. They—and Mr. Ingersoll in particular—had purchased flowers there on many occasions, and viewed Arlene's Flowers as "their florist." *Id.*

On February 28, 2013, Mr. Ingersoll drove to Arlene's Flowers to speak to someone about ordering flowers for his wedding to Mr. Freed. *Id.* At the store, Mr. Ingersoll spoke with Janell Becker, the manager of Arlene's Flowers. *Id.* Mr. Ingersoll told Ms. Becker he was marrying Mr. Freed and that he and Mr. Freed wanted Arlene's to do the flowers. *Id.* Ms. Becker told Mr. Ingersoll he would have to speak to the store owner, Defendant-Appellant Barronelle Stutzman, and she gave Mr. Ingersoll Mrs. Stutzman's work schedule. *Id.* Mr. Ingersoll knew Mrs. Stutzman. He had personally ordered flowers from her many times, including for Mr. Freed's birthday and for their anniversary. *Id.*; CP 317. Mrs. Stutzman knew Mr. Ingersoll and Mr. Freed were gay and in a committed relationship. CP 304-05.

The next day, March 1, 2013, Mr. Ingersoll returned to Arlene's Flowers during his lunch hour to speak with Mrs. Stutzman. CP 350. Mr. Ingersoll told Mrs. Stutzman that he and Mr. Freed were getting married and that they wanted Arlene's to provide the flowers. *Id.* He did not ask Mrs. Stutzman to attend the wedding. CP 426-27. Mrs. Stutzman took Mr. Ingersoll's hand and said she could not sell Mr. Ingersoll and Mr. Freed flowers for their wedding because of her relationship with Jesus Christ. CP 350-51. Indeed, even before Mr. Ingersoll could describe what the couple wanted, Mrs. Stutzman told him categorically that she would not provide services for his wedding; that she "chose not to be part of his event" because of her religious views. CP 309-11, 321, 326.

Mr. Ingersoll was shocked and upset by Mrs. Stutzman's refusal to sell him flowers for his wedding and, not knowing what to do, asked Mrs. Stutzman if she knew any florists who could do the flowers for his wedding. CP 351. Mrs. Stutzman gave Mr. Ingersoll the names of three other florists in the area, and gave Mr. Ingersoll a hug. *Id.* Mr. Ingersoll left Arlene's Flowers and returned to work. *Id.*

Arlene's Flowers had never before refused service to a customer for any reason other than lack of capacity to fill the order. CP 301. Arlene's Flowers—a for-profit corporation with no religious purpose or affiliation whatsoever—sells flowers and other goods and services to members of the public for all kinds of occasions, including weddings.[2] CP 292, 294-95. The decision to refuse to sell flowers to Mr. Ingersoll and Mr. Freed was Mrs. Stutzman's. CP 306-08, 312. She is the owner and president of Arlene's Flowers, Inc., and she establishes its policies. CP 293, 306-08. Mrs. Stutzman concluded she could not allow her business to provide flowers for the wedding because of her "biblical belief that marriage is between a man and a woman," CP 306-08, and that, on an on-going basis, Arlene's Flowers would decline to sell goods and services for any marriage or commitment ceremony for same-sex couples, CP 421-22.

[2] The company's non-discrimination policy reads: "This company prohibits discrimination or harassment based on race, color, religion, creed, sex, national origin, age, disability, marital status, veteran status or any other status protected by applicable law." CP 297-98. Another company policy relating to "Customers" states: "Customers come first, whoever they are, however they are dressed, whatever they look like, whatever color or creed, what[ever] they are willing to spend." CP 299-300. Ms. Stutzman testified that "creed" means "religion" in this policy. *Id.*

Mr. Ingersoll and Mr. Freed were left reeling by the refusal. CP 351. Mr. Ingersoll was deeply hurt by Mrs. Stutzman's refusal to provide services. CP 318-20, 325. Mr. Freed too felt the "tremendous emotional toll of the refusal." CP 332-33. The couple stopped planning for a big wedding in September 2013, in part because they feared being denied service by other wedding vendors. CP 322-33, 351. Ultimately they decided to have a small wedding at their home. CP 352. They were married on July 21, 2013, with 11 people in attendance. CP 327, 352. They bought one flower arrangement from another florist, and boutonnieres and corsages from a friend. CP 351.

B. Proceedings Below

On April 9, 2013, the State of Washington filed a complaint against Arlene's Flowers and Mrs. Stutzman for refusing to sell Mr. Ingersoll and Mr. Freed flowers for their wedding. CP 1-5. The State sought primarily injunctive relief under the CPA. *Id.* Mr. Ingersoll and Mr. Freed filed this action under both the WLAD and the CPA several days later, also primarily seeking injunctive relief. CP 2526-32. The cases were consolidated for all purposes except trial. CP 25-27.

On February 18, 2015, the trial court entered an order granting summary judgment in favor of the State, Mr. Ingersoll, and Mr. Freed. CP 2310-69. In a carefully reasoned, 59-page opinion, the trial court held that Defendants discriminated against Mr. Ingersoll and Mr. Freed because of their sexual orientation in violation of the WLAD and CPA. *Id.* The trial court also rejected Defendants' constitutional defenses:

> For over 135 years, the Supreme Court of the United States has held that laws may prohibit religiously motivated action, as opposed to belief. In trade and commerce, and more particularly when seeking to prevent discrimination in public accommodations, the Courts have confirmed the power of the Legislative Branch to prohibit conduct it deems discriminatory, even where the motivation for that conduct is grounded in religious belief.

CP 2367. The trial court found no reason to depart from that precedent here.

The trial court entered judgments and permanent injunctions in both actions. CP 2418-21, 2553-56. The injunctions do not require Defendants to sell any particular goods or services, but the injunctions prohibit Defendants from discriminating, based on sexual orientation, in the sale of any goods or services they choose to offer the public. *Id.* In the case of Mr. Ingersoll and Mr. Freed, the judgment also awards them actual damages, attorneys' fees, and costs in amounts to be determined.[3] CP 2553-56. Defendants appeal from these judgments. CP 2422-2525, 2557-2660.

IV. ARGUMENT

Defendants contend the trial court erred in granting summary judgment against them because they did not discriminate against Mr. Ingersoll and Mr. Freed based on their sexual orientation in violation of the WLAD. Defendants also argue that, even if they did discriminate based on sexual orientation in violation of the WLAD, they were entitled to do so under the state and federal constitutions. Defendants are wrong on

[3] Mr. Ingersoll and Mr. Freed do not seek damages for emotional distress or other non-economic harms. Mr. Ingersoll and Mr. Freed have claimed only $7.91 in economic damages resulting from gas and mileage spent obtaining flowers from other sources. *See* CP 2341.

all counts. The trial court correctly held both Arlene's Flowers and Mrs. Stutzman liable for WLAD and CPA violations, and properly entered injunctions prohibiting future discrimination. This Court should affirm the trial court's decision.

