NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Barronelle Stutzman is a Christian artist who imagines, designs, and creates floral art. She serves everyone and sells pre-arranged flowers for use in any event. But she cannot take part in or create custom art that celebrates sacred ceremonies that violate her faith.

After serving Robert Ingersoll, a gay client, for nearly ten years, Barronelle politely referred him to three other florists when he asked her to create floral art celebrating his same-sex wedding. That resulted in Washington's unprecedented attack on Barronelle in both her personal and professional capacities, and a ruling that she discriminated against Robert because of his sexual orientation. The ruling threatens to bankrupt her.

After this Court vacated and remanded in light of *Masterpiece Cakeshop*, the Washington Supreme Court doubled-down, reissuing most of its prior decision word for word and cabining *Masterpiece* to prohibit religious hostility *only* by adjudicators—not executive-branch officials like the State's Attorney General. In so doing, the court decided the following important federal questions in conflict with decisions of this Court and multiple Courts of Appeals:

1. Whether the State violates a floral designer's First Amendment rights to free exercise and free speech by forcing her to take part in and create custom floral art celebrating same-sex weddings or by acting based on hostility toward her religious beliefs.

2. Whether the Free Exercise Clause's prohibition on religious hostility applies to the executive branch.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner Arlene's Flowers, Inc. is a small Washington for-profit business owned by Petitioner Barronelle Stutzman, an individual and citizen of Washington. Arlene's has no parent companies, and no entity or other person has any ownership interest in it.

Respondent State of Washington is a government entity. Respondents Robert Ingersoll and Curt Freed are individuals and citizens of Washington.

LIST OF ALL PROCEEDINGS

Supreme Court of Washington, No. 91615-2, *State of Washington* v. *Arlene's Flowers, Inc.* & *Ingersoll* v. *Arlene's Flowers, Inc.*, judgment entered June 6, 2019.

U.S. Supreme Court, No. 17-108, *Arlene's Flowers, Inc.* v. *Washington*, judgment issued June 27, 2018.

Supreme Court of Washington, No. 91615-2, *State of Washington* v. *Arlene's Flowers, Inc.* & *Ingersoll* v. *Arlene's Flowers, Inc.*, judgment entered February 16, 2017.

Superior Court of Benton County, Washington, Nos. 13-2-00871-5 & 13-2-00953-3, *State of Washington* v. *Arlene's Flowers, Inc.* & *Ingersoll* v. *Arlene's Flowers, Inc.*, judgment entered February 18, 2015.

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The Washington Supreme Court's first decision affirming the judgments for Respondents is reported at 389 P.3d 543 (Wash. 2017), and reprinted at App.75a–131a.

This Court's order granting the petition for writ of certiorari, vacating the Washington Supreme Court's judgment, and remanding in light of *Masterpiece Cakeshop* is reported at 138 S. Ct. 2671 (2018), and reprinted at App.74a.

The Washington Supreme Court's second decision affirming the judgments for Respondents is reported at 441 P.3d 1203 (Wash. 2019), and reprinted at App.1a–73a.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its decision on June 6, 2019. Justice Kagan extended the time to file this petition until September 11, 2019. This Court has jurisdiction under 28 U.S.C. 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent text from the First and Fourteenth Amendments to the United States Constitution is found at App.278a. Relevant portions of the Washington Law Against Discrimination are reproduced at App.279a–83a.

INTRODUCTION

In *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), this Court granted review to decide whether the Free Exercise or Free Speech Clauses barred Colorado from using a public-accommodation law to compel cake artist Jack Phillips to participate in and create art celebrating a marriage that violated his religious beliefs. Because Colorado's hostility toward those beliefs so blatantly violated the Free Exercise Clause, this Court did not fully address all the issues presented. This case is an ideal vehicle to resolve the remaining questions.

In *Masterpiece*, this Court said that religious beliefs affirming marriage as the union of a man and a woman "are protected views and in some instances protected forms of expression," and that the government must treat those beliefs with "toleran[ce]" and "respect[ ]." 138 S. Ct. at 1727, 1731. Despite this call for civility, governments across the country have continued to slur, shun, punish, and threaten to imprison those whose faith compels them to honor their religious beliefs about marriage.

One of those vilified for living according to these beliefs is Washington's Barronelle Stutzman, who owns Arlene's Flowers and has practiced floral design for over 40 years. She serves everyone, including Respondents Robert Ingersoll and his same-sex partner, Curt Freed. For almost ten years, Barronelle and Robert built a friendship. During that time, she designed custom floral arrangements for his anniversaries and other events.

Barronelle's Christian beliefs prevent her from creating custom floral arrangements that celebrate same-sex weddings or from attending and participating in those ceremonies. She believes that marriage is sacred and that all wedding ceremonies hold deep religious meaning. When Robert asked Barronelle to create the floral designs for his marriage to Curt, she took Robert aside and, as she held his hands, shared how much she cared for him; then she explained her religious conflict. The two continued to talk, and Barronelle referred Robert to three nearby florists.

Barronelle's compassionate response epitomizes how Americans with differing marriage beliefs can peacefully coexist. While Robert is free to celebrate his and Curt's marriage, Barronelle should be equally free to practice her art without betraying the faith that inspires it. Instead, the State brought all its power down on Barronelle, seeking to compel her to create art against her conscience. The Attorney General concocted a one-of-a-kind lawsuit, prompting others to threaten and harass her. Yet the Attorney General did not investigate, demand assurances, or file suit when a gay coffee-shop owner berated and booted a group of Christians from his store based on religious views they expressed on a public street.

After the Washington Supreme Court ruled against Barronelle, this Court granted her petition and vacated and remanded in light of *Masterpiece*. 138 S. Ct. 2671 (2018). But on remand, the Washington Supreme Court construed *Masterpiece*'s condemnation of religious hostility as applicable only to "adjudicatory bodies," App.19a–21a, ignored all evidence of the Attorney General's hostility toward Barronelle's faith, App.21a–26a, and issued a decision

that restated most of its first opinion verbatim, App.3a–73a & n.1. The court did not believe *it* acted intolerantly, even though it refused to recognize the obvious distinction between Barronelle's undisputed willingness to serve gay customers and her limited conflict with celebrating a sacred event that violates her faith. The court branded Barronelle a "discriminator" and ordered her to attend, facilitate, and create custom floral art celebrating all marriages or none. And it imposed personal liability on her. Barronelle now stands to lose nearly everything she owns.

Barronelle is hardly alone in facing harsh punishment for her religious beliefs on marriage:

- Shortly after Jack Phillips prevailed in *Masterpiece*, Colorado sued him again. One of the commissioners who launched the new suit called him a "hater," and two more expressed support for the very comments that *Masterpiece* called disrespectful and disparaging of religion.[1]
- East Lansing expelled a family-run apple orchard located 22 miles outside of town from its farmer's market—where the orchard served everyone and received wide acclaim—after the owner posted his Catholic marriage beliefs on Facebook. City officials mocked his beliefs as "ridiculous,

[1] Am. Compl. ¶ 259, *Masterpiece Cakeshop, Inc.* v. *Elenis*, No. 18-cv-02074 (D. Colo. Oct. 23, 2018); Caleb Parke, *Colorado Commission drops case against Christian baker*, Fox News (Mar. 5, 2019), https://fxn.ws/2jZEpvA; Audio of Commissioner Fabrizio, http://bit.ly/2lFKFZZ; Audio of Commissioner Lewis, http://bit.ly/2m3bHut.

horrible, [and] hateful" and considered them "the same" as views promoting racism.[2]

- Phoenix insists that if the owners of a calligraphy and hand-painting studio paint a wedding sign with scripture declaring that God has joined a man and a woman as "one flesh," they must write the same message—and draw an image of two grooms or two brides—for a same-sex wedding or face jail time.[3]
- Minnesota interprets its public-accommodation law to require a film studio that tells stories celebrating weddings uniting a man and a woman to either communicate equally "positive" messages about same-sex weddings or stop speaking about marriage at all.[4]
- And New York State is terminating a faith-based adoption provider for declining to make placements that violate its religious beliefs about marriage, even though the organization funds its own operations and needs only a government license to operate.[5]

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[2] Mem. in Supp. of Pls.' Mot. for Summ. J. 1, 4, *Country Mill Farms, LLC* v. *City of East Lansing*, No. 1:17-cv-487 (W.D. Mich. Jan. 24, 2019).

[3] Pet. for Review 4–5, *Brush & Nib Studio* v. *City of Phoenix*, No. CV-18-0176 (Ariz. July 9, 2018); Oral Argument at 35:54–36:48 (Jan. 22, 2019), http://bit.ly/2k4SMyL.

[4] *Telescope Media Group* v. *Lucero*, __ F.3d __, 2019 WL 3979621, at *2 (8th Cir. Aug. 23, 2019).

[5] Opening Br. of Appellant 3–12, *New Hope Family Servs., Inc.* v. *Poole*, No. 19-1715 (2d Cir. Aug. 15, 2019). See also Compl. 2–

These First Amendment violations must stop. Absent this Court's review, government officials will keep dragging "reasonable and sincere people" of faith like Barronelle through the courts, *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2594 (2015), imposing ruinous judgments, and barring them from their professions simply because they hold disfavored views about marriage.

Religious people should be free to live out their beliefs about marriage. But states like Washington afford that freedom only to people who support same-sex marriage, while stripping it from Barronelle and others like her. Only this Court can resolve the numerous First Amendment conflicts these issues have created, restore the balance that the Constitution requires, and set precedent that will protect people across the political spectrum in present and future cultural debates. Certiorari is warranted.

4, *Catholic Charities W. Mich.* v. *Mich. Dep't of Health & Human Servs.*, No. 2:19-cv-11661 (E.D. Mich. Apr. 25, 2019) (same issue in the context of a government-funded agency).

STATEMENT OF THE CASE

A. Barronelle's custom floral designs and participation in weddings

Barronelle learned the art of floral design from her mother, who pioneered the family business. App.377a. Unchallenged expert evidence establishes that floral art dates from "ancient times," App.399a, and that, like other forms of visual art, it incorporates artistic principles such as balance and harmony, App.398a. Barronelle's floral expert confirmed that she "approaches wedding arrangements as an artist." App.400a–01a.

Like all artists, Barronelle speaks through her custom creations. Floral designs "celebrate the happy and joyous occasions of life" and "express emotions from deep within the soul." Wash. Sup. Ct. Clerk's Papers ("CP") 692. Unrebutted expert testimony substantiates that Barronelle's creations are multi-media works incorporating flowers—together with "fabrics, pictures, and a variety of other objects," App.399a—to convey "expressive message[s]," App.380a; see also App.377a, 399a–400a; and that she has her own "recognizable" style, App.400a–01a.

As a Christian, Barronelle sincerely believes she must use her artistic skills and business to honor God. App.376a–77a. Her faith teaches that marriage is a sacred covenant between one man and one woman. App.381a, 387a. Barronelle's theological expert confirmed her belief that all weddings are sacred events, no matter whether the marriage is performed in a church or if the couple shares her beliefs. CP606–07.

Barronelle loves designing custom wedding arrangements because it allows her to celebrate a relationship created by God with eternal importance. App.380a–81a.

Much like installation art, Barronelle's custom wedding work involves creating individual pieces—such as bride and bridesmaid bouquets, arches, boutonnieres, pew markers, and centerpieces—and then weaving them into a larger artistic whole to express celebration for the couple's marriage. App.382a–83a, 400a. Robert and Curt admit that wedding flowers convey a "celebratory" message or atmosphere. CP1752, 1858. And through iconic wedding arrangements like bridal bouquets, Barronelle's art announces the event as a wedding and the couple's union as a marriage. App.382a–83a.

Barronelle's creative process begins with getting to know the couple and their story so she can tailor her designs to express their "relationship and personalities" and celebrate the two becoming one. App.381a–82a; see also App.408a–09a (testimony of past wedding client discussing this process). Every floral designer who testified in this case agreed that creating custom wedding designs demands intense personal investment. App.381a–82a, 385a, 399a–401a, 405a. That personal tie is heightened by Barronelle's "religious beliefs about the importance of marriage." App.385a.

Besides design work, Barronelle often provides "full wedding support" for large weddings or longtime clients. App.383a–85a. Those paid services include delivering wedding arrangements in company vans,

positioning her floral art at the ceremony venue, making last-minute adjustments, and attending and participating in the ceremony itself by—for instance—pinning the groomsmen's boutonnieres and family members' corsages and adjusting those pieces before the bridal party walks down the aisle. App.383a, 410a–11a; CP1589–90. She does "whatever it takes" to make the wedding a success. App.384a.

Over many decades, Barronelle designed the arrangements for "a large number of weddings," CP1591, approximately two to three per month, CP1672. Weddings are Barronelle's favorite work because designing those custom arrangements is the highest form of her art and because weddings have special religious significance for her. App.380a–81a. Demonstrating her artistic skill and excellent personal service at weddings also plays a key role in generating future business. App.381a, 400a, 411a.

B. Barronelle's relationship with Robert and her decision not to take part in his wedding

Barronelle serves and develops friendships with customers "of all different backgrounds and beliefs." App.380a. Her love for people—and desire to treat them with dignity and respect—is a part of her Christian faith. App.379a; CP609. Barronelle regularly serves and hires LGBT individuals. A former gay employee described her as "one of the nicest women [he's] ever met" and said she is "very kind" to LGBT employees and customers alike. App.404a–05a.

For nearly ten years, Barronelle was Robert's florist. App.372a–73a, 385a. Barronelle still considers Robert one of her favorite clients. They had a "warm and friendly" relationship, App.373a; CP1750; and Robert commissioned 30 or more arrangements from Barronelle, CP1735.

Robert valued Barronelle for her artistry and almost always commissioned innovative floral arrangements. CP1737–38. Very rarely did he purchase premade arrangements, CP1737, and never did he buy flowers to arrange himself, CP1797. Instead, Robert would give Barronelle a "message" for her to communicate with flowers, CP1797, and say "[d]o your thing," CP1611.

This creative partnership resulted in Barronelle designing arrangements for Robert and Curt's anniversaries and as Valentine's Day gifts. CP1607, 1735. Robert and Curt were "always . . . happy," CP1740–41, with Barronelle's "exceptional creativity," CP1852, "thoughtful" designs, CP1745, and "amazing work," CP1746.

Soon after Washington began recognizing same-sex marriage, Robert and Curt decided to marry and ask Barronelle "do the flowers." CP350. Robert came to the shop and asked for Barronelle, but she was not there, so an employee provided Robert with a copy of her schedule. CP350. Meanwhile, the employee told Barronelle about Robert's visit. App.386a.

Barronelle had never before received a same-sex wedding request. App.387a; CP1612–14. Because Robert almost "always requested complex and intricate work," and because he was a longtime customer, Barronelle was sure he wanted her "to custom design

his floral arrangements" and "provide full wedding support" at the ceremony. App.386a–87a. She prayed with her husband, looked to her faith, and "decided that [she] could not in good conscience participate" in Robert's same-sex wedding. App.387a–88a.

When Robert returned to the shop, Barronelle walked with him to a quiet corner, "gently took his hand, looked him in the eye, and told him that [she] could not do his wedding"—or "be a part of his event"—because of her "relationship with Jesus Christ." App.388a; CP1615–16. Robert testified that she took no "joy or satisfaction" in having to tell him that. CP1764. Robert said he understood, and they discussed his engagement and wedding plans. App.389a; CP1618. Barronelle gave him the names of three nearby floral artists she knew would do a good job. App.388a. They hugged, and Barronelle expected they would remain friends with a disagreement about marriage. App.389a.

Barronelle's conversation with Robert became public after Curt posted on Facebook and media picked up the story. CP1757, 1860. Curt said that he understood Barronelle's position from a "political and religious" perspective. CP1262. As a result of the media coverage, Robert and Curt experienced an "amazing outpouring of support," CP1757, 1860, including enough offers of free floral designs that they "could get married about 20 times," CP1271.

Robert and Curt were married a few months later in their home at a small ceremony. CP1798–99. A minister presided and explained the meaning of their marriage vows, as well as marriage's significance. CP1488, 1803–04. The couple exchanged rings and

celebrated with "custom-designed" corsages and boutonnieres created by a friend and with a "beautiful" floral arrangement created by a designer Barronelle recommended. CP1747–48, 1801.

As media coverage escalated, Barronelle began receiving calls and needed to decide how to respond to future wedding requests. Because Barronelle views weddings as inherently religious events, and because she personally participates in them, she established a policy that Arlene's Flowers will refer requests to create custom floral designs and provide full wedding support for same-sex weddings. App.389a; CP1640.