A. Arlene's Flowers and Mrs. Stutzman Violated the WLAD When They Refused to Serve Mr. Ingersoll and Mr. Freed Because of their Sexual Orientation

The WLAD prohibits acts that "directly or indirectly result[] in any distinction, restriction, or discrimination . . . in any place of public . . . accommodation" on the basis of sexual orientation. RCW 49.60.215(1); *accord* RCW 49.60.030(1). The WLAD thus guarantees "the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public," without fear of discrimination based on one's sexual orientation. RCW 49.60.040(14). The trial court correctly held that Arlene's Flowers, a place of public accommodation, and its owner, Mrs. Stutzman, violated the WLAD by refusing to serve Mr. Ingersoll and Mr. Freed because of their sexual orientation.[4] CP 2335-39.

On appeal, Defendants do not dispute that Arlene's Flowers is a place of public accommodation and that they discriminated against Mr. Ingersoll and Mr. Freed. Instead, Defendants argue they discriminated against Mr. Ingersoll and Mr. Freed based on their *marital status*, not their

[4] The trial court also held that Defendants violated the Consumer Protection Act (CPA). CP 2340-42. Defendants do not separately challenge this portion of the trial court's decision, and simply combine arguments relating to the CPA with arguments relating to the WLAD. Br. of Appellants at 15 n.8, 24 n.15. Accordingly, Respondents do not separately address the CPA.

sexual orientation. Defendants contend that the WLAD permits such discrimination by a public accommodation. They further argue that the WLAD protects Defendants from having to "endorse same-sex weddings," and that the WLAD expressly protects religious business owners in this context. Br. of Appellants at 15-24. None of Defendants' arguments is correct.

1. Arlene's Flowers and Mrs. Stutzman discriminate based on sexual orientation, not "marital status"

In their refusal to provide wedding goods and services to same-sex couples, Defendants claim they are discriminating based on marital status, not sexual orientation. Br. of Appellants at 19. If that were true, Arlene's Flowers would deny its good and services to all engaged couples, regardless of their sexual orientation. That is not, however, what Arlene's Flowers does. It happily sells flowers and related services to engaged different-sex couples, but not to engaged couples who are gay. Arlene's Flowers, and its owner, Mrs. Stutzman, treat engaged couples differently based only on the sexual orientation of the couple. This is, on its face, discrimination based on sexual orientation.

Defendants respond by claiming they object only to providing "goods and services for a particular type of event" (a *marriage* between same-sex partners), not to providing goods and services to people based on their sexual orientations generally. CP 2539; *accord* Br. of Appellants at 9-11, 19-20. As the trial court recognized, however, this is not a meaningful or lawful distinction. CP 2337-39. When a law "prohibits

discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013), *cert denied*, __ U.S. __, 134 S. Ct. 1787, 188 L. Ed. 2d 757 (2014); *accord Craig v. Masterpiece Cakeshop, Inc.*, __ P.3d __, No. 14CA1351, 2015 WL 4760453, at *5-8 (Colo. App. Aug. 13, 2015). The U.S. Supreme Court has long refused to distinguish between *status* and *conduct* in the way Defendants suggest, and especially in the context of discrimination based on sexual orientation. *E.g.*, *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 2604, 192 L. Ed. 2d 609 (2015) (explaining that the "denial to same-sex couples the right to marry" is a "disability on gays and lesbians" which "serves to disrespect and subordinate them"); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (finding discrimination based on sexual orientation where student group claimed to accept gay students, but rejected students who actually engaged in same-sex intimacy); *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.") (emphasis added). Discriminating against same-sex couples is discrimination "because of" sexual orientation just as surely as a "tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993).

Indeed, protections for gay men and lesbians would be significantly undermined if the Court were to endorse, as Defendants urge, a meaningful legal distinction between sexual orientation and conduct associated with sexual orientation. If the WLAD protected only gay men and lesbians who never engaged in sexual conduct, or who never engaged in any conduct (such as marriage) that expressed their love for a person of the same sex, the WLAD would be of little use to them. That cannot have been the legislature's intention when it added sexual orientation to the WLAD. Discrimination against same-sex couples who are marrying is thus discrimination based on sexual orientation, and is prohibited by the WLAD.

Defendants' prior history of serving Mr. Ingersoll and Mr. Freed is irrelevant. A business cannot *mostly* comply with the WLAD. As the New Mexico Supreme Court explained in *Elane Photography*, the leading case relating to sexual orientation discrimination by wedding businesses, "if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women even if it will serve them appetizers." 309 P.3d at 6. The WLAD requires that gay and lesbian customers have "the full enjoyment" of the goods and services Arlene's Flowers sells to the public. RCW 49.60.030(1)(b) -.040(14). Even though Arlene's Flowers had done business with Mr. Ingersoll and Mr. Freed before (and even hired gay employees), Mr. Ingersoll and Mr. Freed were unlawfully denied "the full enjoyment" of Arlene's Flowers' services when it refused to provide them flowers for their wedding.

Defendants' discriminatory conduct is also prohibited regardless of the fact that the State did not recognize the marriages of same-sex couples when the WLAD was amended to include sexual orientation in 2006.[5] The WLAD was not frozen in time in 2006, and, moreover, does not tie its prohibition of sexual orientation discrimination to the status of same-sex marriage in the state. The law expressly separates the two issues, and makes clear that the WLAD's inclusion of sexual orientation does not "modify or supersede state law relating to marriage." RCW 49.60.020.[6] When Arlene's Flowers treats same-sex and different-sex couples differently, it discriminates on the basis of sexual orientation whether the couples are getting married, celebrating Valentine's Day, or buying flowers for a funeral. The WLAD focuses on whether the public accommodation is discriminating against customers based on their identity; it does not focus on the customers' plans for the goods or services they want to purchase.

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[5] Contrary to Defendants' characterization, same-sex marriage was not *illegal* in Washington in 2006. Washington simply did not recognize marriages between same-sex couples at that time. RCW 26.04.010(1) (2006). Arlene's Flowers would still have violated Washington law at that time if it had refused to sell flowers to a gay couple on their way to the airport to get married in Massachusetts. This case is not like *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 753-54, 953 P.2d 88 (1998), where the Court held "marital status" had a well-established definition (found in *Black's Law Dictionary*) that excluded conduct that also happened to be criminal in Washington when the WLAD was enacted.

[6] *See also Latta v. Otter*, 771 F.3d 456, 475 (9th Cir. 2014) (in affirming the unconstitutionality of Idaho's law excluding same-sex couples from marriage, the Court noted that its ruling would have no effect on small businesses that wanted to discriminate against same-sex couples: "Whether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodations law, federal anti-discrimination law, and the protections of the First Amendment.").

2. The WLAD does not require Arlene's Flowers or Mrs. Stutzman to "endorse" marriages of same-sex couples

Pointing to RCW 49.60.020, Defendants contend the WLAD prohibits the State from requiring any "endorsement" of the marriages of same-sex couples, and that the trial court's rulings require Defendants to make such an "endorsement." Br. of Appellants at 17-19. Defendants' contention is meritless and premised on a simple misreading of the statute, which states that *the WLAD* "shall not be construed to endorse any specific belief, practice, behavior, or orientation." This provision means exactly what it says: the State, in enacting the WLAD, is not endorsing any specific belief, practice, behavior, or orientation. The provision does not create a general "endorsement" exception to the WLAD, allowing businesses subject to the law to disregard it if their owners and operators in some way disagree with its protective scope.