But Arlene's Flowers will sell premade arrangements (those already created and offered for sale), unarranged flowers, and materials for use in same-sex weddings. App.389a–90a; CP1642. And Barronelle continues to offer custom floral art for same-sex couple's anniversaries, child adoptions, Valentine's Day requests, and other life events. App.390a; CP1607, 1637.

C. The Washington Attorney General's punishment of Barronelle

News reports brought Barronelle and Robert's conversation to the Washington Attorney General's attention. CP1296–97. Although Robert and Curt never filed a complaint, CP1503-04, the Attorney General personally called Curt three times to offer support and say that his office was "research[ing] . . . options . . . to pursue this issue," CP1476–77, 1886–88.

The Attorney General kept his promise. His office sent Barronelle a certified letter demanding that she take part in same-sex wedding ceremonies or give up her wedding business. App.365a–70a. If she refused to sign an Assurance of Discontinuance, the office would take formal action. App.367a. Barronelle declined the ultimatum, so the Attorney General sued Arlene's Flowers and Barronelle personally. App.350a–56a. Never before in the history of the State's Consumer Protection Act ("CPA") had the Attorney General pursued a CPA claim based on a violation of the Washington Law Against Discrimination ("WLAD"). CP1502–03. Even though the Attorney General's Office usually refers WLAD complaints to the Washington State Human Rights Commission, it bypassed the Commission here. Working with the Attorney General, Robert and Curt filed a similar lawsuit, App.357a–64a, and the two cases were effectively consolidated.

After the Attorney General's highly publicized lawsuit,[6] Barronelle was inundated with "hate-filled phone calls, emails, and Facebook messages" that contained profanity, attacks on her faith, and "explicit threats against [her] safety, including a threat to burn down [her] shop." App.390a. Six years later, she remains in litigation that could cost her nearly everything she owns.

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[6] News Release, Wash. Attorney General, *AG Ferguson Files Consumer Protection Action Against Tri-Cities Florist* (Apr. 9, 2013), https://bit.ly/2jThaDo.

D. Washington courts' rulings

Although Barronelle designed custom floral art for Robert and Curt for nearly ten years knowing they were in a same-sex relationship, a state trial court declared her guilty of sexual-orientation discrimination for declining to celebrate their wedding ceremony. App.180a–87a, 190a–95a. It rejected Barronelle's free-exercise defense by, among other things, characterizing the WLAD as a neutral and generally applicable law, App.200a–02a, and it bypassed her free-speech defense by holding that there can never be "a free speech exception (be it creative, artistic, or otherwise) to" public-accommodation laws, App.199a.

The Attorney General then requested—and the trial court granted—summary judgment and a permanent injunction prohibiting "any disparate treatment in the offering or sale of goods, merchandise or services . . . to same-sex couples," including those Arlene's Flowers provides "for weddings." App.135a. It did so over Barronelle's explicit objection that this would require her to "physically appear at" and participate in same-sex wedding ceremonies. App.319a. And the trial court held Barronelle personally liable for a not-yet-determined amount of damages and attorney fees. App.141a.

The Washington Supreme Court affirmed, holding that Barronelle's "refusal to provide custom floral arrangements for a same-sex wedding violated the WLAD's prohibition on discrimination in public accommodations," App.97a, because "[d]iscrimination based on same-sex marriage constitutes discrimination on the basis of sexual orientation," App.130a. The court rejected Barronelle's free-exercise defense

by (1) ignoring her compelled-participation argument and refusing to address the language in the trial court's injunction compelling her to take part in same-sex weddings, (2) declaring the WLAD a neutral and generally applicable law that satisfied even strict scrutiny under the state constitution, and (3) deeming the hybrid-rights doctrine inapplicable. App.108a–25a, 127a–28a. Free-speech protections also did not apply in the court's view. App.97a–107a. It upheld the trial court's summary-judgment ruling, permanent injunctions, and final judgments. App.130a–31a.

E. This Court's remand and subsequent proceedings

Barronelle sought this Court's review of her free-exercise and free-speech claims. Pet. for a Writ of Cert., *Arlene's Flowers, Inc.* v. *Washington*, No. 17-108 (July 14, 2017). The Court granted Barronelle's petition, vacated the decision below, and remanded for reconsideration in light of *Masterpiece*. App.74a.

On remand, Barronelle argued that the State violated her free-exercise rights. First, the trial court's order would require Barronelle to personally participate in wedding ceremonies—events she considers sacred—that violate her faith.[7] App.285a, 288a–95a. Second, the Attorney General was hostile to Barronelle's religious beliefs about marriage, likened them to racist views, and sought to punish them via an unprecedented lawsuit. App.285a. Yet

[7] Contrary to the Washington Supreme Court's contention, App.4a, 12a, Barronelle has maintained at every stage that the State's injunctions require her to participate in same-sex weddings. *E.g.*, App.285a, 288a–300a, 311a–13a, 318a–19a, 337a.

the Attorney General let the gay owner of a coffee shop off scot-free after he expelled a group of Christians in October 2017 because they distributed religious flyers on the street. App.285a. Barronelle proffered evidence of the incident, but the court rejected it and related evidence as "irrelevant." App.21a–26a.[8]

Barronelle also maintained that forcing her to create floral art celebrating same-sex weddings violated her free-speech rights. App.285a–86a. In support, she cited principles discussed in *Masterpiece* and this Court's recent decisions in *Janus* v. *American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018), and *National Institute of Family and Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*").

But the Washington Supreme Court punished Barronelle again and reinstated its prior decision—reciting most of its first ruling verbatim. App.3a–73a & n.1. The court cabined *Masterpiece* to forbid hostility only by "adjudicatory bodies," App.19a–21a, holding that the Attorney General's hostility toward Barronelle's faith was irrelevant, App.21a–26a.

The court refused to address the free-exercise ramifications of compelling Barronelle to participate in sacred ceremonies because it said she is not paid to sing or clap at those events. App.12a. But it ignored that the injunctions require Barronelle to deliver wedding arrangements to the ceremony venue,

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[8] Petitioners presented a declaration authenticating a video of the coffee-shop incident to the Washington Supreme Court. That video is publicly available at https://bit.ly/2SNo7m3.

decorate the location with her art, and attend the ceremony to assist the wedding party and ensure her arrangements look beautiful throughout. App.383a, 410a–11a; CP1589–90.

Likewise, the Washington Supreme Court snubbed this Court's free-speech discussions in *Masterpiece*, *Janus*, and *NIFLA*. From its perspective, *Masterpiece* was irrelevant because it did not "reconcile" the conflict between public-accommodation laws and free-speech rights, App.16a; and *Janus* and *NIFLA* were "outside the scope of the remand" and immaterial because they did not specifically address "public accommodations statute[s]," App.21a n.5.

REASONS FOR GRANTING THE WRIT

The First Amendment's free-exercise and free-speech guarantees unite in a common purpose—to ensure freedom of conscience for all. *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943). But the Washington Supreme Court's ruling strips that freedom from those who continue to hold the honorable belief that marriage is a union between one man and one woman. This Court's review is needed to ensure that people of faith have the freedom to live according to their beliefs about marriage, and to bar governments from mandating which sacred events merit celebration. *Barnette*, 319 U.S. at 642.

This Court granted the petition in *Masterpiece* to resolve these very questions. But the Court did not fully answer them. As a result, government officials and courts have continued to punish people like Barronelle because of their beliefs about marriage, almost as if *Masterpiece* never happened. This case is a strong vehicle to address those unanswered questions. And additional percolation of the growing decisional conflicts is unnecessary. It will serve only to further erode civility and harm more citizens forced to speak or act against their conscience.

Here, Washington has violated Barronelle's First Amendment rights in three ways. First, the State requires her to take part in what she believes to be sacred ceremonies that violate her faith. The Free Exercise Clause protects against this kind of compelled participation.

Second, the State forces Barronelle to create custom floral art celebrating same-sex marriage through a content-based application of its public-accommodation law. Barronelle's custom wedding arrangements communicate celebratory messages about marriage. As noted below, even the Attorney General conceded that Barronelle's wedding designs are expression. And the State can no more compel Barronelle to express celebratory messages through her art than it can force her to say them with her lips. The Washington Supreme Court's contrary view conflicts with this Court's decisions in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), *Janus*, *NIFLA*, and many others, and with the Eighth Circuit's ruling in *Telescope Media Group* v. *Lucero*, __ F.3d __, 2019 WL 3979621 (8th Cir. Aug. 23, 2019).

Third, the State acted with hostility by targeting Barronelle's religious beliefs for punishment. The Attorney General manufactured a novel lawsuit to punish Barronelle personally, yet did nothing when a gay coffee-shop owner expelled Christians for their religious speech on a public street and yelled: "I'd f— Christ in the a—, okay. He's hot." Bedlam Coffee Video, https://bit.ly/2SNo7m3. The Washington Supreme Court ignored this hostility by holding that the requirement of religious neutrality does not apply to executive officials. And that court exhibited its own "subtle departures from neutrality" on matters of religion, *Masterpiece*, 138 S. Ct. at 1731, by ignoring Barronelle's near decade of service to Robert and Curt and denouncing her decision not to take part in a single sacred event as invidious status-based discrimination.

Each of these First Amendment infringements is an independent basis for reversal. But the First Amendment violation becomes more egregious as each infringement mutually reinforces the others under the hybrid-rights doctrine.

Because Barronelle declined to join in celebrating a sacred event that violates her beliefs, her 40 years of wedding artistry is over, and her life savings is in jeopardy. This Court should grant the petition and stop the State from wielding its coercive power to banish Barronelle from the wedding industry and ruin her financially simply because she followed the tenets of her faith.

I. Requiring Barronelle to participate in sacred ceremonies that violate her faith conflicts with this Court's case law and presents a national issue of great importance.

The First Amendment prohibits government action that "force[s] . . . a person to go to" a sacred event "against [her] will," *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947), or that "in effect require[s] participation in a religious exercise," *Lee* v. *Weisman*, 505 U.S. 577, 594 (1992). Both the Free Exercise and Establishment Clauses promise this basic liberty. *Masterpiece*, 138 S. Ct. at 1727 (compelling clergy to perform same-sex wedding ceremony would deny their "right to the free exercise of religion"); *Lee*, 505 U.S. at 594 (discussing corresponding Establishment Clause principles). By demanding that Barronelle attend the ceremony and participate in celebrating a view of marriage that

violates her faith, *Barnette*, 319 U.S. at 633, Washington disavowed its "own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people," *Lee*, 505 U.S. at 592. This issue of compelled-participation in sacred ceremonies presents a critical constitutional question that warrants this Court's intervention.

"Marriage is sacred to those" like Barronelle "who live by their religions." *Obergefell*, 135 S. Ct. at 2594; *Turner* v. *Safley*, 482 U.S. 78, 96 (1987) (similar). Barronelle's faith teaches that all weddings are innately religious, App.381a; CP606–07; and she cannot participate in celebrating a marriage ceremony that is not between one man and one woman, App.387a–88a; CP608-09. These ceremonies often contain explicit religious components. In fact, a minister presided over Robert and Curt's ceremony, explained marriage's importance, and led the couple in reciting vows. CP1488, 1803–04.

The State's injunctions command Barronelle to perform for same-sex weddings those "services offered" for weddings between a man and a woman. App.135a, 140a. Barronelle is an active participant in her clients' weddings. She imagines, designs, and creates floral art that celebrates the wedding; delivers her creations to the venue; adorns the site—and the participants—with her art; attends the ceremony; and does whatever it takes to make the ceremony a success. App.380a–85a. Because she does all this to celebrate weddings consistent with her beliefs, the State insists she must do it for weddings that violate her faith. Though the First Amendment prohibits government from forcing Barronelle to attend and participate in sacred ceremonies, the Washington

Supreme Court refused to consider this religious-liberty violation. App.4a, 12a. Such a deep intrusion into religious exercise justifies this Court's review.

The Washington Supreme Court's primary answer to this free-exercise concern was that Barronelle is not paid to sing or clap at weddings. App.12a. But she is paid to decorate the venue with her art and attend the ceremony to assist the wedding party and ensure her arrangements are beautiful throughout. App.383a, 410a–11a; CP1589–90. The First Amendment forbids that kind of compelled participation. That is especially true when a conscientious objector like Barronelle reasonably believes that partaking in a "group exercise" like a marriage ceremony "signifie[s] her own participation" in it. *Lee*, 505 U.S. at 593; *Barnette*, 319 U.S. at 631–33 & n.13. The constitutional violation does not hinge on whether the government forces a conscientious objector to sing or clap.

The Washington Supreme Court also suggested that Barronelle's compelled-participation claim was foreclosed by *Employment Division* v. *Smith*, 494 U.S. 872 (1990). App.50a–56a. But government practices clearly at odds with our nation's history and traditions are not subject to *Smith*'s neutrality and general-applicability rule. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 190 (2012) ("The contention that *Smith* forecloses recognition of" well-established historical precepts "rooted in the Religion Clauses has no merit"); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (refuting the notion "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause"); see also *Masterpiece*, 138 S.

Ct. at 1727 (clergy cannot "be compelled to perform [a same-sex wedding] ceremony" without violating "right to the free exercise of religion").

Our nation's history and traditions have long outlawed compelled participation in religious events. Forced attendance at religious services was a hallmark of the Old World and one of the evils the First Amendment was created to remedy. *Everson*, 330 U.S. at 10–11 (outlining this history). Such government coercion was "well known to the framers of the Bill of Rights." *Barnette*, 319 U.S. at 633. After all, when many colonists fled for our shores, English law compelled attendance at religious services. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2144 (2003). But the Framers repudiated that practice. And *Smith* cannot compel a result so obviously in conflict with our history. Indeed, even the attorney representing the same-sex couple in *Masterpiece* admitted that future cases requiring people like Barronelle to attend or "physical[ly] participat[e]" in wedding ceremonies they "deeply oppose[ ]" might not be "governed by *Smith*." Oral Argument Tr. 77–78.

Nor does *Smith*'s rule control when governments "impose special disabilities on the basis of religious views." *Smith*, 494 U.S. at 877; accord *Trinity Lutheran*, 137 S. Ct. at 2021. Yet that is precisely what the State has done here. It has uniquely disadvantaged religious creative professionals who work in the wedding industry, believe that marriage is between one man and one woman, and are unable to attend and participate in wedding ceremonies contradicting that belief. The State has taken away their right to

earn a living by celebrating and taking part in wedding ceremonies that comport with their faith. Because of this special disability, *Smith* does not apply.

If *Smith* allows the State to compel Barronelle to attend and participate in sacred events contrary to her faith, it should be overruled, as many Members of this Court have suggested. *E.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting); *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 559–77 (1993) (Souter, J., concurring in part and concurring in the judgment). The First Amendment's text "guarantees the free *exercise* of religion, not just the right to inward belief." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring). It is inconceivable that the Constitution's protection for religious exercise allows the government to force Barronelle to join in a religious exercise that violates her faith.

Smith's decision to "drastically cut back on the protection provided by the Free Exercise Clause," *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., respecting the denial of certiorari), has never become ingrained in the law because it was wrongly decided, ignored the Free Exercise Clause's text and history, rewrote precedent, has proven inadequate and unworkable in practice, and has "harmed religious liberty." *City of Boerne*, 521 U.S. at 547 (O'Connor, J., dissenting); see generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

The people that *Smith* harms the most are those like Barronelle who hold disfavored religious beliefs or engage in disfavored religious practices. Barronelle should not be another one of *Smith*'s victims.

II. The Washington Supreme Court's decision conflicts with the free-speech precedent of this Court and multiple circuits.

Masterpiece recognized that "objections to gay marriage" can implicate "protected forms of expression," 138 S. Ct. at 1727, and that cases like Barronelle's "can deepen our understanding" of the Free Speech Clause's meaning, *id.* at 1723. Tellingly, the State admitted below that Barronelle's custom floral arrangements are "a form of expression." Oral Argument Video at 40:49–40:53, https://bit.ly/2SP3aaj. But the Washington Supreme Court nullified this concession and held that Barronelle's floral art "does not implicate" her expressive freedom. App.41a.