In any event, the trial court's application of the WLAD does not require Arlene's Flowers or Mrs. Stutzman to endorse the marriages of same-sex couples. Courts have rejected the argument that compliance with anti-discrimination laws amounts to an endorsement of any protected viewpoint or conduct. As the New Mexico Supreme Court explained in *Elane Photography*, "It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom." 309 P.3d at 69-67; *accord Craig*, 2015 WL

4760453, at *12 ("it is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage").[7]

Even Mrs. Stutzman, in her deposition, agreed she is not endorsing a wedding or its participants when she sells flowers for a wedding. CP 2108.[8] The WLAD thus does not require Defendants to endorse speech they do not wish to endorse.

3. The WLAD protects equal access to public accommodations, regardless of the religious beliefs of business owners

Defendants make the extraordinary claim that the WLAD "protects those who provide public accommodations to the same extent as their patrons." Br. of Appellants at 22. They cite no example, however, of any public accommodations law ever being interpreted or applied in that way. *Id.* Nevertheless, Defendants contend the Court must adopt a new

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[7] In a different context, U.S. Supreme Court rejected law schools' contentions that their compliance with military recruitment laws would be interpreted as an endorsement of the military's exclusionary policies regarding gay and lesbian soldiers. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64-65, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). The Court held that "high school students can appreciate the difference between speech a school sponsors and speech a school permits because legally required to do so," and explained that students surely "have not lost that ability by the time they get to law school." *Id.*

[8] Q: When you sell flowers for the wedding of two atheists are you endorsing atheism?

A: I don't ask if they're atheist.

Q: Well, if you happened to know, regardless of whether you asked, you're selling flowers to people who are nonbelievers are you endorsing nonbelief?

A: No.

Q: If you sell flowers for the wedding of a Muslim couple, are you endorsing Muslim as a religion?

A: No.

Q: Islam as a religion?

A: No.

balancing test to weigh Defendants' religious interests against Mr. Ingersoll's and Mr. Freed's interests in obtaining "custom floral designs for their same-sex wedding," and conclude that Defendants' religious interests prevail. *Id.* at 21-24. This is wholly inconsistent with Washington law.

Businesses open to the public (public accommodations) are *not* accorded the protections Defendants claim. It is well established, in Washington and elsewhere, that people "who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity." *Backlund v. Bd. of Comm'rs of King Cnty. Hosp. Dist. 2*, 106 Wn.2d 632, 648, 724 P.2d 981 (1986); *accord United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.") Religious business owners therefore cannot avoid governmental regulations on their conduct as business owners, and nothing in the WLAD's text requires otherwise.

Defendants misinterpret the WLAD's protection of religious people in the context of public accommodations. The WLAD prohibits discrimination on the basis of religion, but, in the context of public accommodations, it protects the customer, not the business owner.

RCW 49.60.215(1); *see also Pines v. Tomson*, 206 Cal. Rptr. 866 (Cal. Ct. App. 1984) (prohibiting discrimination by Christian business against Jewish customers). For example, an atheist business owner would not be permitted to deny Mrs. Stutzman goods or services because she is a Christian; and a Unitarian Universalist business owner would not be permitted to deny Mrs. Stutzman goods and services because she is a Southern Baptist. RCW 49.60.215(1). Nothing in the WLAD requires balancing the business owner's interests against Mrs. Stutzman's as a customer in that scenario. *See id.*

Nor should it. Under Defendants' interpretation of the WLAD, a religious business owner could claim a right to discriminate on any basis (*e.g.*, race, gender, disability), and those religious rights would, in Defendants' proposed balancing test, trump any customer's rights to access goods and services without discrimination.[9] The WLAD does not, and should not, permit that outcome.

Moreover, public accommodations laws do not exist simply to ensure access to goods and services. Public accommodations laws were enacted "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of*

[9] Defendants claim that a narrowly tailored exemption for Mrs. Stutzman would not "give anyone a license to discriminate in the name of religion." Br. of Appellants at 23. Defendants offer no logical basis, however, by which to limit an exception to Mrs. Stutzman alone. Courts are not permitted to make judgments about individuals' sincerely held religious views, *e.g.*, *State v. Balzer*, 91 Wn. App. 44, 55, 954 P.2d 931 (1998), and there is no principled basis on which to grant an exception in Mrs. Stutzman's case, and not in the case of another person who claims to want to discriminate in the name of religion against people based on their race, gender, sexual orientation, or other protected characteristics.

Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964). As Justice Goldberg explained:

> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

Id. at 291-92. Defendants ask the Court to apply a new test that balances these concerns against a business owner's religious rights, but courts and legislatures have already struck that balance: the State has a well-established right to prohibit discrimination in public accommodations, and people who choose to open public accommodations must abide by those prohibitions. *E.g.*, *Backlund*, 106 Wn.2d at 648; *Lee*, 455 U.S. at 261. As the Supreme Court held in *Obergefell*, to deny same-sex couples the "same legal treatment as opposite-sex couples … would … diminish their personhood." *Obergefell*, 135 S. Ct. at 2602.

Defendants discriminated against Mr. Ingersoll and Mr. Freed based on their sexual orientation in Defendants' operation as a public accommodation, and the trial court properly found them in violation of the WLAD.

B. No Constitutional Provision Provides a Defense to Defendants' Discriminatory Conduct

Defendants claim Mrs. Stutzman's religious views entitle her to discriminate against Mr. Ingersoll and Mr. Freed pursuant to the state and

federal constitutions. Br. of Appellants at 31-38. Defendants also claim Mrs. Stutzman was entitled to discriminate against Mr. Ingersoll and Mr. Freed because Arlene's Flowers is engaged in expressive activity protected by the state and federal constitutions. *Id.* at 24-31. Mr. Ingersoll and Mr. Freed recognize Mrs. Stutzman's religious views as sincere and strongly held. Nevertheless, neither Mrs. Stutzman's religious views nor her expression in the flower arranging she offers for sale to the public entitle her to discriminate against Mr. Ingersoll and Mr. Freed on the basis of their sexual orientation.[10]

1. Enforcement of the WLAD does not violate First Amendment free exercise rights

Anti-discrimination laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-American Gay, Lesbian and Bisexual Gr. of Boston*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (describing Massachusetts statute prohibiting discrimination based on sexual orientation in public accommodations). Defendants claim the WLAD conflicts with Mrs. Stutzman's religious views and cannot be applied here without violating the First Amendment to the U.S. Constitution. Br. of Appellants at 36-39. However, anti-discrimination statutes are permissible and enforceable under the First

[10] Respondents, like Appellants, focus on the WLAD here, but the arguments relating to the WLAD are equally applicable to the CPA. *See, e.g.*, RCW 49.60.030(3) (making a WLAD violation a CPA violation where the WLAD violation causes injury to business or property).

Amendment because they are neutral laws of general applicability. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

In *Employment Division v. Smith*, the leading U.S. Supreme Court case on this issue, the Court approved Oregon's denial of unemployment benefits to two people who were fired from their jobs after ingesting peyote for religious purposes. *Id.* at 874. The employees' religious use of peyote violated Oregon law, and made them ineligible for unemployment benefits. *Id.* In upholding the constitutionality of Oregon's statutes as applied to the religious employees, the Court explained that its "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (citations and quotations omitted). To hold otherwise "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 879 (citations and quotations omitted). Thus, a generally applicable, neutral law is constitutional[11] under the First Amendment free exercise clause even where its application incidentally affects religious practices.

A law is neutral unless "the object of the law is to infringe upon or restrict practices *because of their religious motivation*." *Church of the*

[11] A neutral, generally applicable law is subject to rational basis review. *E.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir. 2009). The WLAD easily survives rational basis review, and no party contends otherwise.

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (emphasis added). A law is generally applicable unless it, "in a selective manner," imposes "burdens *only on conduct motivated by religious belief*." *Id.* at 543 (emphasis added). In other words, a law is neutral and generally applicable so long as it does not target a particular religious belief or practice.

The WLAD, like other state anti-discrimination laws, is a neutral law of general applicability that passes constitutional muster under the First Amendment. The WLAD's plain statutory language prohibits discrimination in places of public accommodation regardless of whether the discrimination is motivated by religion, culture, personal animus, or some other source. RCW 49.60.040(2) & (19), 49.60.215. On its face, the law is neutral because it does not single out religious people or any particular religion, and it is generally applicable because it broadly applies to all businesses open to the public in Washington.

Defendants complain that the WLAD is neither neutral nor generally applicable because the WLAD contains certain limited exemptions that do not apply to Arlene's Flowers or Mrs. Stutzman. Br. of Appellants at 37-39. These exemptions are constitutionally permissible (and in some cases, required). For example, the WLAD exempts certain religious institutions from the definition of "public accommodation." RCW 49.60.040(2). Such exemptions reflect the legislature's respect for free exercise rights, and do not make the law any less neutral or generally applicable for purposes of a First Amendment

analysis. *Elane Photography*, 309 P.3d at 74-75 (New Mexico anti-discrimination statute neutral and generally applicable even though it contains certain religious and secular exemptions). The same is true of the exemption in the marriage statute for ministers or religious organizations that do not want to officiate any particular marriages. RCW 26.04.010(4)-(6). These exemptions are intended to *accommodate* religious views, and are evidence of (not against) the law's neutrality. *Elane Photography*, 309 P.3d at 74-75; *see generally Corp. of Presiding Bishop of Church of Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-38, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (discussing purposes and effects of religious exemptions to anti-discrimination laws).[12] In fact, as the trial court noted, the WLAD treats a minister and Mrs. Stutzman equally. CP 2351. The WLAD does not permit a minister—anymore than it does Mrs. Stutzman—to obtain a business license, open a public accommodation, and discriminate on the basis of sexual orientation. *See* RCW 49.60.040(2).[13]

[12] Defendants suggest that the public accommodations law is so undermined by secular exemptions that additional religious exemptions should be permitted. Br. of Appellants at 38. But the sole exemption cited by Defendants is for "distinctly private organizations." *Id.* (citing RCW 49.60.040(2) and other exemptions that do not apply to public accommodations). An exemption relating to "distinctly private organizations" does not undermine a law enacted to regulate discrimination in *public* commerce. Indeed, if a "distinctly private organization" allows public use of its place of accommodation, that use is covered by the WLAD. RCW 49.60.040(2).

[13] The cases Defendants cite, Br. of Appellants at 38-39, are inapposite. They involve instances where the government either failed to extend privileges to religious people that it extended to other, similarly situated, people, or targeted a religion for particular sanction. *See Lukumi*, 508 U.S. at 542 (finding that local ordinances at issue were intended to suppress only Santeria religious practices); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2003) (disapproving animal permit exemption for circuses and zoos where exemption not also extended to similarly situated religious people); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366-67 (3d Cir. 1999) (disapproving

The WLAD does not selectively burden any religion or religious belief. In being ordered to abide by the WLAD, Mrs. Stutzman is simply being required to comply with the same anti-discrimination laws that apply to all other public accommodations in Washington. The WLAD is therefore neutral, generally applicable, and constitutional as applied here. *See Masterpiece Cakeshop*, 2015 WL 4760453, at *17; *Elane Photography*, 309 P.3d at 72-75 (upholding state anti-discrimination statute); *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 44 Cal. 4th 1145, 189 P.3d 959 (2008) (same); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

2. Enforcement of the WLAD does not violate religious freedom under Washington's Constitution

Although the Washington Constitution is different from the U.S. Constitution, the outcome in this case is the same. Under Washington law, a statute "is presumed to be constitutional, and a party challenging its constitutionality bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt." *State v. Leatherman*, 100 Wn. App. 318, 321, 997 P.2d 929 (2000). To challenge a statute on free exercise grounds, a litigant must show (a) that the statute is not a reasonable police power regulation directed to the State's peace and safety, Wash. Const. art. 1, sec. 11, and (b) that the statute impermissibly burdens the practice of one's

policy allowing police officers to wear beards for medical reasons, but not for religious reasons).

religion, *Munns v. Martin*, 131 Wn.2d 192, 199-200, 930 P.2d 318 (1997). Defendants make no such showing here.

a. The WLAD protects the peace and safety of the State

Article 1, section 11 of Washington's Constitution guarantees "[a]bsolute freedom of conscience in all matters of religious sentiment, belief, and worship," but explicitly provides that the "liberty of conscience" secured by that section "***shall not be so construed as to . . . justify practices inconsistent with the peace and safety of the state***." (Emphasis added.) The freedom to believe is thus absolute, but the freedom to act on one's beliefs is not. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 224, 840 P.2d 174 (1992); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 864, 239 P.2d 545 (1952). As this Court recently reiterated in a free exercise case, "the government may require compliance with reasonable police power regulation." *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642 n.3, 211 P.3d 406 (2009) (involving free exercise challenge to city suspension of permitting process); *accord Open Door Baptist Church v. Clark Cnty.*, 140 Wn.2d 143, 167, 995 P.2d 33 (2000) (upholding zoning ordinance against free exercise challenge, and holding that "[t]he necessity or validity of zoning as an exercise of *police power* . . . cannot be in serious question").

The WLAD is, by its own terms, an "exercise of the police power of the state for the protection of the public welfare, health, and peace of

the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights." RCW 49.60.010. The WLAD's purpose, "to deter and eradicate discrimination in Washington," is "a policy of the highest order." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.3d 655 (2002). A WLAD violation therefore cannot be justified under article 1, section 11, which explicitly limits the freedom of religious exercise to conduct that is *not inconsistent* with the peace and safety of the State. Mrs. Stutzman is free to hold her religious beliefs about marriage, but she is not entitled to invoke them to discriminate in a place of public accommodation.

b. **The WLAD does not burden free exercise**

The WLAD does not impermissibly burden Mrs. Stutzman's free exercise rights. Br. of Appellants at 32-36. Government action burdens religious exercise "if the coercive effect of an enactment operates against a party in the practice of his religion." *Woodinville*, 166 Wn.2d at 642-43 (citations and quotations omitted). The WLAD has no such effect here. Mrs. Stutzman voluntarily owns and operates a place of public accommodation for profit. She must therefore comply with the neutral and general anti-discrimination laws that apply to all business owners in her position.[14] Compliance with generally applicable business regulations

[14] *E.g.*, *Backlund*, 106 Wn.2d at 648 (explaining that physician "freely chose to enter into the profession of medicine" and therefore voluntarily faced "regulation as to [his] own conduct" that could not be overridden by his own "personal limitations"); *Lee*, 455 U.S. at 261 (when religious people voluntarily enter into commercial activity, they are subject to the same regulations as others in that activity); *Swanner v. Anchorage Equal Rights*

does not impose a substantial burden on Mrs. Stutzman "in the practice of [her] religion." *Woodinville*, 166 Wn.2d at 642-43; *accord id.* at 644 ("Housing the homeless may be part of religious belief or practice, but it is different from prayer or services, for example, which are at the core of protected worship.").