That holding conflicts with this Court's compelled-speech jurisprudence, including cases like *Hurley*, *Janus*, and *NIFLA*, and decisions by the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Those decisions collectively establish that (1) Barronelle's custom wedding art is protected expression, (2) forcing her to create custom floral designs celebrating same-sex weddings violates the compelled-speech doctrine, (3) the State applies its public-accommodation statute to speech based on its content, and (4) this application of the State's public-accommodation statute does not satisfy strict scrutiny.

A. By holding that Barronelle's custom wedding arrangements are not protected expression, the Washington Supreme Court's ruling conflicts with decisions of this Court and multiple circuits.

This Court's definition of "speech" extends to artistic expression, *Hurley*, 515 U.S. at 569, such as "pictures, films, paintings, drawings, and engravings," *Kaplan* v. *California*, 413 U.S. 115, 119–20 (1973), and even abstract art like Pollock's paint drips and Schöenberg's atonal instrumentals, *Hurley*, 515 U.S. at 569. It also includes expressive conduct as diverse as "nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, . . . and flying a plain red flag." *Masterpiece*, 138 S. Ct. at 1741–42 (Thomas, J., concurring).

Barronelle introduced unopposed expert testimony establishing that her custom wedding designs are artistic expression akin to other visual art. App.398a–401a. But the Washington Supreme Court ruled that her floral art "is not 'speech' in a literal sense," App.42a, and that judges "cannot be in the business of deciding which businesses" merit speech protection, App.49a. Contra *NIFLA*, 138 S. Ct. at 2373 ("[T]his Court's precedents have long drawn" "the line between speech and conduct"). The court also held that Barronelle's custom floral arrangements are not protected as expressive conduct. App.49a.

Neither holding comports with this Court's or Courts of Appeals' precedent. Speech protection applies to more than "written or spoken words." *Hurley*, 515 U.S. at 569. That is why seven circuits

have held that visual art merits full speech protection. *Mastrovincenzo* v. *City of N.Y.*, 435 F.3d 78, 96 (2d Cir. 2006) (custom-painted clothing); *ETW Corp.* v. *Jireh Publ'g, Inc.*, 332 F.3d 915, 924–25 (6th Cir. 2003) (original artwork); *Piarowski* v. *Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (stained-glass windows); *Telescope Media*, 2019 WL 3979621, at *4 (films); *Anderson* v. *City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (tattooing); *Cressman* v. *Thompson*, 798 F.3d 938, 952–53 (10th Cir. 2015) (images); *Buehrle* v. *City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (tattooing).

The Washington Supreme Court's ruling also ignores the factors this Court and the Second, Seventh, Ninth, and Tenth Circuits use to evaluate whether an item constitutes speech. Those factors include that Barronelle intends to, and does in fact, communicate through her custom wedding arrangements and her participation in the event. *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (video games are speech because they "communicate"). See App.380a. Such considerations also include that Barronelle's wedding arrangements have no "non-expressive purpose or utility," and that their sole purpose is to express a message: celebration of a marriage. *Mastrovincenzo*, 435 F.3d at 95 (custom artistic goods with a "dominant expressive purpose" have a strong claim to speech protection). Accord, *e.g.*, *White* v. *City of Sparks*, 500 F.3d 953, 956 n.4 (9th Cir. 2007); *Cressman*, 798 F.3d at 952-54; *Piarowski*, 759 F.2d at 628.

Given the obviously artistic and expressive nature of Barronelle's custom wedding designs, it is no surprise that the Attorney General admitted they are

a form of expression. As multiple Justices observed about the wedding cake in *Masterpiece*: "The use of [a creative professional's] artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing or flying a plain red flag." 138 S. Ct. at 1743 (Thomas, J., concurring) (cleaned up); *id.* at 1738 (Gorsuch, J., concurring) (similar).

The Washington Supreme Court's response was that "refus[ing] to provide flowers for a wedding does not inherently express a message about that wedding." App.43a. But that is the wrong question. Barronelle's claim is that her custom wedding art is itself expressive, not simply that the act of declining to create it is expressive. App.42a (recognizing Barronelle argued that "creating floral arrangements for wedding ceremonies" is expressive).

Masterpiece and *Hurley* make the error plain. In *Masterpiece*, this Court asked whether "a beautiful wedding cake" is "an exercise of protected speech." 138 S. Ct. at 1723. And in *Hurley*, this Court held that the parade was expressive. 515 U.S. at 568–69. Both times the Court focused on the alleged expression, not just the "act" of declining to create or participate in expression. The opinion below contradicts these cases.

Placing the focus on Barronelle's wedding art confirms that free-speech protections apply here. It simply cannot be that the First Amendment treats child pornography, *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 240 (2002), and sleeping in tents, *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 293

(1984), as expression while excluding Barronelle's original wedding designs from protection.

B. By compelling Barronelle to create objectionable expression, the Washington Supreme Court's ruling conflicts with decisions of this Court and multiple circuits.

The government may not compel individuals or businesses to express objectionable messages. *E.g.*, *NIFLA*, 138 S. Ct. at 2371–76 (law demanding that pro-life pregnancy centers communicate information about state-subsidized abortions); *Wooley*, 430 U.S. at 717 (law forcing religious objectors to display the state motto on their license plates); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (law ordering newspaper to print politician's rejoinder to negative coverage); *Telescope Media*, 2019 WL 3979621, at *3–10 (law requiring filmmakers who desire to tell stories about weddings between one man and one woman to tell stories about same-sex weddings). "[F]reedom of speech includes . . . the right to refrain from speaking." *Janus*, 138 S. Ct. at 2463.

Forcing Barronelle to create art that celebrates same-sex marriage violates the "'cardinal constitutional command' against compelled speech." *Telescope Media*, 2019 WL 3979621, at *5 (quoting *Janus*, 138 S. Ct. at 2463). "Compelling speech in this manner . . . 'is always demeaning.'" *Ibid.* (quoting *Janus*, 138 S. Ct. at 2464).

Spurning this precedent, the Washington Supreme Court held that the State can apply the WLAD to require Barronelle to create art celebrating

same-sex weddings. App.49a. And the Attorney General insisted that Washington can force poets to write poems celebrating same-sex marriage, and floral designers to use flowers to spell phrases like "God bless this marriage." Oral Argument Video at 33:40–34:36, 41:36–42:59, https://bit.ly/2SP3aaj.

The court below gave two flawed justifications for compelling Barronelle's artistic expression. First, the court distinguished compelled speech from commercial activity. App. 45a n.18. But "a speaker is no less a speaker because he or she is paid to speak." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). That is why the Second, Sixth, Eighth, Ninth, and Eleventh Circuits have granted full speech protection to visual art sold for profit. *Bery* v. *City of N.Y.*, 97 F.3d 689, 695, 697 (2d Cir. 1996); *ETW Corp.*, 332 F.3d at 918, 924; *Telescope Media*, 2019 WL 3979621, at *4; *White*, 500 F.3d at 957; *Buehrle*, 813 F.3d at 978.

Second, the Washington Supreme Court held that the compelled-speech doctrine does not apply to "paradigmatic public accommodation[s]," App.45a n.17, that are "traditionally . . . subject to antidiscrimination laws," App.45a. Yet *Hurley*, which held that Massachusetts cannot use its public-accommodation law to force parade organizers to express unwanted messages, was a public-accommodation case. And it declared that protection against compelled speech applies to "business corporations generally," 515 U.S. at 574, even when those businesses do not originate the "item[s] featured in the[ir] communication," *id.* at 570.

In addition, the Eighth Circuit recently held that Minnesota cannot use a public-accommodation law to compel a film studio—a for-profit business—to create films telling stories of same-sex marriages just because they create films celebrating marriages between one man and one woman. *Telescope Media*, 2019 WL 3979621, at *6. By allowing the State to apply its public-accommodation law to force Barronelle to celebrate same-sex marriage through her floral art, the Washington Supreme Court's ruling squarely conflicts with both *Hurley* and *Telescope Media*.

The court below erred in relying on *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). App.42a–43a. Unlike the law schools in *FAIR*, Barronelle does not object to letting *others* speak; she objects to expressing celebratory messages through *her own* art. *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *FAIR*'s compelled "[f]acilitation of speech" for another person from the government's "co-opt[ing]" a person's "own . . . speech"). In a situation like this, *FAIR* does not control.

C. By upholding a content-based application of a public-accommodation law, the Washington Supreme Court's ruling conflicts with decisions of this Court and the Eighth Circuit.

A public-accommodation law like the WLAD is content based when applied to compel speech. By treating Barronelle's decision to speak in celebration of one topic—marriage between one man and one

woman—as "a trigger" for compelling her to speak celebratory messages about a topic she does not want to address—same-sex marriage—the WLAD "mandates speech that a speaker would not otherwise make" and "exacts a penalty on the basis of the content of" speech. *Telescope Media*, 2019 WL 3979621, at *6 (quoting *Riley*, 487 U.S. at 795, and *Tornillo*, 418 U.S. at 256) (cleaned up).

Laws that regulate speech based on its content are subject to strict scrutiny. *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). But the Washington Supreme Court did not apply strict scrutiny to Barronelle's compelled-speech claim. App.49a. That decision conflicts with this Court's compelled-speech cases and the Eighth Circuit's ruling in *Telescope Media*.

D. The Washington Supreme Court's strict-scrutiny analysis conflicts with decisions of this Court and the Eighth Circuit.

The Washington Supreme Court concluded that even if strict scrutiny applied, the State could satisfy it. App.63a–67a. But this too conflicts with this Court's decisions and *Telescope Media*. Relying on this Court's free-speech cases like *Hurley*, the Eighth Circuit held that "regulating speech because it is [allegedly] discriminatory or offensive is not a compelling state interest, however hurtful the speech may be." *Telescope Media*, 2019 WL 3979621, at *7 (canvassing cases). "It is a 'bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself

offensive or disagreeable.'" *Ibid.* (quoting *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989)).

Besides the absence of a compelling interest, the State also fails strict scrutiny because it can pursue its goals by narrower means without infringing Barronelle's First Amendment rights. *Reed*, 135 S. Ct. at 2231–32 (discussing narrow-tailoring requirement). For example, the State could narrowly define discrimination to exclude situations where artists like Barronelle serve gay customers but decline to take part in celebrating same-sex weddings.

III. By holding that the Free Exercise Clause's prohibition on religious hostility does not reach executive officials, the Washington Supreme Court excused the State's hostility toward Barronelle's faith.

A. Other courts recognize that the ban on religious hostility applies to all governmental branches.

The Washington Supreme Court's decision implausibly cabined *Masterpiece*'s prohibition on religious hostility to only "adjudicatory bodies." App.19a–21a. No religious-neutrality requirement applies to officials like "the attorney general of the State of Washington." App.23a. Accordingly, the court refused to consider whether there was even a "slight suspicion" that the Attorney General acted with hostility toward Barronelle's faith. *Masterpiece*, 138 S. Ct. at 1731. This Court should reaffirm that the Free Exercise Clause binds *all* state actors, not only adjudicators.

Masterpiece referenced "adjudicators" because they were the offending government officials. But *Masterpiece*'s holding is not so limited: it applies to "the government" and proclaims that "even [the] slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" violates the Free Exercise Clause. 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 547).

Masterpiece relied heavily on *Lukumi*, which prohibited legislative—not adjudicatory—hostility toward religion. *Masterpiece*, 138 S. Ct. at 1730–31. A free-exercise principle that bars religious hostility by the legislative and judicial branches naturally applies to the executive branch too. *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1143 (10th Cir. 2006).

The Washington Supreme Court's decision conflicts with rulings by four federal circuits that have applied *Lukumi*'s religious-hostility rule to executive officials. *Cent. Rabbinical Congress of U.S. & Canada* v. *N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 194–98 (2d Cir. 2014) (city health officials); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (city police officials); *Booth* v. *Maryland*, 327 F.3d 377, 381 (4th Cir. 2003) (state public-safety and correctional officials); *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (state higher-education officials).

Instead of following established precedent, the Washington Supreme Court faulted Barronelle for not bringing a selective-prosecution claim under the Equal Protection Clause. App.23a–25a. But federal courts would have allowed Barronelle to bring a

religious-hostility claim on these facts, even though related to selective enforcement. *E.g.*, *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 165–67 (3d Cir. 2002) (selective application of ordinance); *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1083–84 (9th Cir. 2015) (implicitly recognizing such a claim). Exempting an entire branch of government from the constitutional prohibition on religious hostility threatens significant harm to people of faith. This Court's review is needed.

B. Washington's actions stem from hostility toward Barronelle's religious beliefs.

To prevail on a free-exercise hostility claim, Barronelle need not prove that the Attorney General acted solely or even predominantly out of animus toward her religious beliefs. She need only show a "slight suspicion" that the Attorney General's actions stemmed from such animosity, *Masterpiece*, 138 S. Ct. at 1731, and she has shown far more here.

Without a complaint from Robert or Curt, CP1503–04, the Attorney General took the unprecedented step of suing Barronelle in her personal *and* business capacities under the CPA and the WLAD. App.350a–56a; CP1502–03. In stark contrast, after receiving dozens of complaints about a gay coffee-shop owner who profanely ejected a group of Christians with some of the vilest invective imaginable, the Attorney General did not investigate or file suit.

The Attorney General insists that Barronelle's religious objection to celebrating same-sex weddings is inextricably linked to sexual orientation. But the Attorney General is playing favorites because he

simultaneously says that the coffee-shop owner's objection to Christians' religious speech is not tied to their creed. Appellants' Post-GVR Reply Br. 8–10 (Feb. 13, 2019).

Similarly, the Attorney General advanced a strict-liability standard in Barronelle's case that prohibited any discriminatory impact on same-sex couples and rendered her long service to Robert and Curt irrelevant. But the Attorney General permitted the coffee-shop owner to expel a group of Christians because the owner said he would serve Christians in other contexts. *Id.* at 10–11.

Moreover, like one of the hostile state officials in *Masterpiece*, the Attorney General derided Barronelle's religion as a "mechanism or a means to discriminate."[9] And he promised that protecting her First Amendment rights would undo the Civil Rights Era, arguing that business owners would no longer have to serve African Americans food. Appellants' Post-GVR Br. 23–24 (Nov. 13, 2018) (cataloging these kinds of statements by the Attorney General); *e.g.*, Wash. Response Br. 2–3, 38 (Dec. 23, 2015); CP367–68.

Only one thing explains this blatant difference in treatment and hostile rhetoric—religious animosity. The Attorney General has left no doubt that Barronelle is "less than fully welcome" in the business community, *Masterpiece*, 138 S. Ct. at 1729, and that has resulted in her enduring death threats and public ridicule, App.390a. Hounding Barronelle based on her

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[9] *Dori at odds with AG's explanation of florist-gay wedding lawsuit*, Kiro Radio (Jan. 9, 2015), https://bit.ly/2AM3bVA.

"decent and honorable" religious beliefs about marriage, *Obergefell*, 135 S. Ct. at 2602, is exactly the sort of hostility *Masterpiece* forbids.

The court below also "'subtl[y] depart[ed] from neutrality' on matters of religion." *Masterpiece*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534). First, after considering *Masterpiece*—which applied a religious-hostility theory to judicial officers—and *Lukumi*—which applied the same theory to the legislative branch—the court somehow concluded that executive officials are allowed to act with hostility toward religion. App.24a–26a.

Second, despite Barronelle's nearly decade-long relationship with Robert, the court below determined that her decision not to take part in celebrating his wedding was based on *who he was* rather than *what he requested*. But if it were true that Barronelle "discriminated on the basis of [Robert's] 'sexual orientation,'" App.30a, she would not have served him for nearly a decade since she always knew he was gay, App.372a–73a. Nor would she offer to sell all her stock product to LGBT customers for any reason, including a same-sex wedding, or to create custom designs for LGBT customers for countless other occasions. The court's refusal to distinguish between Barronelle's treatment of LGBT customers generally and her decision not to participate in celebrating a sacred event manifests the kind of "distrust" of religion that *Masterpiece* condemned. 138 S. Ct. at 1731. Like the Colorado Court of Appeals' opinion in *Masterpiece*, the decision below "itself sends a signal of official disapproval of [Barronelle's] religious beliefs." *Ibid.*

IV. The State's actions violate the hybrid-rights doctrine.

Together, the Free Exercise and Free Speech Clauses guard "the sphere of intellect and spirit . . . from all official control." *Barnette*, 319 U.S. at 642. Thus, in *Smith*, this Court identified a "class of 'hybrid situation[s]' in which 'the Free Exercise Clause *in conjunction* with other constitutional protections, such as freedom of speech,' can 'bar[ ] application of a neutral, generally applicable law.'" *Telescope Media*, 2019 WL 3979621, at *10 (quoting *Smith*, 494 U.S. at 881–82).