Even if the WLAD burdened Mrs. Stutzman in some way, the burden would not be substantial. Not every "slight burden is invalid":

> If the constitution forbade all government actions that worked *some* burden by minimally affecting sentiment, belief or worship, then any church actions argued to be part of religious exercise would be totally free from government regulation. Our constitution expressly provides to the contrary. The argued burden on religious exercise must be more, it must be substantial.

Woodinville, 166 Wn.2d at 643 (emphasis in original, citations and quotations omitted). Accordingly, where a litigant does not show "anything more than an incidental burden upon the free exercise of religion," Washington's free exercise provision is not implicated. *Open Door Baptist Church*, 140 Wn.2d at 166-67 (church could not show more than incidental burden on religion, and therefore could not support a free exercise challenge to zoning restriction).

No "substantial burden" exists here. Washington courts have found substantial burdens on religious exercise when religious conduct—not

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Comm'n, 874 P.2d at 283 (rejecting free exercise challenge to anti-discrimination law and holding that "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity"); *McClure v. Sports & Health Club, Inc.*, 370 N.W. 2d 844, 853 (Minn. 1985) ("when appellants entered into the economic arena and began trafficking in the market place, they . . . subjected themselves to the standards the legislature has prescribed . . . for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination").

business conduct for profit—has been significantly impeded by government activity. For example, a "substantial burden" existed when a historical landmark designation would have reduced the value of church property by half, *First United Methodist Church v. Hearing Examiner*, 129 Wn.2d 238, 249, 916 P.2d 374 (1996), or when a city's moratorium on permit applications prevented a church from even asking for city approval to undertake certain religious activities, *Woodinville*, 166 Wn.2d at 644-45. In those cases, governmental regulations would have substantially impacted a church's core religious work. *First United*, 129 Wn.2d at 252; *Woodinville*, 166 Wn.2d at 645. And, in those cases, the asserted religious rights did not conflict with other individuals' rights, and the religious institutions had no way to avoid the conflict between government regulation and their religious activities. *See id*. This case is very different, and no court has ever found a substantial burden on facts like the ones presented here. *See Woodinville*, 166 Wn.2d at 644 (any asserted burden "must be evaluated in the context in which it arises").

3. The WLAD serves a compelling government interest

The WLAD is neutral and generally applicable and does not substantially burden religious exercise. Even if it did, however, it is still constitutional under both state and federal law because it furthers a compelling state interest and uses narrow means to do so. *Lukumi*, 508 U.S. at 546; *Woodinville*, 166 Wn.2d at 642.

The WLAD exists specifically to protect compelling state interests. Compelling interests "are based in the necessities of national or community life such as threats to public health, peace, and welfare." *Munns*, 131 Wn.2d at 200. As the legislature explains in the text of the WLAD itself, it passed the WLAD to protect the public health, peace, and welfare:

> This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. The compelling government interests served by the WLAD thus include (a) protection of the public welfare, health, and peace; (b) fulfillment of state constitutional provisions concerning civil rights; (c) protection of the rights and proper privileges of the State's inhabitants; and (d) protection of the State's democratic foundations. *Id.*

The state legislature also had specific compelling interests in mind when it added sexual orientation to the WLAD in 2006. Before amending the WLAD to include sexual orientation, the legislature heard testimony from a wide variety of groups supporting the addition. *E.g.*, CP 2091-94. The prevalence of discrimination against gay men and lesbian women in the state supported adding sexual orientation to the WLAD. *See* CP 2091.

For example, the legislature learned that approximately 10 percent of discrimination complaints filed in Spokane were based on sexual orientation. *Id.* That number was five percent in Seattle. *Id.* Even in recent memory in Washington, gay men and lesbian women could be fired from public employment solely because of their sexual orientation. *E.g.*, *Gaylord v. Tacoma Sch. Dist. No. 10*, 88 Wn.2d 286, 559 P.2d 1340 (1977) (teacher fired for "immorality" just because he acknowledged being gay).

Discrimination on the basis of sexual orientation still exists, as the incident giving rise to this litigation shows. Just last year, the Ninth Circuit Court of Appeals acknowledged that "[e]mpirical research . . . show[s] that discriminatory attitudes toward gays and lesbians persist," and that "for most of the history of this country, being openly gay resulted in significant discrimination." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485, 487 (9th Cir. 2014). Even more recently, the Seventh Circuit Court of Appeals explained that "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) (Posner, J.).[15]

[15] The history of discrimination against gay men and lesbian women is also recounted in *Obergefell*, 135 S. Ct. at 2596 ("Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity…. For much of the 20th century, moreover, homosexuality was treated as an illness…. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable…. In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays

Washington courts have confirmed that the WLAD advances compelling state interests in prohibiting discrimination. This Court has explained that the "purpose of the WLAD—to deter and eradicate discrimination in Washington—is a policy of the highest order." *Fraternal Order of Eagles*, 148 Wn.2d at 246. The Court of Appeals, in a case involving a free exercise challenge to the WLAD, also determined that the legislature had "a compelling interest" in passing the WLAD. *Niemann v. Vaughn Community Church*, 118 Wn. App. 824, 831 n.2, 77 P.3d 1208 (2003) (citing RCW 49.60.010 and finding that "the State has a compelling interest in eradicating discriminatory property ownership").

Other courts have long acknowledged that compelling interests underlie anti-discrimination laws. Over decades, the U.S. Supreme Court has repeatedly held that anti-discrimination laws, such as the WLAD, serve compelling government interests. *E.g.*, *New York State Club Ass'n v. New York City*, 487 U.S. 1, 14 n.5, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (the Court has "recognized the State's 'compelling interest' in combating invidious discrimination"); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) ("public accommodations laws plainly serv[e] compelling state interests of the highest order, and government has a "compelling interest in eliminating discrimination against women") (internal quotation omitted); *Roberts v. Unites States Jaycees*, 468 U.S. 609, 624, 104 S. Ct. 3244, 82 L. Ed. 2d 462

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and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.")

(1984) (Minnesota's law barring discrimination in public accommodation "plainly serves compelling state interests of the highest order"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (government has a "compelling . . . fundamental, overriding interest in eradicating racial discrimination in education"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 257-61 (upholding Civil Rights Act of 1964 and confirming legality of ages-old "common-law innkeeper rule[s]" prohibiting discrimination in public accommodations).

Courts do not reach different conclusions when the law at issue prohibits discrimination based on sexual orientation. *E.g.*, *N. Coast Women's Care Med. Gr., Inc. v. San Diego Cnty. Superior Court*, 44 Cal. 4th at 1158 (anti-discrimination act "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation and there are no less restrictive means for the state to achieve that goal"); *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (government has compelling interest in "eradicating sexual orientation discrimination").

The WLAD also serves compelling government interests by the narrowest means possible. The only way to prohibit discrimination by public accommodations is simply to prohibit such discrimination. A narrower law would be ineffective. CP 2359 (trial court opinion, citing *Balzer*, 91 Wn. App. at 65); *accord Roberts*, 468 U.S. at 628-29 (finding that Minnesota's public accommodations law's "effect is no greater than is necessary to accomplish the State's legitimate purposes" . . . and that the

statute "abridges no more . . . freedom than is necessary to accomplish that purpose."). At the same time, the WLAD is not so broad that it covers conduct unrelated to its compelling goals. For example, the WLAD does not prevent Mrs. Stutzman from holding the personal belief that marriage is an institution reserved for a man and a woman. Nor does it prevent Mrs. Stutzman from participating in private or religious organizations that share her views. The WLAD forbids Mrs. Stutzman only from acting on her personal belief to discriminate in the operation of her public accommodation. That prohibition is constitutional. *E.g.*, *Roberts*, 468 U.S. at 628-29.

Defendants attempt to frame the issue in a more stinted way, suggesting the Court should consider whether the State has a compelling interest "in ensuring access to floral design services." Br. of Appellants at 45. Even under that formulation, the State plainly has a compelling interest in combatting discrimination in any market for goods and services, including the market for floral services. *Roberts*, 468 U.S. at 625 (acknowledging the government's rightful interest in prohibiting discrimination "in the allocation of publicly available goods and services"). But, more importantly, anti-discrimination laws were not enacted merely to ensure access to goods and services. *See, e.g.*, *id.*; *Heart of Atlanta Motel*, 379 U.S. at 250 ("Discrimination is not simply dollars and cents, hamburgers and movies"); *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 31, 194 P. 813 (1921) (an act of discrimination "in itself carries with it the elements of an assault upon the person, and in such

cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering are elements of actual damages for which a compensatory award may be made"). This case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches. *E.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 953 (D.S.C. 1966), *aff'd in part and rev'd in part*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified*, 390 U.S. 400 (1968) (enjoining restaurant from refusing to admit African American customers). The WLAD prohibits discrimination by public accommodations, and the State has a well-established and compelling interest in advancing that goal.

Defendants also argue that the State has a compelling interest in preventing only "invidious" discrimination, not the "reasoned religious distinctions" purportedly drawn by Mrs. Stutzman. Br. of Appellants at 41-42. The term "invidious" is not used in the WLAD, however, and this Court has generally referenced "discrimination" in concluding that the WLAD furthers compelling state interests. *See Fraternal Order of Eagles*, 148 Wn.2d at 246. Moreover, in enacting the WLAD, the State has already determined that, in the context of public accommodations, *all* discrimination based on protected characteristics (*e.g.*, sexual orientation, race, gender) is unjustifiable—whether it is described as "invidious" or otherwise.

Exemptions for self-described "reasoned religious objections" would swallow public accommodations law. Litigants have claimed a

religious right to discriminate based on race, *Bob Jones Univ.*, 461 U.S. 574; sex, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); marital status, *McClure*, 370 N.W.2d 844; and religious beliefs different from their own, *Pines*, 206 Cal. Rptr. 866. Protection on all those bases, and others, would be at risk if the Court allowed a "reasoned" religious exemption here.[16]

Defendants' own asserted expert, Dr. Mark David Hall, admitted there is no logical distinction between religiously based discrimination against a same-sex couple, and religiously based discrimination against an interracial couple:

> Q: So if they were of a different race, then there should be no religious accommodation. But because they happen to be – instead of an interracial couple they happen to be a gay couple, that now their civil rights should not be protected to the same degree? That's your opinion?
>
> A: What I think I would say is this. That the state has an interest in varying weights in prohibiting different sorts of discrimination. And I can see that it's being greater in the case of – of interracial marriage than in the case of same-sex marriage.
>
> But I suppose, when push comes to shove, I'm a pretty doggone powerful advocate of religious liberty. And so I would, in fact, argue for religious accommodation in this case – particularly in the case of an interracial marriage, particularly if there are plenty of alternatives available to that couple.

CP 2101.

[16] Washington courts would be particularly handicapped in limiting religious exemptions because Washington courts do not judge the reasonableness or veracity of a litigant's claimed religious beliefs. *E.g.*, *State v. Balzer*, 91 Wn. App. at 55.

If Defendants were permitted a religious exemption here, there is no logical reason they, or any other public accommodation, would not be permitted to discriminate in other ways based on their religious beliefs. The State unquestionably has a compelling interest in prohibiting such discrimination in places of public accommodation, and the WLAD is appropriately and narrowly tailored to achieve that goal.

4. Enforcement of the WLAD against Defendants does not violate the constitutional free speech guaranty

Defendants repeatedly insist that the State, through the WLAD, is attempting to "force [Mrs. Stutzman] to employ her mind, time, energy, and artistic talents to *actually create* unwanted expression." Br. of Appellants at 2 (emphasis in original); *see also, e.g.*, *id.* at 26, 28 n.21, 47, 50. The State is doing no such thing, and neither is the trial court. Defendants are prohibited only from discriminating in the sale of goods or services based on sexual orientation. Mrs. Stutzman is not being forced to make any particular flower arrangement or convey any message: she is simply being told she cannot choose to offer her goods and services to the public and, at the same time, discriminate in offering those goods and services based on customers' sexual orientation. *E.g.*, CP 2553-56. Nothing about this is unconstitutional.

a. The WLAD regulates Defendants' conduct, not Defendants' speech

On many occasions, courts have explained that anti-discrimination laws permissibly regulate *conduct*, not *speech*. The WLAD, like the

Minnesota law against discrimination at issue in *Roberts*, "does not aim at the suppression of speech, [and] does not distinguish between prohibited and permitted activity on the basis of viewpoint." *Roberts*, 468 U.S. at 624. The law "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Id.*

Similarly, in *Rumsfeld*, the U.S. Supreme Court explained that a law requiring law schools to admit military recruiters regulates conduct because it "affects what law schools must *do* . . . not what they may or may not *say*." 547 U.S. at 60 (emphasis in original). To illustrate that distinction, the Court noted that Congress "can prohibit employers from discriminating in hiring on the basis of race," and that such a prohibition relates to conduct even though it would "require an employer to take down a sign reading 'White Applicants Only.'" *Id.* at 62.

The WLAD is likewise focused on equal treatment, not speech. The WLAD does not require Defendants to sell goods and services for weddings, but if Defendants choose to make goods and services available to a different-sex couple, Defendants must also make them available to a same-sex couple, whether the couple is paying for bulk flowers, arranged flowers, delivery services, or some service entailing attendance at the place of the ceremony. The WLAD is thus focused on equal treatment in Defendants' chosen business conduct, not on Defendants' speech.

b. Even if Defendants' conduct were deemed expressive, the First Amendment would permit application of the WLAD to Defendants' conduct

Even if Arlene's Flowers is deemed to be engaged in expressive activity, enforcement of the WLAD is still constitutional. First, Arlene's Flowers does not express any views of its own. Defendants sell their goods and services to the general public and, to the extent any views are expressed through Defendants' flower arrangements, they are the customers' views. As Ms. Stutzman readily acknowledges, her customers have final sign-off, and ultimate creative control, over any flower arrangements they purchase. CP 2107. Defendants do not, therefore, express any views of their own subject to constitutional protection, no matter how much passion or creativity goes into Defendants' work. *See Elane Photography*, 309 P.3d at 69-70 ("It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom.").