The Washington Supreme Court recognized the validity of such a "hybrid" claim. App.59a. But it rejected the claim because it concluded that the State did not burden Barronelle's free-speech rights. App.69a. As explained above, that holding conflicts with numerous precedents of this Court and others. The hybrid-rights claim requires this Court to consider the forced participation, compelled speech, and religious hostility all at once. Taken together, they establish a stark and egregious First Amendment violation.

V. This case is an ideal vehicle to confirm that governments cannot force creative professionals to celebrate and take part in ceremonies that violate their beliefs.

Masterpiece already recognized that the questions raised in this petition are of national importance. Indeed, the livelihoods of devout Muslims, Jews, and Christians depend on them. The Court should grant review here and answer those questions definitively.

A number of factors confirm that this case is an ideal vehicle. First, Barronelle designed custom floral arrangements for Robert and Curt for nearly a decade. She gladly serves LGBT customers and clearly holds no animus against them.

Second, Barronelle does not refuse to sell all her "goods" for use at "gay weddings." *Masterpiece*, 138 S. Ct. at 1728. She sells pre-made floral arrangements and other materials for customers to use however they like, including at same-sex weddings, and she designs custom floral arrangements celebrating other events in LGBT persons' lives, including Valentine's Day and adoptions. Her objection is specific to participating in and creating custom arrangements that celebrate same-sex weddings.

And finally, the Washington Supreme Court gave *Masterpiece* no serious consideration and gutted that decision by exempting all but adjudicators from its reach. If the Washington Supreme Court is right, Colorado could freely crush Jack Phillips using the same hostility but a different state official. The First Amendment is not so toothless.

In *Obergefell*'s wake, government officials continue to disregard civility and punish "reasonable and sincere" people of faith like Barronelle because of their beliefs about marriage. 135 S. Ct. at 2594. This violates the First Amendment's promise that citizens are free "to differ as to things" such as marriage and religion "that touch the heart of the existing order." *Barnette*, 319 U.S. at 642. Unless this Court intervenes, that freedom will be gone, and people like Barronelle will be marginalized in their own communities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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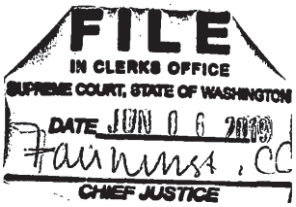
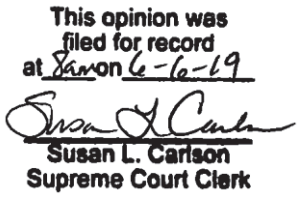
[1] CP stands for the Clerk's Papers transmitted by the trial court as the record on appeal to the Washington Supreme Court.





IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARLENE'S FLOWERS, INC, d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Appellants.	NO. 91615-2 EN BANC Filed JUN 06 2019
ROBERT INGERSOLL and CURT FREED, Respondents, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Appellants.	

GORDON McCLOUD, J.—The United States Supreme Court has tasked us with deciding whether the Washington courts violated the United States Constitution's guaranty of religious neutrality in our prior adjudication of this case. We have fully reviewed the record with this issue in mind, and we have considered substantial new briefing devoted to this topic. We now hold that the answer to the Supreme Court's question is no: the adjudicatory bodies that considered this case did not act with religious animus when they ruled that the florist and her corporation violated the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, by declining to sell wedding flowers to a gay couple, and they did not act with religious animus when they ruled that such discrimination is not privileged or excused by the United States Constitution or the Washington Constitution.

OVERVIEW

This case is back before our court on remand from the United States Supreme Court. The Supreme Court vacated our original judgment and remanded "for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.*" *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (mem.). In *Masterpiece Cakeshop*, the Supreme Court held that the adjudicatory body tasked with deciding a particular case must remain neutral; that is, the adjudicatory body must "give full and fair consideration" to the dispute before it and avoid animus toward religion. 584 U.S. ___, 138 S. Ct. 1719, 1732, 201 L. Ed. 2d 35 (2018). Disputes like those presented in *Masterpiece Cakeshop* and *Arlene's Flowers* "must be resolved with tolerance, without

undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *Id.*

We recognize the profound importance of a fair and neutral adjudicator. Although settled law compelled us to reject Arlene's Flowers and Barronelle Stutzman's claims the first time around, we recognized Stutzman's "sincerely held religious beliefs" and "analyze[d] each of [her] constitutional defenses carefully." *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 815-16, 830, 389 P.3d 543 (2017). And on remand, we have painstakingly reviewed the record for any sign of intolerance on behalf of this court or the Benton County Superior Court, the two adjudicatory bodies to consider this case. After this review, we are confident that the two courts gave full and fair consideration to this dispute and avoided animus toward religion. We therefore find no reason to change our original decision in light of *Masterpiece Cakeshop*.

The dispute we resolve today is the same as the dispute that formed the basis for our original opinion.[1] The State of Washington bars discrimination in "public . . . accommodation[s]" on the basis of "sexual orientation." RCW 49.60.215(1). Barronelle Stutzman owns and operates a place of public accommodation in our state: Arlene's Flowers Inc. Stutzman and her public business, Arlene's Flowers and Gifts, refused to sell wedding flowers to Robert Ingersoll because his betrothed, Curt Freed, is

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[1] The careful reader will notice that starting here, major portions of our original (now vacated) opinion. *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, are reproduced verbatim.

a man. The State and the couple sued, each alleging violations of the WLAD and the Consumer Protection Act (CPA), chapter 19.86 RCW. Stutzman defended on the grounds that the WLAD and CPA do not apply to her conduct and that if they do, those statutes violate her state and federal constitutional rights to free speech, free exercise of religion, and free association.

The Benton County Superior Court granted summary judgment to the State and the couple, rejecting all of Arlene's Flowers and Stutzman's claims. We granted review, and in our earlier opinion, we affirmed. The United States Supreme Court then granted appellants' petition for a writ of certiorari, vacated, and remanded, as discussed in the Procedural History section below.

On remand, we once again affirm. In doing so, we reject appellants' expansive reading of *Masterpiece Cakeshop*. We reject appellants' attempt to relitigate issues resolved in our first opinion and outside the scope of this remand. And we reject appellants' suggestion that the permanent injunction requires them to "personally attend and participate in same-sex weddings." Br. of Appellants (Nov. 13, 2018) at 25. As the superior court carefully noted, "The degree to which [Stutzman] voluntarily involves herself in an event ... is not before the Court" and therefore would not "be covered by an injunction." Clerk's Papers (CP) at 2347 n.23.

FACTS

In 2004, Ingersoll and Freed began a committed, romantic relationship. In 2012, the people of our state voted to recognize equal civil marriage

rights for same-sex couples. Laws of 2012, ch. 3, § 1 (Referendum Measure 74, approved Nov. 6, 2012). Freed proposed marriage to Ingersoll that same year. The two intended to marry on their ninth anniversary, in September 2013, and were "excited about organizing [their] wedding." Clerk's Papers (CP) at 350. Their plans included inviting "[a] hundred plus" guests to celebrate with them at Bella Fiori Gardens, complete with a dinner or reception, a photographer, a caterer, a wedding cake, and flowers. *Id.* at 1775-77.

By the time he and Freed became engaged, Ingersoll had been a customer at Arlene's Flowers for at least nine years, purchasing numerous floral arrangements from Stutzman and spending an estimated several thousand dollars at her shop. Stutzman is the owner and president of Arlene's Flowers. She employs approximately 10 people, depending on the season, including three floral designers, one of whom is herself. Stutzman knew that Ingersoll is gay and that he had been in a relationship with Freed for several years. The two men considered Arlene's Flowers to be "[their] florist." *Id.* at 350.

Stutzman is an active member of the Southern Baptist church. It is uncontested that her sincerely held religious beliefs include a belief that marriage can exist only between one man and one woman.

On February 28, 2013, Ingersoll went to Arlene's Flowers on his way home from work, hoping to talk to Stutzman about purchasing flowers for his upcoming wedding. Ingersoll told an Arlene's Flowers employee that he was engaged to marry Freed and

that they wanted Arlene's Flowers to provide the flowers for their wedding. The employee informed Ingersoll that Stutzman was not at the shop and that he would need to speak directly with her. The next day, Ingersoll returned to speak with Ms. Stutzman. At that time, Stutzman told Ingersoll that she would be unable to do the flowers for his wedding because of her religious beliefs, specifically because of "her relationship with Jesus Christ." *Id.* at 155, 351, 1741-42, 1744-45, 1763. Ingersoll did not have a chance to specify what kind of flowers or floral arrangements he was seeking before Stutzman told him that she would not serve him. They also did not discuss whether Stutzman would be asked to bring the arrangements to the wedding location or whether the flowers would be picked up from her shop.

Stutzman asserts that she gave Ingersoll the names of other florists who might be willing to serve him, and that the two hugged before Ingersoll left her store. Ingersoll maintains that he walked away from that conversation "feeling very hurt and upset emotionally." *Id.* at 1743.

Early the next morning, after a sleepless night, Freed posted a status update on his personal Facebook feed regarding Stutzman's refusal to sell him wedding flowers. The update observed, without specifically naming Arlene's Flowers, that the couple's "favorite Richland Lee Boulevard flower shop" had declined to provide flowers for their wedding on religious grounds, and noted that Freed felt "so deeply offended that apparently our business is no longer good business" because "[his] loved one [did not fit] within their personal beliefs." *Id.* at 1262. This message was apparently widely circulated,

though Ingersoll testified that their Facebook settings were such that the message was "only intended for our friends and family." *Id.* at 1760, 1785. Eventually, the story drew the attention of numerous media outlets.

As a result of the "emotional toll" Stutzman's refusal took on Freed and Ingersoll, they "lost enthusiasm for a large ceremony" as initially imagined. *Id.* at 1490. In fact, the two "stopped planning for a wedding in September 2013 because [they] feared being denied service by other wedding vendors." *Id.* at 351. The couple also feared that in light of increasing public attention—some of which caused them to be concerned for their own safety—as well as then-ongoing litigation, a larger wedding might require a security presence or attract protesters, such as the Westboro Baptist group. So they were married on July 21, 2013, in a modest ceremony at their home. There were 11 people in attendance. For the occasion, Freed and Ingersoll purchased one bouquet of flowers from a different florist and boutonnieres from their friend. When word of this story got out in the media, a handful of florists offered to provide them wedding flowers free of charge.

Stutzman also received a great deal of attention from the publicity surrounding this case, including threats to her business and other unkind messages.

Prior to Ingersoll's request, Arlene's Flowers had never had a request to provide flowers for a same-sex wedding, and the only time Stutzman has ever refused to serve a customer is when Ingersoll and

Freed asked her to provide flowers for their wedding. The decision not to serve Ingersoll was made strictly by Stutzman and her husband. After Ingersoll and Freed's request, Stutzman developed an "unwritten policy" for Arlene's Flowers that they "don't take same sex marriages." *Id.* at 120. Stutzman states that the only reason for this policy is her conviction that "biblically[,] marriage is between a man and a woman." *Id.* at 120-21. Aside from Ingersoll and Freed, she has served gay and lesbian customers in the past for other, non-wedding-related flower orders.

Stutzman maintains that she would not sell Ingersoll any arranged flowers for his wedding, even if he were asking her only to replicate a prearranged bouquet from a picture book of sample arrangements. She believes that participating, or allowing any employee of her store to participate, in a same-sex wedding by providing custom floral arrangements and related customer service is tantamount to endorsing marriage equality for same-sex couples. She draws a distinction between creating floral arrangements—even those designed by someone else—and selling bulk flowers and "raw materials," which she would be happy to do for Ingersoll and Freed. *Id.* at 546-47. Stutzman believes that to create floral arrangements is to use her "imagination and artistic skill to intimately participate in a same-sex wedding ceremony." *Id.* at 547. However, Stutzman acknowledged that selling flowers for an atheistic or Muslim wedding would not be tantamount to endorsing those systems of belief.

By Stutzman's best estimate, approximately three percent of her business comes from weddings. Stutzman is not currently providing any wedding

floral services (other than for members of her immediate family) during the pendency of this case.

PROCEDURAL HISTORY

After the State became aware of Stutzman's refusal to sell flowers to Ingersoll and Freed, the Attorney General's Office sent Stutzman a letter. It sought her agreement to stop discriminating against customers on the basis of their sexual orientation and noted that doing so would prevent further formal action or costs against her. The letter asked her to sign an "Assurance of Discontinuance," which stated that she would no longer discriminate in the provision of wedding floral services. Stutzman refused to sign the letter.

As a result, the State filed a complaint for injunctive and other relief under the CPA and the WLAD against both Stutzman and Arlene's Flowers, in Benton County Superior Court on April 9, 2013. Stutzman filed an answer on May 16, 2013, asserting, among other defenses, that her refusal to furnish Ingersoll with wedding services was protected by the state and federal constitutions' free exercise of religion, free speech, and freedom of association guaranties. Ingersoll and Freed filed a private lawsuit against Arlene's Flowers and Stutzman on April 18, 2013, which the trial court consolidated with the State's case on July 24, 2013. The parties filed various cross motions for summary judgment. The trial court ultimately entered judgment for the plaintiffs in both cases, awarding permanent injunctive relief, as well as monetary damages for Ingersoll and Freed to cover actual damages, attorney fees, and costs, and finding Stutzman personally liable.

When it granted the plaintiffs' motions for summary judgment, the trial court made seven rulings that are at issue in this appeal. First, it issued two purely statutory rulings: (1) that Stutzman violated the WLAD's public accommodations provision (RCW 49.60.215(1)) and the CPA (*see* RCW 19.86.020; RCW 49.60.030) by refusing to sell floral services for same-sex weddings and (2) that both Stutzman (personally) and Arlene's Flowers (the corporate defendant) were liable for these violations. CP at 2566-600. Next, the court made five constitutional rulings. It concluded that the application of the WLAD's public accommodations provision to Stutzman in this case (1) did not violate Stutzman's right to free speech under the First Amendment to the United States Constitution or article I, section 5 of the Washington Constitution, (2) did not violate Stutzman's right to religious free exercise under the First Amendment, (3) did not violate her right to free association under the First Amendment, (4) did not violate First Amendment protections under the hybrid rights doctrine, and (5) did not violate Stutzman's right to religious free exercise under article I, section 11 of the Washington Constitution. *Id.* at 2601-60.

Stutzman appealed directly to this court, assigning error to all seven of those rulings. We granted direct review. Order, *Ingersoll v. Arlene's Flowers, Inc.*, No. 91615-2 (Wash. Mar. 2, 2016). With respect to most of the claims, Stutzman and Arlene's Flowers make identical arguments—in other words, Stutzman asserts that both she and her corporation enjoy identical rights of free speech, free exercise, and

free association.[2] It is only with respect to the CPA claim that Stutzman asserts a separate defense: she argues that even if Arlene's Flowers is liable for the CPA violation, she cannot be *personally* liable for a violation of that statute.

In our original opinion, we affirmed the trial court's rulings. *Arlene's Flowers*, 187 Wn.2d at 856. Appellants then petitioned the United States Supreme Court for a writ of certiorari, seeking review of their federal free speech and free exercise claims. Pet. for Writ of Cert., *Arlene's Flowers*, No. 17-108 (U.S. July 14, 2017). Before ruling on the petition, the United States Supreme Court issued its decision in *Masterpiece Cakeshop*, 138 S. Ct. 1719, a case involving similar issues to those in the case before us now. The Supreme Court then granted appellants' petition, vacated our original judgment, and remanded "for further consideration in light of *Masterpiece Cakeshop*." *Arlene's Flowers*, 138 S. Ct. 2671.

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[2] In their brief on remand, appellants again claim that the corporation's "free-exercise rights are synonymous with Mrs. Stutzman's." Br. of Appellants (Nov. 13, 2018) at 18 n.3. But the general rule is that "'[a] corporation exists as an organization distinct from the personality of its shareholders.'" Br. for Professor Kent Greenfield as Amicus Curiae in Supp. of Resp'ts at 8 (alteration in original) (quoting *Grayson v. Nordic Constr. Co., Inc.*, 92 Wn.2d 548, 552, 599 P.2d 1271 (1979)). In this case, however, we need not resolve whether some exception to that rule allows Arlene's Flowers to share the free exercise rights of its shareholders, officers, and employees. Even assuming the rights are synonymous, we found no violation of any constitutional right in our first opinion, and today we hold that that opinion is unaffected by *Masterpiece Cakeshop*.