Any expressive component of Defendants' conduct—offered for hire—is therefore significantly different from the speech at issue in *Hurley* and *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000). In those cases, cited by Defendants, states tried to apply public accommodation laws to non-profit organizations that were expressing their own protected messages. *Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 568-70. In *Hurley*, private parade organizers produced a

parade to express celebration of Irish heritage, 515 U.S. at 560, 568-70, and in *Dale*, the Boy Scouts at that time did not allow gay members and existed to "transmit . . . a system of values . . . in expressive activity," 530 U.S. at 561. In each case, the First Amendment prevented the government from requiring those organizations to alter their own messages to accommodate new members or participants who do not share those messages. *Dale*, 530 U.S. at 661; *Hurley*, 515 U.S. at 581.[17] That is not a problem here. Defendants are not operating an expressive association, and, by selling goods and services for weddings, Defendants are conveying only those messages approved by Defendants' customers (if any messages are conveyed at all). CP 2107.

Second, even if it could be said that the enforcement of the WLAD in this case had some impact on Arlene's Flowers' own speech, the State's interest in eradicating discrimination still justifies any incidental effect on speech. As the U.S. Supreme Court has long-since determined, "even if enforcement of [an anti-discrimination statute] causes some incidental abridgment of . . . protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Roberts*, 468 U.S. at 628. Acts of "invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that

[17] Although both *Hurley* and *Dale* involved public accommodations law, they involved unusual applications of public accommodations law not analogous to this case. In *Hurley*, the Court found that Massachusetts law had been "applied in a peculiar way" to an association of people organizing an expressive parade. 515 U.S. at 572. And in *Dale*, the Court repeatedly explained that the Boy Scouts was a "private" membership organization not analogous to "clearly commercial entities, such as restaurants, bars, and hotels." 530 U.S. at 657.

government has a compelling interest to prevent—*wholly apart from the point of view such conduct may transmit.*" *Id.* (emphasis added). Indeed, as explained above, the WLAD serves a compelling governmental interest and is narrowly tailored to serve that interest. Because the WLAD meets the highest standard of constitutional scrutiny, it is constitutional under the lower level of scrutiny that would apply here.[18]

Defendants contend that businesses involving expression (such as flower shops and photographers) must be allowed exemptions from public accommodations laws, but the WLAD and other anti-discrimination laws apply to creative professions just like they apply to other businesses. *E.g.*, RCW 49.60.040(2) (defining public accommodation). In *Elane Photography*, the New Mexico Supreme Court rejected this same argument and explained that none of the cases it surveyed exempted "creative and expressive profession[s]" from anti-discrimination laws. 309 P.3d at 71. To the contrary, the U.S. Supreme Court has applied anti-discrimination laws to the practices of a law firm, even though "[l]egal work unquestionably involves creative and expressive skill and art." *Id.* (discussing *Hishon v. King & Spalding*, 467 U.S. 69-71-73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). A business cannot avoid anti-discrimination laws simply because some aspect of the business's work requires creativity. *Cf. O'Brien*, 391 U.S. at 376 ("We cannot accept the

[18] Under the test articulated by the U.S. Supreme Court in *O'Brien v. United States*, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.")

In addition, as the New Mexico Supreme Court noted, "Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Elane Photography*, 309 P.3d at 71. A wide range of businesses covered by the WLAD could plausibly claim to use artistic or creative talents on a routine basis (*e.g.*, bakers, caterers, hair dressers, tailors, architects, software developers, house painters), and anti-discrimination laws would be undermined if such businesses were exempt from compliance. The Constitution does not require exemptions in those cases, or in this one.

5. Defendants' operation as a commercial florist is not constitutionally protected free association

Defendants claim their rights to association are also implicated here. Br. of Appellants at 39-40. They did not make that argument in the trial court, so they should not be permitted to make it now. *E.g.*, *Brower v. Pierce Cnty.*, 96 Wn. App. 559, 566-67, 984 P.2d 1036 (1999); CP 469-529. Regardless, Arlene's Flowers is not an expressive non-profit organization like the Boy Scouts (*Dale*) or a group of people organizing a celebratory parade (*Hurley*). Arlene's Flowers sells flowers and other goods and services to the general public for profit. Its customers "are not part of" Arlene's Flowers and are, "by definition, outsiders" who enter the store to buy goods and services. *Rumsfeld*, 547 U.S. at 69 (explaining why

military recruiters on law school campuses are not part of any law school association). Defendants' associational rights are not violated by requiring them to serve their arms-length customers without reference to sexual orientation, *id.*, and Defendants cite no case holding otherwise, Br. of Appellants at 39-40.[19]

6. The Hybrid Rights Doctrine does not apply

Defendants contend they have asserted a so-called "hybrid" claim, where a free exercise claim is made along with other constitutional claims. *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999). Strict scrutiny applies to a hybrid claim only where the additional constitutional claim has a "fair probability" or "likelihood" of success on the merits. *Id.* (citations and quotations omitted). For the reasons discussed above, Defendants' constitutional defenses are meritless, and, regardless, application of the WLAD in this case survives strict scrutiny.

C. The Trial Court Properly Held Mrs. Stutzman Personally Liable

The trial court also properly held Mrs. Stutzman personally liable under both the WLAD and CPA. The WLAD explicitly makes it unlawful for "any *person or the person's agent or employee* to commit an act" resulting in discrimination in public accommodation on the basis of sexual orientation. RCW 49.60.215 (emphasis added); *accord* RCW 49.60.030.

[19] Defendants also suggest that Arlene's Flowers is in the business of "accept[ing] artistic commissions" rather than something more mundane, such as filling customer orders. Arlene's Flowers can attempt to describe its business in any way it chooses, but it does not dispute it is a public accommodation for purposes of the WLAD, and that it has never turned away a customer (besides Mr. Ingersoll and Mr. Freed) for any reason other than insufficient capacity to fill the order. CP 301.

The WLAD broadly defines "person" to include individuals, corporate entities, business owners, and employees. RCW 49.60.040(19). Mrs. Stutzman, the owner of Arlene's Flowers, is thus a "person" subject to the WLAD, and the plain language of the WLAD reaches an individual (whether an owner, manager, agent, or employee) who violated the WLAD while on the job. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 354-60, 20 P.3d 921 (2001) (in employment discrimination case, holding that the WLAD authorizes liability for "both the individual supervisor who discriminates and the employer for whom he or she works"); *Marquis v. City of Spokane*, 130 Wn.2d 97, 103, 922 P.2d 43 (1996) (requiring the City of Spokane and individual city employees to stand trial for sex discrimination under the WLAD); *Lewis v. Doll*, 53 Wn. App. 203, 204, 765 P.2d 1341 (1989) (owner of 7-11 store sued individually, and held liable, under the WLAD for racial discrimination).