The parties, as well as several other interested organizations and individuals (amici curiae), have fully briefed what they see as the issues on remand.[3] Appellants now claim that the permanent injunction issued by the superior court requires them to "personally attend and participate in same-sex weddings." Br. of Appellants (Nov. 13, 2018) at 25. Stutzman made a similar argument before the superior court, claiming "that other aspects of her involvement in weddings are speech, including singing, standing for the bride, clapping to celebrate the marriage, and in one instance counseling the bride." CP at 2347 n.23. But as the superior court explained,

> Tellingly, Stutzman does not claim that she was being paid to do any of these things. Said another way, she does not claim that these are services that she is providing for a fee to her customers such that they would be covered by an injunction. The degree to which she voluntarily involves herself in an event outside the scope of services she must provide to all customers on a non-discriminatory basis (if she provides the service in the first instance) is not before the Court.

Id. The issue was not before the superior court then, and it is not before this court now.

In addition, Arlene's Flowers and Stutzman filed a motion to supplement the record or for judicial notice, as did the State of Washington. We passed the

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[3] The parties have not moved for oral argument, and we find the briefing sufficient for our consideration of this case on remand.

motions to supplement or for judicial notice to the merits, and we now deny both motions and adhere to our original decision for the reasons explained below.

ANALYSIS

A grant, vacate, remand (GVR) order "is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it." *Gonzalez v. Justices of Mun. Court*, 420 F.3d 5, 7 (1st Cir. 2005). "Consequently, we do not treat the Court's GVR order as a thinly-veiled direction to alter course . . . ." *Id.*; *see also Wright v. Florida*, 256 So. 3d 766, 770 (Fla. 2018) ("[W]e will not guess at the implied intentions of the Supreme Court's GVR order."), *cert. denied* (U.S. June 3, 2019) (No. 18-8653). Instead, we follow the Supreme Court's clear instruction to "further consider[]" this case "in light of *Masterpiece Cakeshop*." *Arlene's Flowers*, 138 S. Ct. 2671; *see also Gonzalez*, 420 F.3d at 8 ("As a general rule, 'when the Supreme Court remands in a civil case, the [court on remand] should confine its ensuing inquiry to matters coming within the specified scope of the remand.'" (quoting *Kotler v. Am. Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992))).

I. In *Masterpiece Cakeshop*, the Supreme Court held that the adjudicatory body tasked with deciding a particular case must remain neutral

In *Masterpiece Cakeshop*, Jack Phillips, the shop's owner, told a same-sex couple "that he would not create a cake for their wedding because of his

religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time." 138 S. Ct. at 1723. After being turned away, the couple filed a charge with the Colorado Civil Rights Commission (Commission), *id.*, a state adjudicatory body "charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law," *id.* at 1729. The couple alleged that the shop owner had illegally discriminated against them "on the basis of sexual orientation." *Id.* at 1723. The Commission ruled in the couple's favor, and the Colorado courts affirmed. *Id.*

At the Supreme Court, Phillips argued that Colorado violated his First Amendment rights by requiring him "to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation." *Id.* at 1728; U.S. CONST. amend. I. The Supreme Court explained that "the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs." *Id.* The Court found the baker's "dilemma . . . particularly understandable" given that Colorado did not yet "recognize the validity of gay marriages performed in its own State." *Id.*

At the same time, the Court reaffirmed that "while . . . religious and philosophical objections [to gay marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public

accommodations law." *Id.* at 1727 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, 402 n.5, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) (per curiam)). In fact, the *Piggie Park* footnote to which the United States Supreme Court cites explicitly states that the shop owners' defense in that case—that the Civil Rights Act of 1964, 42 U.S.C. § 2000e, "'constitutes an interference with the free exercise of the Defendant's religion'"—was "patently frivolous." *Piggie Park*, 390 U.S. at 402 n.5 (internal quotation marks omitted) (quoting *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring specially)). Indeed, in *Masterpiece Cakeshop*, "Petitioners conceded . . . that if a baker refused to sell any goods or any cakes for gay weddings, . . . the State would have a strong case under [the Supreme] Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law." 138 S. Ct. at 1728.

As to weddings, the Supreme Court noted that "it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion." *Id.* at 1727. But the Court observed the narrowness of such an exception:

> Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might

> refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

Id. Thus,

> any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons.

Id. at 1728-29.

In sum, the issue before the Supreme Court was one of the "proper reconciliation of at least two principles." *Id.* at 1723. "The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." *Id.* "The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment." *Id.*

But the Supreme Court did not reconcile those two principles. Instead, the Court explained that the Commission failed to adjudicate "with the religious neutrality that the Constitution requires" and held that "whatever the outcome of some future controversy involving facts similar to these, the

Commission's actions here violated the Free Exercise Clause [of the First Amendment]." *Id.* at 1724. "Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided." *Id.* at 1732. Disputes like Phillips' "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *Id.*

The Supreme Court therefore ruled that the Commission violated the free exercise clause of the First Amendment in two respects: two of its members made disparaging comments about religion and it treated similarly situated parties differently. We address each of those holdings below.

A. Members of an Adjudicatory Body May Not Disparage the Religion of a Party Before It

The Supreme Court observed that two of the seven commissioners on the Commission "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community." *Id.* at 1729. The Court took particular issue with the following statement made by a commissioner:

> "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations

> where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."

Id. That statement, the Court reasoned, characterized the baker's religion as "something insubstantial and even insincere," which "is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation." *Id.* The other commissioners did not object to this statement, nor did they object to two related statements made by another commissioner. *Id.* "And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content." *Id.* at 1729-30.

The Supreme Court, emphasizing that the statements were made "by an adjudicatory body deciding a particular case"—not "by lawmakers" or members of the executive branch—concluded that the "statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case." *Id.* at 1730.

B. An Adjudicatory Body Must Treat Similarly Situated Parties Equally

The Court also discussed "the difference in treatment" between Phillips' case and the cases of three other bakers who refused, on the basis of conscience, "to create cakes with images that conveyed disapproval of same-sex marriage, along

with religious text." *Id.* at 1730. In those three cases, all of which occurred "while enforcement proceedings against Phillips were ongoing," *id.* at 1728, the Colorado Civil Rights Division[4] "found that the baker acted lawfully in refusing service," *id.* at 1730. The Supreme Court held that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections." *Id.*

II. *Masterpiece Cakeshop* does not affect our original decision because the adjudicatory bodies tasked with deciding this case remained neutral

Throughout the course of this litigation, appellants have never alleged that the adjudicatory bodies tasked with deciding this case failed to remain neutral. Since the argument has never been made, we had no reason to discuss in our first opinion the importance of a neutral adjudicatory body or to comb the record for signs of bias from the courts.

Even on remand, appellants still do not claim that our court or the Benton County Superior Court failed to adjudicate "with the religious neutrality that the Constitution requires." *Masterpiece Cakeshop*, 138 S. Ct. at 1724. Presumably, appellants do not make such a claim because the record would not support it. Indeed, the record reveals that the courts remained neutral "in all of the circumstances in which this case was presented, considered, and decided." *Id.* at 1732. In its decision, the Benton County Superior

[4] The Colorado Civil Rights Division is tasked with investigating claims and referring those with potential merit to the Commission. *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

Court acknowledged that "Stutzman has a sincerely-held religious belief" that is "entirely consistent" with her church's "doctrinal statement," and the superior court refused to "inquire further in the matter." CP 2355. In fact, the superior court went out of its way to note that it

> intend[ed] no disrespect and d[id] not mean to imply either that Stutzman possesses any racial animus, or that she has conducted herself in any way inconsistently with Resolutions of the [Southern Baptist Church]'s direction to condemn "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" toward gay men or women.

CP at 2360 n.31. Our court also recognized Stutzman's "sincerely held religious beliefs," *Arlene's Flowers*, 187 Wn.2d at 815-16, and "analyze[d] each of [her] constitutional defenses carefully," *id.* at 830. After carefully reviewing the record, including transcripts of hearings and written orders, and after carefully reviewing our prior opinion, we are confident that the courts resolved this dispute "with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *Id.* at 1732.

Apparently realizing the limits of *Masterpiece Cakeshop*, appellants attempt to stretch its holding beyond recognition and to relitigate issues resolved in our first opinion and outside the scope of *Masterpiece Cakeshop*. We reject this attempt and instead comply with the Supreme Court's explicit mandate to

"further consider[]" our original judgment "in light of *Masterpiece Cakeshop*." *Arlene's Flowers*, 138 S. Ct. 2671; *see also Gonzalez*, 420 F.3d at 7-8.[5]

III. We deny the motions to supplement the record or to take judicial notice

This court will grant a motion to supplement the record or to take judicial notice only if the proposed supplemental materials are relevant to the outcome of the proceeding. For example, we "may direct that additional evidence on the merits of the case be taken before the decision of a case on review if" "additional proof of facts *is needed to fairly resolve the issues on review*," "the additional evidence *would probably change the decision being reviewed*," and "*it would be inequitable to decide the case solely on the evidence already taken in the trial court*." RAP 9.11(a) (emphasis added). If the additional evidence is irrelevant, it is not needed to resolve the issues on review, it would not change the decision being reviewed, and it would therefore be equitable to decide the case without the irrelevant evidence. Additionally, in some situations we may take judicial

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[5] For this reason, we also reject appellants' attempt to rely on *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018), and *National Institute of Family & Life Advocates v. Becerra*, ___ U.S. ___, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018). Both of those opinions were issued after the Supreme Court remanded this case, and therefore both are outside the scope of the remand. Even if we were to consider those cases, neither involves the type of public accommodations statute at issue here or in *Masterpiece Cakeshop*. As *Masterpiece Cakeshop* observes, "The outcome of cases like this in other circumstances must await further elaboration in the courts." 138 S. Ct. at 1732. Neither *Janus* nor *Becerra* provides further elaboration.

notice of adjudicative facts under our Evidence Rules—but only if those facts are relevant. ER 201; ER 402 ("Evidence which is not relevant is not admissible.").

Appellants Arlene's Flowers and Stutzman filed a motion to supplement the record or for this court to take judicial notice of supplemental materials. The proposed supplemental materials concern a single unrelated incident that occurred after we issued our first opinion in this case but before the Supreme Court ruled on appellants' petition for writ of certiorari. In that unrelated incident, appellants claim that "the owner of Bedlam Coffee in Seattle expelled a group of Christian customers visiting his shop." Appellants' Mot. to Suppl. R. or for Judicial Notice at 2. The crux of appellants' argument is that the attorney general sought to enforce the WLAD in the case before us but not in the incident at the coffee shop, revealing "hostility toward Mrs. Stutzman's beliefs." *Id.* at 7.

Respondent State also filed a motion to supplement the record or for this court to take judicial notice of supplemental materials. Although the State argues that the incident in the coffee shop is irrelevant, it requests that if we grant appellants' motion, then we should also grant its motion "to give a more complete picture of the incident described." Resp't State of Wash.'s Mot. to Suppl. R. or for Judicial Notice at 3-4. For their part, respondents Ingersoll and Freed argue that "the other parties' proposed supplemental materials are irrelevant." Br. of Resp'ts Ingersoll & Freed on Remand from the U.S. Supreme Ct. (Jan. 14, 2019) at 13 n.3.

We agree with respondents Ingersoll and Freed and hold that the attorney general's response to the incident at the coffee shop is irrelevant to this case. As discussed above, the Supreme Court in *Masterpiece Cakeshop* held that the *adjudicatory* body tasked with deciding a particular case must remain neutral. That Court was explicitly sensitive to the context in which the lack of neutrality occurred: during adjudication by the adjudicatory body deciding the case. *Masterpiece Cakeshop*, 138 S. Ct. at 1729-30 (describing statements made by lawmakers during lawmaking as "a very different context"); *see also* Br. of Church-State Scholars as Amici Curiae in Supp. of Pls.-Resp'ts (Mar. 13, 2019) at 9 (noting "*Masterpiece*'s clear sensitivity to the institutional context in which the government allegedly engaged in religious targeting"). The holding of *Masterpiece Cakeshop* might make additional evidence about a lack of neutrality on behalf of the adjudicatory bodies that heard this case relevant. But that is not what the proposed evidence is about; the parties instead seek to introduce evidence about a lack of neutrality on behalf of the attorney for one of the parties, the attorney general of the State of Washington.

It would take a broad expansion of *Masterpiece Cakeshop* to apply its holding—that the *adjudicatory* body hearing a case must show religious neutrality—to a *party*. That is especially true here, where the party supposedly exhibiting antireligious bias is Washington's attorney general. By arguing that *Masterpiece Cakeshop*'s holding about adjudicatory bodies applies to the attorney general's enforcement decisions, appellants essentially seek to revive their selective-enforcement claim, a claim that was rejected

by the superior court, CP at 2361-64, *and abandoned on appeal*, *see* Statement of Grounds for Direct Review at 6.

Appellants' decision to abandon that claim on appeal was sound. Controlling precedent shows that claims of selective enforcement arise in "a very different context" than claims of biased adjudication. *Masterpiece Cakeshop*, 138 S. Ct. at 1729-30. In the criminal arena, the United States Supreme Court has noted that selective-enforcement claims "invade a special province of the Executive—its prosecutorial discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999). Courts are wary to question a prosecutor's decision of which claims to pursue and thus generally "'presume that [prosecutors] have properly discharged their official duties.'" *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15, 47 S. Ct. 1, 71 L. Ed. 131 (1926)). To overcome this presumption of regularity, the Court has "emphasized that the standard for proving [selective-enforcement claims] is particularly demanding." *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 489. A defendant must "introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully." *Id.* (citing *Armstrong*, 517 U.S. at 463-65).

Rather than grapple with this precedent, appellants seem to argue that selective-enforcement claims premised on the free exercise clause should not be subject to the same demanding standard to which all other selective-enforcement claims are subject. Appellants' Resp. to Amici Curiae (Mar. 22, 2019) at

6-7. In making this argument, appellants rely on two cases controlling in our court: *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), and *Masterpiece Cakeshop*. But the issue in *Lukumi Babalu Aye* was *not* whether the executive branch selectively enforced a law in an unconstitutional manner; it was whether the law itself was neutral and generally applicable. 508 U.S. at 531-32. And as appellants recognize, *Masterpiece Cakeshop*—the case with which we are most concerned on remand—says nothing about selective-enforcement claims. Appellants' Resp. to Amici Curiae (Mar. 22, 2019) at 5-6. Against this backdrop, we decline to recognize the carve-out requested by appellants but missing from any controlling precedent.

Even if appellants were correct, they fail to recognize that only one of the two consolidated cases before us would be affected. The attorney general was not a party to or a lawyer in Ingersoll and Freed's separate, private lawsuit, and the alleged selective-enforcement claim would therefore not extend to it.[6]

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[6] Appellants argue that *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 718, 11 L. Ed. 2d 686 (1964), suggests otherwise. Reply Br. of Appellants (Feb. 13, 2019) at 13. *Sullivan* involved the constitutionality of a state law, the enforcement of which supplied the necessary state action. 376 U.S. at 265. At this stage of this case, we are no longer concerned with the constitutionality of any state law; we held that the state laws relevant here were constitutional in our first opinion, and *Masterpiece Cakeshop* does not affect that analysis. Instead, we are concerned solely with *Masterpiece Cakeshop*'s mandate that state adjudicatory bodies must exhibit religious neutrality. Appellants argue that *Masterpiece Cakeshop*'s holding extends to the executive branch and that the attorney general failed to

In any event, we decline to expansively read *Masterpiece Cakeshop* to encompass the "very different context" of executive branch discretion. We do not believe that the Supreme Court intended to silently overturn any of its selective-enforcement precedents or to create a carve-out within that precedent for claims based on the free exercise clause. That is not to say that the Washington attorney general is free to enforce the WLAD in a manner that offends the state or federal constitution. We simply recognize our mandate on remand to further consider this case in light of *Masterpiece Cakeshop*, a case that requires neutrality from the adjudicatory bodies hearing a particular case and says nothing about claims of selective enforcement by the executive branch. The remand is not an invitation to the parties to litigate new issues outside the scope of both our initial ruling and *Masterpiece Cakeshop*. Because the proposed supplemental evidence has nothing to do with the neutrality of either our court or the Benton County Superior Court, it is irrelevant, and the motions are therefore denied.

IV. Because the Washington courts resolved this dispute with tolerance, we find no reason to alter our original opinion

As noted above, this case presents both statutory and constitutional questions. Both are reviewed de novo. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012) ("[s]tatutory interpretation is

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act with the required neutrality. Even if that interpretation were correct, it would have no bearing on the individual plaintiffs' lawsuit because the attorney general was not a party to or a lawyer in that case.

a question of law reviewed de novo" (citing *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003))); *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503, 198 P.3d 1021 (2009) (appellate court "review[s] all constitutional challenges de novo" (citing *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006))).

A. Stutzman's Refusal To Provide Custom Floral Arrangements for a Same-Sex Wedding Violated the WLAD's Prohibition on Discrimination in Public Accommodations, RCW 49.60.215

Stutzman's first statutory argument implicates the WLAD, chapter 49.60 RCW. The trial court ruled that Stutzman violated RCW 49.60.215, which prohibits discrimination in the realm of public accommodations. That statute provides:

> (1) It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of . . . sexual orientation . . . .

RCW 49.60.215. The protected class status of "sexual orientation" was added to this provision in 2006. LAWS OF 2006, ch. 4, § 13.

The WLAD defines places of public accommodation to include places maintained "for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services . . . ." RCW 49.60.040(2). Protected individuals are guaranteed "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges" of such places. RCW 49.60.030(1)(b). Additionally, the WLAD states that "[t]he right to be free from discrimination *because of* . . . sexual orientation . . . is recognized as and declared to be a civil right," RCW 49.60.030(1) (emphasis added). The WLAD prohibits discrimination on the different basis of "marital status" in the employment context, but not in the context of public accommodations. *Compare* RCW 49.60.180 (listing "marital status" as a protected class in section governing unfair practices of employers), *with* RCW 49.60.215 (omitting marital status from analogous public accommodations statute).

RCW 49.60.030(2) authorizes private plaintiffs to bring suit for violations of the WLAD. To make out a prima facie case under the WLAD for discrimination in the public accommodations context, the plaintiff must establish four elements: (1) that the plaintiff is a member of a protected class, RCW 49.60.030(1); (2) that the defendant is a place of public accommodation, RCW 49.60.215; (3) that the defendant discriminated against the plaintiff, whether directly or indirectly, *id.*; and (4) that the discrimination occurred "because of" the plaintiff's status or, in other words, that the

protected status was a substantial factor causing the discrimination, RCW 49.60.030. *See also Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996) (setting forth elements of prima facie case for disability discrimination under RCW 49.60.215).

Stutzman contests only the last element: she contends that she did not discriminate against Ingersoll "because of" his protected class status under the WLAD. *See* Br. of Appellants at 19-21.[7] She offers three arguments in support of this interpretation of the statute.

First, Stutzman argues that if she discriminated against Ingersoll, it was on the basis of his "marital status," not his "sexual orientation." Br. of Appellants at 19-21. Second, she argues that the legislature could not have intended the 2006 amendments to protect people seeking same-sex wedding services since same-sex marriages were "illegal" in Washington in 2006. *Id.* at 15-17. She points out that when the legislature amended the public accommodations provisions of the WLAD in 2006, it also added language stating that the chapter "shall not be construed to endorse any specific belief, practice, behavior, or orientation" and affirming that the addition "shall not be construed to modify or

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[7] No one disputes that Ingersoll and Freed are gay men who sought to marry in recognition of their nearly nine-year committed relationship. And Stutzman admits that she is the "sole owner and operator of Arlene's Flowers, Inc.," CP at 535, which is "a Washington for-profit corporation engaged in the sale of goods and services, including flowers for weddings," to the public. *Id.* at 2, 7-8. Furthermore, Stutzman confirms that she declined to do the flowers for Ingersoll's wedding because of her religious convictions.

supersede state law relating to marriage." *Id.* at 17-18, 15 (quoting LAWS OF 2006, ch. 4, § 2 (codified at RCW 49.60.020)). Third, Stutzman argues that because the WLAD protects both sexual orientation and religion, it requires that courts balance those rights when they conflict.[8] These arguments fail.

i. By refusing to provide services for a same-sex wedding, Stutzman discriminated on the basis of "sexual orientation" under the WLAD

Stutzman argues that the WLAD distinguishes between discrimination on the basis of "sexual orientation"—which the statute prohibits—and discrimination against those who marry members of the same sex. But numerous courts—including our own—have rejected this kind of status/conduct distinction in cases involving statutory and constitutional claims of discrimination. *E.g.*, *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007) ("under the plain language of the WLAD and its interpretative regulations, pregnancy related employment discrimination claims are matters of sex discrimination"); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53 (rejecting argument identical to Stutzman's, in context of New Mexico's Human Rights Act (NMHRA), N.M. STAT. ANN. §§

[8] Stutzman also argues that by compelling her to furnish flowers for a same-sex marriage ceremony, the State "endorses" same-sex marriages and also requires her to "endorse" them. Br. of Appellants at 18. She claims that this conflicts with the WLAD provision stating that "[t]his chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation." RCW 49.60.020. But Stutzman cites no legal authority for this interpretation of the term "endorse" in the WLAD.

28-1-1 to 28-1-13);[9] *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 672, 688, 130 S. Ct. 2971, 177 L.Ed. 2d 838 (2010) (student organization was discriminating based on sexual orientation, not belief or conduct, when it excluded from membership any person who engaged in "'unrepentant homosexual conduct'"; thus, University's antidiscrimination policy did not violate First Amendment protections); *see also Lawrence v. Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (by criminalizing conduct typically undertaken by gay people, a state discriminates against gay people in violation of protections under the Fourteenth Amendment to the federal constitution); *Romer v. Evans*, 517 U.S. 620, 641, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (Scalia, J., dissenting) ("'After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.'" (quoting

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[9] In *Elane Photography*, the New Mexico Supreme Court addressed the question of whether a wedding photographer discriminated against a lesbian couple on the basis of their sexual orientation by refusing to photograph their wedding under a state public accommodations law similar to the WLAD. 309 P.3d 53. The proprietor of Elane Photography argued, much like Stutzman here, that she was not discriminating against Willock and her fiancée based on their sexual orientation, but rather was choosing not to "endorse" same-sex marriage by photographing one in conflict with her religious beliefs. *Id.* at 61. The court rejected Elane Photography's attempt to distinguish status from conduct, finding that "[t]o allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the NMHRA." *Id.* Elane Photography was represented on appeal by the same organization—Alliance Defending Freedom—that represents Stutzman before this court. *Id.* at 58.

Padula v. Webster, 261 U.S. App. D.C. 365, 371, 822 F.2d 97 (1987))); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (summarizing that some conduct is so linked to a particular group of people that targeting it can readily be interpreted as an attempt to disfavor that group by stating that "[a] tax on wearing yarmulkes is a tax on Jews");[10] *Bob Jones Univ. v. United States*, 461 U.S. 574, 605, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) ("discrimination on the basis of racial affiliation and association is a form of racial discrimination").[11] Finally, in 2015, the Supreme

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[10] Stutzman argues that *Bray* actually supports her position because the *Bray* Court rejected the argument that a group's antiabortion protests outside clinics reflected an "'invidiously discriminatory animus'" toward women in general. 506 U.S. at 269 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)); Reply Br. of Appellants at 39. This is related to her argument in the opening brief on appeal that because she generally lacks animus toward gay people, and because her refusal to provide service to Mr. Ingersoll was motivated by religious beliefs, she cannot be said to have discriminated "because of" sexual orientation as required by the WLAD. *See* Br. of Appellants at 19-21. From *Bray*, Stutzman concludes that her decision to decline Mr. Ingersoll's "artistic commission" was acceptable because it was "reasonable"and she bore "no underlying animus" toward gay people in general. Reply Br. of Appellants at 40. However, *Bray* dealt with a question of statutory interpretation of 42 U.S.C. § 1985(3), which has been interpreted to require a showing of animus. *See Bray*, 506 U.S. at 267-68; *Griffin*, 403 U.S. at 102. In contrast, we have already addressed this question of an animus requirement with regard to the WLAD and have held that it contains no such requirement (see discussion below).

[11] *See also Blackburn v. Dep't of Soc. & Health Servs.*, 186 Wn.2d 250, 258-59, 375 P.3d 1076 (2016) (discrimination on

Court likened the denial of marriage equality to same-sex couples itself to discrimination, noting that such denial "works a grave and continuing harm," and is a "disability on gays and lesbians [that] serves to disrespect and subordinate them." *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2604, 2607-08, 192 L. Ed. 2d 609 (2015) (fundamental right to marry includes same-sex couples and is protected by due process and equal protection clauses of Fourteenth Amendment; abrogating the equal protection and due process holdings in *Andersen v. King County*, 158 Wn.2d 1, 30, 138 P.3d 963 (2006) (plurality opinion) to the contrary).[12]

In accordance with this precedent, we reject Stutzman's proposed distinction between status and conduct fundamentally linked to that status. This is consistent with the language of the WLAD itself, which, as respondents observe, states that it is to be construed liberally, RCW 49.60.020; that all people, regardless of sexual orientation are to have "*full enjoyment* of any of the accommodations, advantages, facilities, or privileges" of any place of public accommodation, RCW 49.60.030(1)(b) (emphasis added); and that *all* discriminatory acts, including any act "which directly or *indirectly* results in any distinction, restriction, or discrimination" based on a person's sexual orientation is an unfair practice in

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basis of race occurs even where racially motivated staffing decision might have been based on benign reason).

[12] In response to the authority cited here, Stutzman cites two cases for the proposition that other courts have drawn a distinction between conduct and status. *See* Reply Br. of Appellants at 36-37. She draws our attention to two trial court decisions from Kentucky and Virginia. *Id.*

violation of the WLAD, RCW 49.60.215(1) (emphasis added).

ii. There is no same-sex wedding exception to the WLAD's public accommodation provision, RCW 49.60.215

For the reasons given in Section IV.A.i above, the plain language of RCW 49.60.215 prohibits Stutzman's refusal to provide same-sex wedding services to Ingersoll; such refusal constitutes discrimination on the basis of "sexual orientation," in violation of RCW 49.60.215. The same analysis applies to her corporation.

Stutzman asks us to read an implied same-sex wedding exception into this statute. She argues that the legislature could not have intended to require equal access to public accommodations for same-sex wedding services because when it amended RCW 49.60.215 to prohibit sexual orientation discrimination, same-sex marriage was "illegal" in Washington.

We reject this argument for two reasons. First, the WLAD already contains an *express* exemption to RCW 49.60.215 for "religious organization[s]"[13] that object to providing public accommodations for same-sex weddings. LAWS OF 2012, ch. 3, § 1(5) ("[n]o religious organization is required to provide accommodations, facilities, advantages, privileges,

[13] This exemption does not extend to Arlene's Flowers, which does not meet the WLAD's definition of a "religious organization." RCW 26.04.010(7)(b) (defining "religious organization" to include "entities whose principal purpose is the study, practice, or advancement of religion," such as "churches, mosques, synagogues, temples," etc.).

services, or goods related to the solemnization or celebration of a marriage" (formatting omitted)). If the WLAD *already* excluded same-sex wedding services from the public accommodations covered under RCW 49.60.215, this exemption would be superfluous. We interpret statutes to avoid such superfluity whenever possible. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (in giving meaning to ambiguous statutory provisions, "we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous").

Second, for purposes of the analysis Stutzman would like us to adopt, same-sex marriage has never been "illegal" in Washington. Stutzman cites our decision in *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 750, 953 P.2d 88 (1998), which rejected a claim of marital status discrimination by two people terminated from their jobs for cohabiting in contravention of their workplace antinepotism policy. Waggoner argued that "cohabitation" fit within the meaning of the term "marital status." In examining this question of statutory interpretation, we determined that the plain meaning of the word "marital"—that is, pertaining to "the status of being married, separated, divorced, or widowed"—was sufficient to resolve the question against petitioners. *Id.* at 753. We thus rejected Waggoner's argument because "[w]e presume legislative consistency when called upon to construe statutory enactments or new amendments to old ones" and our legislature had criminalized cohabitation prior to protecting marital status under the WLAD. *Id.* at 754. Of significance here, we noted that cohabitation remained a *crime* for a full three years after marital status was included as

a protected status, and observed that "[i]t would be most anomalous for the Legislature to *criminalize* and protect the same conduct at the same time." *Id.* (emphasis added). Stutzman argues that we should treat same-sex marriage the same way and hold that the legislature could not possibly have intended to protect that *practice* when it protected sexual orientation as a *status*.

But Stutzman's reliance on *Waggoner* is misplaced. Washington's Defense of Marriage Act did not criminalize same-sex marriage. Former RCW 9.79.120 (1973), *repealed by* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(211). Rather, it codified, as a matter of state law, that the only legally *recognized* marriages in the state of Washington were those between a man and a woman. *See* LAWS OF 1998, ch. 1, § 2 ("It is the intent of the legislature . . . to establish public policy against same-sex marriage in statutory law that clearly and definitively declares same-sex marriages will not be recognized in Washington"). Former RCW 26.04.010 (1998) enacted no criminal penalties for attempts by two individuals of the same sex to wed; those individuals would simply not have had a valid "marriage" under Washington law. *See* LAWS OF 1998, ch. 1, § 3. Former RCW 9.79.120, on the other hand, specified that cohabitation was "a gross misdemeanor." *Waggoner*, 134 Wn.2d at 754 n.4. Our reasoning in *Waggoner* turned on the presence of a criminal statute targeting the conduct at issue, which is absent here.

We hold that there is no same-sex wedding exception to the WLAD's public accommodations provisions.

iii. The WLAD contains no mandate to balance religious rights against the rights of protected class members

In her final statutory argument regarding the WLAD, Stutzman contends that the superior court erred by failing to balance her right to religious free exercise against Ingersoll's right to equal service. Stutzman argues that because the WLAD also protects patrons of public accommodations from discrimination based on "creed," RCW 49.60.030(1), and because this court has recognized that the WLAD "sets forth a *nonexclusive* list of rights," *Marquis v. City of Spokane*, 130 Wn.2d 97, 107, 922 P.2d 43 (1996), the statute actually grants conflicting rights. As a consequence, she argues, courts should conduct a balancing inquiry "on a case-by-case basis," Reply Br. of Appellants at 43. She cites *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), for the rule that this court uses balancing tests to resolve claims of competing rights in other contexts.[14]

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[14] Although Stutzman refers to the balancing test set forth in *Ishikawa*, that is not the test that she applies in her briefing. Instead, Stutzman articulates a three-part balancing inquiry that (1) prioritizes "[r]ights of express constitutional magnitude . . . over other rights when they conflict," (2) evaluates whether infringement on the rights of the opposing party are narrowly tailored to protect the rights of the claimant, and (3) weighs the benefits and burdens on each party. Br. of Appellants at 23-24. In conducting this inquiry, Stutzman concludes that her rights "should take precedence" here because they are of constitutional magnitude, rather than derived from police power as are Ingersoll's; the exception for weddings only (as opposed to refusal to serve the gay community for any purpose) is narrowly tailored to protect her religious rights; and she is more significantly burdened in that she is forced to choose between

But Stutzman cites no authority for her contention that the WLAD protects proprietors of public accommodations to the same extent as it protects their patrons, nor for her contention that a balancing test should be adopted for the WLAD. And, to the extent that Stutzman relies on *Ishikawa*, that case is inapposite: it dealt with two competing rights—the right to a fair trial and the right to open courts—*both* of which are *constitutional*, not statutory. *Id.* at 37.

When faced with a question of statutory interpretation, we "'must not add words where the legislature has chosen not to include them.'" *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Here, the legislature has provided no indication in the text of the WLAD that it intended to import a fact-specific, case-by-case, constitutional balancing test into the statute. Moreover, the plain terms of the WLAD's public accommodations provision—the statute at issue here—protect patrons, not business owners. In other regulatory contexts, this court and the United States Supreme Court have held that individuals who engage in commerce necessarily accept some limitations on their conduct as a result. *See United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment) (declining to extend Social Security exemption to Amish employers on religious

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losing business or violating her religious beliefs, whereas "Mr. Ingersoll and Mr. Freed are able to obtain custom floral designs for their same-sex wedding from nearby florists." *Id.*

grounds because "[w]hen 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"); *Backlund v. Bd. of Comm'rs of King County Hosp. Dist. No. 2*, 106 Wn.2d 632, 648, 724 P.2d 981 (1986) (rejecting religious grounds as valid basis for physician to decline liability insurance because "[t]hose who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct"); *In re Marriage of Didier*, 134 Wn. App. 490, 499, 140 P.3d 607 (2006).