Because Mrs. Stutzman committed a WLAD violation, she is also personally liable under the CPA. Under the WLAD, "any unfair practice prohibited by [the WLAD] committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce." RCW 49.60.030(3). Thus, an unfair practice under the WLAD, occurring in trade or commerce, satisfies every element of a CPA claim where the unfair

practice results in injury (as will inevitably be the case). *E.g.*, *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (listing elements of CPA claim). Because Mrs. Stutzman is individually liable for her discriminatory act under the WLAD, she is individually liable for the injuries caused by that act under the CPA. RCW 49.60.030(3).

Ms. Stutzman is also individually liable under the CPA because the CPA applies to an individual's on-the-job conduct. In Washington, "[i]f a corporate officer participates in the wrongful conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties." *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976). This source of liability is unrelated to liability resulting from corporate veil piercing. *Id.* Indeed, a corporate employee may not be liable under theories of corporate veil piercing but, on the same facts, be personally liable for her violations of the CPA. *Id.* at 322 (even though veil piercing was unjustified, defendant was "independently liable for his role in formulating and supervising the . . . unlawful activities"); *accord Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552-54, 599 P.2d 1271 (1979) (finding that veil piercing was inappropriate, but holding corporate officer liable under *Ralph Williams*).

Mrs. Stutzman cites this body of law, but wrongly suggests that it depends on the existence of fraud. Br. of Appellants at 49. It does not.[20]

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[20] In support of this position, Defendants cite *One Pac. Towers Homeowners' Ass'n v. Hal Real Estate Invs., Inc.*, 108 Wn. App. 330, 347-48 (2001), *rev'd in part on other grounds*, 148 Wn.2d 319 (2002). In that case, the appellate court found that the conduct at issue was neither "so wrongful" nor so "deceptive" as to justify personal liability. *Id.* at 348. Here, Mrs. Stutzman's conduct was plainly wrongful, and it is not necessary

The rule this Court has articulated does not depend on the existence of fraud, deception, theft, or an intentional violation of the law, and it is more than broad enough to require personal liability for Mrs. Stutzman here: "If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties." *Grayson*, 92 Wn.2d at 554; *Ralph Williams*, 87 Wn.2d at 322.

D. Anti-Discrimination Laws Would be Undermined if Individual Religious Exemptions Were Permitted

This is a consequential case. A religious exception made here could have far reaching implications for all of anti-discrimination law. Mrs. Stutzman contends that the Court could, on a principled basis, limit exemptions to (1) "reasoned religious distinctions;" (2) expressive goods or services (as opposed to non-expressive goods and services) sold at expressive businesses (as opposed to non-expressive businesses); and (3) the public accommodations context (as opposed to employment or real estate contexts). As explained above, none of this is workable, necessary, or consistent with the well-established body of law upholding anti-discrimination statutes. *See, e.g.*, *Newman*, 256 F. Supp. at 945 (holding that a religious restaurant owner cannot discriminate against African American customers based on his religious beliefs). And Defendants certainly cannot offer a principled basis for limiting religious exemptions

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that she knew it was wrongful at the time. *E.g.*, *Lewis*, 53 Wn. App. at 210 ("Nor is the fact that [defendant] did not intend a discriminatory effect relevant" under the WLAD.); *Wine v. Theodoratus*, 19 Wn. App. 700, 706, 577 P.2d 612 (1978) (finding that intent is not necessary under the CPA, and that "good faith on the part of the [violator] is immaterial).

to sexual orientation discrimination, and not extending those same religious exemptions to discrimination based on other protected characteristics. *See, e.g.*, *Bob Jones Univ.*, 461 U.S. 574 (religiously motivated discrimination based on race); *Fremont Christian Sch.*, 781 F.2d 1362 (same, based on sex); *McClure*, 370 N.W.2d 844 (same, based on marital status); *Pines*, 206 Cal. Rptr. 866 (same, based on religious differences). An exception made for Mrs. Stutzman would place all of public accommodations law at risk.

The Court has no legal basis to take such a risk. Courts have approved anti-discrimination laws for well more than a century—since at least the "the Civil Rights Cases themselves, where Mr. Justice Bradley for the [U.S. Supreme Court] inferentially found that innkeepers, 'by the laws of all the States . . . are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.'" *Heart of Atlanta Motel*, 379 U.S. at 260 (quoting *Civil Rights Cases*, 109 U.S. 3, 25, 3 S. Ct. 18, 27 L. Ed. 835 (1883)). Courts have also uniformly upheld anti-discrimination laws in the face of more recent challenges by public accommodations refusing, for religious reasons, to provide goods and services for weddings between same-sex partners. *Masterpiece Cakeshop*, 2015 WL 4760453, at *1; *Elane Photography*, 309 P.3d at 77. The Court should not depart from this long, unbroken tradition of upholding statutes that prohibit discrimination in public commerce.

Nor should the Court embrace any suggestion that discrimination is acceptable as long as a customer is referred to another business willing to supply the goods or services requested. *E.g.*, Br. of Appellants at 48. Such a regime would mean the death of public accommodations law. Under such a regime, African American customers in the segregated South could have been "referred" to lunch counters down the street in an African American neighborhood. In the world posited by Defendants, customers could have no confidence any business would serve them. They would spend time and energy finding businesses that welcome them, and would suffer the indignity of being turned away by businesses that do not. One can even imagine a world where businesses would post signs (not unlike signs prevalent in the segregated South) announcing their preferences for certain customers and distaste for others. That is not a world we want to live in, and it is not a world permitted by the WLAD and other longstanding anti-discrimination laws.

V. REQUEST FOR ATTORNEYS' FEES AND COSTS

Pursuant to RAP 18.1, Mr. Ingersoll and Mr. Freed ask the Court to award them their attorneys' fees and costs on appeal. They were awarded attorneys' fees and costs in the trial court pursuant to RCW 49.60.030 and RCW 19.86.090 (CP 2555), and should, on the same bases, be awarded attorneys' fees and costs on appeal.

VI. CONCLUSION

For more than a century, the federal and state laws of our country have prohibited discrimination in places of public accommodation. Our tradition and our laws require businesses to serve the public without discriminating on impermissible bases. The core purpose of these laws is to preserve and protect the essential human dignity of all members of our diverse society in the sphere of public commerce. This Court should affirm the trial court's decision, and confirm that Washington law protects the citizens of this state from discrimination in places of public accommodation, including same-sex couples seeking goods and services for their weddings.

RESPECTFULLY SUBMITTED this 23rd day of December, 2015.

HILLIS CLARK MARTIN & PETERSON P.S.

By _____
Michael R. Scott, WSBA #12822
Amit D. Ranade, WSBA #34878
Jake Ewart, WSBA #38655

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
Margaret Chen, WSBA #46156

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Elizabeth Gill (Admitted *pro hac vice*)

Attorneys for Plaintiffs-Respondents
Robert Ingersoll and Curt Freed

CERTIFICATE OF SERVICE

On the date indicated below, I hereby certify that I caused to be served upon all counsel of record, via electronic and U.S. mail, a true and correct copy of the Brief of Respondents Ingersoll and Freed.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of December, 2015, at Seattle, Washington.

Suzanne Powers

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