Because it is inconsistent with the WLAD's plain terms and unsupported by any precedent, we decline to adopt Stutzman's proposed balancing test. In sum, Stutzman's refusal to provide custom floral arrangements for a same-sex wedding violated the WLAD's prohibition on discrimination in public accommodations.[15]

B. Stutzman Fails To Show That the WLAD, as Applied in This Case, Violates Her State or Federal Constitutional Right to Free Speech

As noted above, Stutzman raises five constitutional challenges to the WLAD as applied to her. She is correct that if the State statute violated a constitutional right, the constitutional right would certainly prevail. U.S. CONST. art. VI, cl. 2 (federal

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[15] To the extent Stutzman argues that her religious free exercise rights supersede Ingersoll's and Freed's statutory protections, we address that argument in the constitutional analyses below.

constitutional supremacy); *Davis v. Cox*, 183 Wn.2d 269, 294-95, 351 P.3d 862 (2015) (state constitutional provision prevails over state statute to the contrary). We therefore analyze each of Stutzman's constitutional defenses carefully.

The first of these defenses is a free speech challenge: Stutzman contends that her floral arrangements are artistic expressions protected by the state and federal constitutions and that the WLAD impermissibly compels her to speak in favor of same-sex marriage.

i. As applied to Stutzman in this case, the WLAD does not violate First Amendment speech protections

"Free speech is revered as the 'Constitution's most majestic guarantee,' central to the preservation of all other rights." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 624, 957 P.2d 691 (1998) (plurality opinion) (quoting *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 536, 936 P.2d 1123 (1997)). "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012). Indeed, the First Amendment protects even hate speech, provided it is not "fighting words" or a "'true threat.'" *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (quoting *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (per curiam)).

Stutzman argues that the WLAD, as applied to her in this case, violates First Amendment

protections against "compelled speech" because it forces her to endorse same-sex marriage. Br. of Appellants at 24-31. To succeed in this argument, she must first demonstrate that the conduct at issue here—her commercial sale of floral wedding arrangements—amounts to "expression" protected by the First Amendment. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive.").

She fails to meet this burden. The First Amendment's plain terms protect "speech," not conduct. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). But the line between speech and conduct in this context is not always clear. Stutzman contends that her floral arrangements are "speech" for purposes of First Amendment protections because they involve her artistic decisions. Br. of Appellants at 24. Relying on the dictionary definition of "art," as well as expert testimony regarding her creativity and expressive style, she argues for a broad reading of protected speech that encompasses her "unique expression," crafted in "petal, leaf, and loam." *Id.* at 25-26. Ingersoll and the State counter that Stutzman's arrangements are simply one facet of conduct—selling goods and services for weddings in the commercial marketplace—that does not implicate First Amendment protections at all.

We agree that the regulated activity at issue in this case—Stutzman's sale of wedding floral

arrangements—is not "speech" in a literal sense and is thus properly characterized as conduct. But that does not end our inquiry. The Supreme Court has protected conduct *as* speech if two conditions are met: "[(1)] [a]n intent to convey a particularized message was present, and [(2)] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (per curiam). Recent cases have characterized this as an inquiry into whether the conduct at issue was "inherently expressive." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 64, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006).

Stutzman's floral arrangements do not meet this definition. Certainly, she argues that she *intends* to communicate a message through her floral arrangements. But the major contest is over whether Stutzman's intended communications actually communicated something to the public at large—whether her conduct was "inherently expressive." *Spence*, 418 U.S. at 410-11; *FAIR*, 547 U.S. at 64. And her actions in creating floral arrangements for wedding ceremonies do not satisfy this standard.

The leading case on the "inherently expressive" standard is *FAIR*. The plaintiffs in *FAIR*—an association of law schools and faculty members—challenged the constitutionality of a law that required higher education institutions to provide military recruiters on campus with access to facilities and students that was at least equivalent to that of the most favorably treated nonmilitary recruiter. 547 U.S. at 52, 55. The *FAIR* Court ruled that the law

schools' conduct in denying military recruiters most-favorable-recruiter access to students was *not* protected by the First Amendment because it was not "inherently expressive." *Id.* at 66. It explained that additional speech would be required for an outside observer to understand that the schools' reason for denying military recruiters favorable access was to protest the military's "Don't Ask, Don't Tell" policy. *Id.*

Stutzman's refusal is analogous. The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding. As Stutzman acknowledged at deposition, providing flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism. Stutzman also testified that she has previously declined wedding business on "[m]ajor holidays, when we don't have the staff or if they want particular flowers that we can't get in the time frame they need." CP at 120. Accordingly, an outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock.

Stutzman argues that *FAIR* is inapposite and that we should instead apply *Hurley*. *Hurley* held that a state antidiscrimination law could not be applied so as to require a private parade to include marchers displaying a gay pride message. 515 U.S. at 568. Stutzman claims *Hurley* recognizes her First Amendment right "to exclude a message [she] did not like from the communication [she] chose to make."

Reply Br. of Appellants at 11 (citing *Hurley*, 515 U.S. at 574).[16]

Hurley is similar to this case in one respect: it involved a public accommodations law like the WLAD.[17] But the Massachusetts trial court had ruled

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[16] Stutzman relies on *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988), in which the Boston Symphony (BSO) refused to perform with Vanessa Redgrave in light of her support of the Palestine Liberation Organization. Redgrave sued the BSO for breach of contract and consequential damages in federal court. *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985), *aff'd in part, vacated in part*, 855 F.2d 888. The First Amendment issue in that case arose from the district court's concern that Redgrave's novel theory of consequential damages was sufficiently related to defamation cases so as to implicate First Amendment concerns. *Id.* at 1201.

However, as the attorney general here notes, the First Circuit resolved that case on statutory interpretation of the Massachusetts Civil Rights Act, MASS. GEN. LAWS ch. 12, §§ 11H-11J, not on First Amendment grounds. Att'y Gen.'s Resp. Br. at 26. In fact, the court ultimately chose to "decline to reach the federal constitutional issues," given the complex interaction between First Amendment doctrine and state law, and saw "no need to discuss the existence or content of a First Amendment right not to perform an artistic endeavor." *Redgrave*, 855 F.2d at 911. Accordingly, Stutzman's references are, at best, out-of-circuit dicta.

[17] Stutzman cites both *Hurley* and *Boy Scouts of America v. Dale*, 530 U.S. 640, 657, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), as examples of cases in which the Supreme Court vindicated First Amendment rights over state antidiscrimination public accommodations laws. In fact, both cases involved state courts applying public accommodations laws in unusually expansive ways, such that an individual, private, expressive association of people fell under the law. *Dale*, 530 U.S. at 657 (New Jersey Court "went a step further" from an already "extremely broad" public accommodations law in applying it "to a private entity

that the *parade itself* was a place of public accommodation under state antidiscrimination law—a ruling that the Supreme Court called "peculiar." 515 U.S. at 561-62, 572. The Court noted that the parade's "inherent expressiveness" distinguished it from the places traditionally subject to public accommodations laws—places that provide "publicly available goods, privileges, and services." *Id.* at 568-72. *Hurley* is therefore unavailing to Stutzman: her store is the kind of public accommodation that has traditionally been subject to antidiscrimination laws. *See Elane Photography*, 309 P.3d at 68 (rejecting photographer's reliance on *Hurley* because state antidiscrimination law applies not to defendant's photographs but to "its business decision not to offer its services to protected classes of people"; concluding that "[w]hile photography may be expressive, the operation of a photography business is not").[18]

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without even attempting to tie the term 'place' to a physical location"); *Hurley*, 515 U.S. at 572 (noting that Massachusetts trial court applied a public accommodations law "in a peculiar way" to encompass a privately sponsored parade). This case is distinguishable because Arlene's Flowers is a paradigmatic public accommodation.

[18] The Supreme Court has drawn this distinction between expressive conduct and commercial activity in the context of First Amendment freedom of association claims, and likewise rejected the notion that the First Amendment precludes enforcement of antidiscrimination public accommodations laws in that context as well. *E.g.*, *Dale*, 530 U.S. at 657 (distinguishing between "clearly commercial entities" and "membership organizations" in cases involving the intersection between state public accommodations laws and First Amendment rights); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (finding that even private membership organizations may be regulated by public accommodations laws

United States Supreme Court decisions that accord free speech protections to conduct under the First Amendment have all dealt with conduct that is clearly expressive, in and of itself, without further explanation. *See Hurley*, 515 U.S. at 568 (parades); *United States v. Eichman*, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990) (burning the American flag); *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (burning the American flag); *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) (distributing leaflets outside Supreme Court building in violation of federal statute); *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) (per curiam) ("'[m]arching, walking or parading'" while wearing Nazi uniforms (alteration in original)); *Smith v. Goguen*, 415 U.S. 566, 588, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974) (White, J., concurring in judgment) (treating flag "'contemptuously'" by wearing a small American flag sewn into the seat of one's pants); *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (state motto on license plates); *Spence*, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (displaying American flag upside down on private property with peace sign superimposed on it to express feelings about Cambodian invasion and Kent State University shootings); *Cohen v. California*, 403 U.S. 15, 16, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (wearing jacket emblazoned with the words "'F**k the Draft'");

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where such regulations will not impair its ability "to disseminate its preferred views" and holding that there was no such impairment where young men's social organization was required to accept women members).

Schacht v. United States, 398 U.S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970) (wearing army uniform in short play criticizing United States involvement in Vietnam, inasmuch as it does not tend to discredit the armed forces); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (wearing black armbands to protest Vietnam conflict); *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966) (sit-in to protest "whites only" area in public library during civil rights struggle); *Cox v. Louisiana*, 379 U.S. 536, 552, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965) (giving speech and leading group of protesters in song and prayer in opposition to segregation); *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963) (peaceful march on sidewalk around State House grounds in protest of discrimination); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (refusing to salute the American flag while saying pledge of allegiance); *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) (peaceful display of red flag as a sign of opposition to organized government). Stutzman's conduct—whether it is characterized as creating floral arrangements, providing floral arrangement services for opposite-sex weddings, or denying those services for same-sex weddings—is not like the inherently expressive activities at issue in these cases. Instead, it is like the unprotected conduct in *FAIR*, 547 U.S. at 66.[19]

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[19] Stutzman and amici point to a handful of cases protecting various forms of art—and some of them do seem to provide surface support for their argument. *See* Br. of Appellants at 6-7; Mot. for Leave to File Br. & Br. for Cato Inst, as Amicus Curiae

Finally, Stutzman asserts that even if her case doesn't fall neatly within the contours of these prior holdings, we should nevertheless place her floral artistry within a new, narrow protection. The "narrow" exception she requests would apply to "businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression as opposed to gift items, raw products, or prearranged [items]." Reply Br. of Appellants at 45. In her case, she proposes that she would be willing to sell Mr. Ingersoll "uncut flowers and premade arrangements." *Id.* at 46. But, as amicus Americans United for Separation of Church and State points out, Stutzman's rule would create a "two-tiered system" that carves out an enormous hole from public

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in Supp. of Appellants (Cato) at 7 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (music without words); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (theater); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 627-28 (7th Cir. 1985) (stained glass windows on display in an art gallery at a junior college)).

But, on closer examination, those cases do not expand the definition of "expressive conduct." For example, *Piarowski* held that stained glass windows were protected in the context of a college's demands that the artist move some of his pieces from a gallery to an alternate location on campus because they were objected to as "sexually explicit and racially offensive." 759 F.2d at 632. And the *Anderson* court reached its finding that tattoos receive First Amendment protections by pointing out that they "are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection." 621 F.3d at 1061. Stutzman's floral arrangements do not implicate any similar concerns.

accommodations laws: under such a system, a "dime-store lunch counter would be required to serve interracial couples but an upscale bistro could turn them away." Br. of Amicus Curiae Ams. United in Supp. of Resp'ts at 13. Indeed, the New Mexico Supreme Court also grappled with this question, ultimately finding that "[c]ourts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws," and noting that this concern was hardly hypothetical in light of the proliferation of cases requesting exceptions for "florists, bakeries, and other wedding vendors" who refused to serve gay couples. *Elane Photography*, 309 P.3d at 71.

Because Stutzman's sale of floral arrangements is not expressive conduct protected by the First Amendment, we affirm the trial court and hold that the WLAD does not violate free speech protections as applied to Stutzman in this case.

ii. Stutzman does not argue that article I, section 5 of the Washington Constitution provides any greater protection than the First Amendment in this context; we therefore affirm the trial court's ruling that no article I, section 5 violation occurred in this case

Stutzman asserts violations of both state and federal free speech constitutional provisions, though she does not distinguish between them.

As the superior court correctly points out, we interpret article I, section 5 independently from the First Amendment. *Bradburn v. N. Cent. Reg'l Library*

Dist., 168 Wn.2d 789, 800, 231 P.3d 166 (2010). In some cases, we have found article I, section 5 to be more protective than its federal counterpart, and in some cases, we have held the two to contain equivalent protections. *Id.* In this case, however, Stutzman has not assigned error to the superior court's use of a First Amendment analysis rather than a separate state constitutional analysis. We therefore decline to reach the issue of whether article I, section 5 rights in this context are coextensive with First Amendment rights.

C. As Applied in This Case, the WLAD Does Not Violate Stutzman's Right to Religious Free Exercise under the First Amendment to the United States Constitution

In her second constitutional claim, Stutzman argues that the WLAD, as applied to her in this case, violated her First Amendment right to religious free exercise. We disagree.

The free exercise clause of the First Amendment, which applies to the States through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Laws that burden religion are subject to two different levels of scrutiny under the free exercise clause. Neutral, generally applicable laws burdening religion are subject to rational basis review,[20] while laws that discriminate against some

[20] *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

or all religions (or regulate conduct *because* it is undertaken for religious reasons) are subject to strict scrutiny.[21]

Stutzman argues that the WLAD is subject to strict scrutiny under a First Amendment free exercise analysis because it is neither neutral nor generally applicable. She is incorrect.

A law is not neutral for purposes of a First Amendment free exercise challenge if "the object of [the] law is to infringe upon or restrict practices *because* of their religious motivation." *Lukumi Babalu Aye*, 508 U.S. at 533 (emphasis added). Stutzman does not argue that our legislature passed the WLAD in order to target religious people or people whose religions dictate opposition to gay marriage. Instead, she argues that the WLAD is unfair because it grants exemptions for "religious organizations"[22]—permitting these organizations to refuse marriage services—but does not extend those same exemptions to her. Br. of Appellants at 37.

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[21] *Lukumi Babalu Aye*, 508 U.S. at 532.

[22] *See* RCW 26.04.010(6) ("A religious organization shall be immune from any civil claim or cause of action, including a claim pursuant to chapter 49.60 RCW, based on its refusal to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage."). "Religious organization" is defined as including, "but . . . not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, and other entities whose principal purpose is the study, practice, or advancement of religion." RCW 26.04.010(7)(b).

We disagree. The cases on which Stutzman relies all address laws that single out for onerous regulation either religious conduct in general or conduct linked to a particular religion, while exempting secular conduct or conduct associated with other, nontargeted religions. *E.g.*, *Lukumi Babalu Aye*, 508 U.S. at 532-42 (law was not neutral where legislative history, including enactment of numerous exemptions for members of other religions, evidenced a clear intent to target practitioners of Santeria faith). They recognize that the "[t]he Free Exercise Clause forbids any regulation of beliefs as such," and that this unconstitutional regulation may sometimes be accomplished through a law that *appears* facially neutral. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208-09 (3d Cir. 2004). But blanket exemptions for religious organizations do not evidence an intent to target religion. Instead, they indicate the opposite. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-38, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (exemption in Civil Rights Act of 1964, 42 U.S.C. § 2000e, for religious organizations does not violate the establishment clause because it serves a secular purpose—to minimize governmental interference with religion—and neither advances nor inhibits religion); *Elane Photography*, 309 P.3d at 74-75 ("Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion.").

Stutzman also argues that the WLAD is not "generally applicable" because it does not apply to businesses that employ fewer than eight persons,

employees working for a close family member or in domestic service, people renting out certain multifamily dwellings, and distinctly private organizations.

Again, the authority Stutzman cites is inapposite. That authority stands for two principles, neither of which is implicated here.

First, a law may fail the "general applicability" test, and thus trigger strict scrutiny, if it adopts a patchwork of specific exemptions that conspicuously omits certain religiously motivated conduct. As with nonneutral laws, such an omission is evidence that the government has deliberately targeted religious conduct for onerous regulation, or at the very least devalued religion as a ground for exemption. *Lukumi Babalu Aye*, 508 U.S. at 544-46 (holding that ordinance was not generally applicable because it "pursues the city's governmental interests *only* against conduct motivated by religious belief" (emphasis added)); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-66 (3d Cir. 1999) (police department policy prohibiting officers from wearing beards triggered strict scrutiny because it allowed individual exemptions for medical but not religious reasons; because the medical exemption undermined the policy's purpose—to create uniformity of appearance among its officers—just as much as a religious exemption would, the disparity evidenced the department's preference for medical (secular) objections over religious ones).

Second, a law is not "generally applicable" if it permits individual exemptions but is then applied in a manner that is needlessly prejudicial to religion.

Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 276 (3d Cir. 2007) ("What makes a system of individualized exemptions suspicious is the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons. In *Blackhawk*, it was not the mere existence of an exemption procedure that gave us pause but rather the fact that the Commonwealth could not coherently explain what, other than the religious *motivation* of Blackhawk's conduct, justified the unavailability of an exemption." (citing *Blackhawk*, 381 F.3d at 211)).

In this case, Stutzman seeks an exemption that would allow her to refuse certain customer services to members of a WLAD-protected class on religious grounds. Under a First Amendment free exercise analysis, the WLAD would trigger strict scrutiny if it permitted that sort of discrimination only for nonreligious reasons, and thus indicated the government's preference for secular discrimination. But the WLAD does not do this.

Three of the alleged "exemptions" Stutzman cites have nothing at all to do with the exemption she seeks (an exemption permitting discrimination in public accommodations). The exemption for "[people] renting [out] certain multifamily dwellings," Br. of Appellants at 38 (citing RCW 49.60.040(5)), is not really an exemption from the WLAD at all. RCW 49.60.040(5) defines a "covered multifamily dwelling" to exclude all buildings with fewer than four units and certain buildings with no elevators. In conjunction with RCW 49.60.222(2)(c), this provision requires that "covered multifamily dwellings" be designed and constructed in compliance with state and federal

disability access laws. This is not a license for certain landlords to discriminate. With respect to public accommodations, the same is true of the WLAD's "exemptions" for individuals employed in domestic service or by family members and for "employers" with fewer than eight employees. *See* Br. of Appellants at 38 (citing RCW 49.60.040(10), (11)). These exemptions protect *employers* from WLAD liability as *employers*—that is, liability to their employees—in the context of family relationships, domestic service, and very small businesses; they have nothing to do with Stutzman's liability as the proprietor of a public accommodation. *Compare* RCW 49.60.180 (listing prohibited "[u]nfair practices of employers," all of which discriminate against employees or potential employees—not customers), *with* RCW 49.60.215 (listing prohibited "[u]nfair practices of places of public resort, accommodation, assemblage, amusement"; completely omitting any reference to "employers"). Thus, these exemptions are distinguishable from the exemptions at issue in *Lukumi Babalu Aye*, *Blackhawk*, or *Fraternal Order of Police* because none is an exemption that Stutzman would actually like to invoke.

And the other "exemption" Stutzman identifies—for distinctly private organizations, Br. of Appellants at 38 (citing RCW 49.60.040(2))—does not undermine the purposes of the WLAD's public accommodations provision: to prevent discrimination in *public* accommodations. Thus, it does not trigger strict scrutiny under a First Amendment free exercise analysis either. *Fraternal Order of Police*, 170 F.3d at 366 (contrasting exemptions that undermine a law's purpose—and thus trigger strict scrutiny—with

exemptions for "activities that [the government] does not have an interest in preventing"; holding that police department's exemption permitting undercover officers to wear beards did not trigger strict scrutiny because the governmental interest served by the shaving requirement—making officers readily recognizable as officers—did not apply to undercover officers).

For these reasons, we reject Stutzman's claim that the WLAD, as applied to her, triggers strict scrutiny under the free exercise clause of the First Amendment. The WLAD is a neutral, generally applicable law subject to rational basis review. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). And the WLAD clearly meets that standard: it is rationally related to the government's legitimate interest in ensuring equal access to public accommodations. *See Lighthouse*, 510 F.3d at 277 (to withstand free exercise challenge, neutral, generally applicable law "must be reasonable and not arbitrary and it must bear 'a rational relationship to a [permissible] state objective'" (alteration in original) (quoting *Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974))).

D. As Applied in This Case, the WLAD Did Not Violate Stutzman's Right to Religious Free Exercise under Article I, Section 11 of the Washington Constitution

i. This court has applied strict judicial scrutiny to certain article I, section 11 claims

Stutzman also raises a state constitutional challenge to the WLAD as applied to her religiously motivated conduct in this case. Article I, section 11 of the Washington Constitution provides, in relevant part:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Obviously, this language differs from the language of the First Amendment's free exercise clause.

In the past, however, we interpreted article I, section 11 to provide the same protection as the First Amendment's free exercise clause. *See First Covenant Church of Seattle v. City of Seattle*, 114 Wn.2d 392,402, 787 P.2d 1352 (1990) (*First Covenant I*), *vacated and remanded*, 499 U.S. 901, 111 S. Ct. 1097, 113 L. Ed. 2d 208 (1991). Thus, for many years this court relied on First Amendment free exercise case law in article I, section 11 challenges and applied strict scrutiny to laws burdening religion. *Id.* (law burdening religion must serve "compelling state interest" and "constitute[ ] the least restrictive means to achieve the government's objective" (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Hobbie v.*

Unemployment Appeals Comm'n, 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987))).[23]

In 1990, however, things changed. That was the year that the United States Supreme Court adopted rational basis review for claims that neutral, generally applicable laws (like the WLAD) incidentally burden religion in *Smith*, 494 U.S. at 878-90. *Smith* definitively repudiated strict scrutiny for neutral, generally applicable laws prohibiting "socially harmful conduct." *Id.* at 884-85. It reasoned that applying heightened scrutiny—which requires a balancing of governmental against personal interests—would pose two problems. *Id.* First, it would vitiate the state's ability to regulate, allowing every individual "'to become a law unto himself.'" *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 167, 25 L. Ed. 244 1878)). Second, it would entangle civil courts in religion by requiring them to evaluate the significance of a particular practice to a faith. *Id.* at 887 ("[r]epeatedly and in many different

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[23] Some scholarship distinguishes between the "compelling interest" test and "strict scrutiny." *E.g.*, Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359-60 (2008) (describing the "compelling interest" standard as one of three barriers that legislation must overcome under strict scrutiny). But this court has always treated them as synonymous in religious free exercise cases. *E.g.*, *Backlund*, 106 Wn.2d at 641 ("Since [the plaintiff's] beliefs are protected by the free exercise clause of the First Amendment, the burden of proof shifts to the Board to prove that (1) a compelling governmental interest justifies the regulation in question and (2) the regulation is the least restrictive imposition on the *practice* of his belief to satisfy that interest." (citing *United States v. Lee*, 455 U.S. 252, 257, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982); *State v. Meacham*, 93 Wn.2d 735, 740, 612 P.2d 795 (1980))).

contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"). The *Smith* Court reasoned that such a balancing test would be incompatible with the religious pluralism that is fundamental to our national identity. *Id.* at 888.

Smith's holding is limited in two ways. First, it left in place prior First Amendment case law applying the "compelling interest" balancing test where the statute in question "lent itself to individualized . . . assessment"—e.g., an unemployment benefits statute under which an administrative court determines, on a case-by-case basis, whether a person was fired for good cause. *Id.* at 884. In such cases, the Court explained that "the State [already] has in place a system of individual exemptions"—thus, the challenged law is not "generally applicable" for purposes of First Amendment free exercise analysis. *Id.* Where an individual requests a religious exemption from such a law, the government must have a compelling reason for denying it. *Id.* Second, the *Smith* Court distinguished cases involving "hybrid" claims—e.g., challenges to laws that burdened *both* religious freedom *and* another right such as free speech. *Id.* at 881 (collecting cases).

We revisited our article I, section 11 test following *Smith* in *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 840 P.2d 174 (1992) (*First Covenant II*). In that case, the plaintiff church argued that its designation as a historical landmark (subject to "controls" limiting alterations to its building) violated both First Amendment and article I, section 11 protections. *Id.* at 208-09. In *First*

Covenant I, we applied strict scrutiny to both constitutional challenges and held that the zoning law was unconstitutional. 114 Wn.2d at 401-02, 410. On remand from the United States Supreme Court following *Smith*, we addressed the state and federal free exercise claims again. Regarding the First Amendment claim, the *First Covenant II* court held that the challenged statute fell within both of the exceptions to rational basis review recognized in *Smith*: it created a system of "individualized assessments" *and* it raised "hybrid" constitutional concerns (by restricting speech as well as religious free exercise). 120 Wn.2d at 214-17. The court therefore held that the historical landmark statute was subject to strict scrutiny under the First Amendment. *Id.* at 217-18.

But after determining that the statute failed strict scrutiny as applied to the plaintiff church—because a city's purely aesthetic or cultural interest in preserving historical landmarks is not compelling—the *First Covenant II* court went on to separately analyze the church's article I, section 11 claim. *Id.* at 223 ("The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom . . . [and] [a]lthough we might . . . base our decision solely on federal grounds, we decline to do so."). It performed a *Gunwall*[24] analysis and concluded that

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[24] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). A *Gunwall* analysis determines whether a state constitutional provision is more protective than its federal counterpart by considering six nonexclusive factors: (1) the text of the state constitutional provision at issue, (2) significant differences between the text of parallel state and federal constitutional

article I, section 11 "extends broader protection than the [F]irst [A]mendment . . . and precludes the City from imposing [the disputed] Landmarks Preservation Ordinance on First Covenant's church." *Id.* at 229-30.

Since that time, our court has addressed four article I, section 11 claims—all by churches challenging land use regulations[25]—and has subjected the challenged law to strict scrutiny in each case. Thus, both before and after *Smith* and *First Covenant II*, we have applied the same four-pronged analysis in an article I, section 11 challenge: where a party has (1) a sincere religious belief and (2) the exercise of that belief is substantially burdened by the challenged law, the law is enforceable against that party only if it (3) serves a compelling government interest and (4) is the least restrictive means of achieving that interest. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009); *Backlund*, 106 Wn.2d at 641. And we have specifically held—in the context of a church's challenge to a zoning law—that article I, section 11 is more protective of religious free exercise

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provisions, (3) state constitutional and common law history, (4) state law predating the state constitution, (5) structural differences between the state and federal constitutions, and (6) matters of particular state or local concern. *Id.* at 61-62.

[25] *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 644-45, 211 P.3d 406 (2009); *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 156-60, 995 P.2d 33 (2000); *Munns v. Martin*, 131 Wn.2d 192, 195, 930 P.2d 318 (1997); *First United Methodist Church of Seattle v. Hr'g Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 249-50, 252-53, 916 P.2d 374 (1996).

than the First Amendment is. *E.g.*, *First Covenant II*, 120 Wn.2d at 224 (applying strict scrutiny to zoning ordinance as a matter of state constitutional law because "[o]ur state constitutional and common law history support a broader reading of article [I], section 11 than of the First Amendment").[26]

The parties dispute the significance of these post-*Smith* holdings to this case. Ingersoll and the attorney general argue that they are limited to zoning laws, as applied to churches, and thus make no difference to the outcome under our long-standing, four-pronged test. They maintain that a neutral health and safety regulation like the WLAD creates no substantial burden on the free exercise of religion—and thus does not trigger strict scrutiny—when it operates in the commercial marketplace.

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[26] The attorney general correctly notes that this court has never held that a corporate defendant such as Arlene's Flowers has a "conscience" or "sentiment" subject to article I, section 11 protections. *See* Att'y Gen. Resp. Br. at 31 ("Indeed the plain language of article I, section 11 guarantees its protections to 'every individual,' making no mention of protection for businesses."); Att'y Gen.'s Answer to Brs. of Amici Curiae at 19 ("Neither Defendants nor their amici point to any Washington authority to support the notion that for-profit corporations are protected by article I, section 11."). But Stutzman argues only that she may assert her *own* free exercise rights on behalf of her corporation. Br. of Appellants at 32 n.24 ("'protecting the free-exercise rights of [closely held] corporations . . . protects the religious liberty *of the humans who own and control those companies*'" (emphasis added) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014))). Thus, we address only Stutzman's individual claim that *her* article I, section 11 rights have been violated. We do not address whether Arlene's Flowers (the corporation) has any such rights.

Stutzman contends that under *First Covenant II* and its progeny, "strict scrutiny applies even if the regulation 'indirectly burdens the exercise of religion.'" Br. of Appellants at 33 (quoting *First Covenant II*, 120 Wn.2d at 226).

We decline to resolve that dispute here because we conclude that Stutzman's free exercise claim fails even under the test she advances. Even if article I, section 11 provides Stutzman with the strongest possible protections, subjecting the WLAD to strict scrutiny in this case, her state constitutional challenge must still fail.

ii. The WLAD survives strict scrutiny

In the decades before *First Covenant II*, this court upheld numerous health and safety regulations under strict scrutiny—the test that we then assumed was required under the First Amendment. *E.g.*, *Backlund*, 106 Wn.2d at 641 (requirement that physician purchase professional liability insurance did not violate First Amendment; State had a compelling interest in licensure requirement and the requirement was "the least restrictive imposition on the *practice* of [the plaintiffs] belief to satisfy that interest"); *State v. Meacham*, 93 Wn.2d 735, 740-41, 612 P.2d 795 (1980) (court-ordered blood test for putative fathers did not violate First Amendment; State had a compelling interest in securing child support and that interest could not "be achieved by measures less drastic"); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 861, 863-64, 239 P.2d 545 (1952) (neither First Amendment nor prior version of article I, section 11 barred mandatory tuberculosis testing as condition of admission to University of

Washington; "the public interest [served] is the health of all of the students and employees of the university[;] . . . [t]he danger to this interest is clear and present, grave and immediate[, and] . . . [i]nfringement of appellant's rights is a necessary consequence of a practical attempt to avoid the danger"); *see also State v. Clifford*, 57 Wn. App. 127, 132-34, 787 P.2d 571 (1990) (law mandating that drivers be licensed does not violate First Amendment; "[t]here is no less restrictive means available to satisfy the State's compelling interest in regulating the driving of motor vehicles"). Like all of the laws at issue in those cases, the WLAD's public accommodations provision is a neutral health and safety regulation. Under our long-standing precedent, such laws satisfy strict scrutiny in an article I, section 11 challenge.

To be sure, none of our previous article I, section 11 cases addressed an antidiscrimination law. But numerous other courts have heard religious free exercise challenges to such laws and upheld them under strict scrutiny. *E.g.*, *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 281-83 (Alaska 1994) (in rental housing context, state antidiscrimination law passed strict scrutiny—meaning that defendants were not entitled to a religious exemption—because "[t]he government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing"; moreover, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity"); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 852-54 (Minn. 1985) (in employment context, state antidiscrimination law

passed strict scrutiny in religious free exercise challenge because "[t]he state's overriding compelling interest of eliminating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes"); *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158-59, 189 P.3d 959, 81 Cal. Rptr. 3d 708 (2008) (assuming that strict scrutiny applied as a matter of state constitutional law, it would not invalidate statute barring discrimination on the basis of sexual orientation as applied to fertility clinic with religious objections to helping gay patients conceive; "[t]he 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" (citing CAL. CIV. CODE § 51)); *Gay Rights Coal, of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 31-39 (D.C. 1987) (District of Columbia's Human Rights Act, former D.C. CODE § 1-2520 (1981), *recodified as* D.C. CODE § 2-1402.41, as applied to prohibit defendant university from denying equal recognition and support to gay student groups, survived strict scrutiny in university's pre-*Smith* free exercise challenge; "[t]o tailor the Human Rights Act to require less of the University than equal access to its 'facilities and services,' without regard to sexual orientation, would be to defeat its compelling purpose[:] [t]he District of Columbia's overriding interest in eradicating sexual orientation discrimination, if it is ever to be converted from aspiration to reality, requires that Georgetown

equally distribute tangible benefits to the student groups"); see also *Bob Jones Univ.*, 461 U.S. at 602-04 (federal government's denial of tax exempt status to schools that enforced religiously motivated racially discriminatory policies survived strict scrutiny; "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . [, and] [t]hat . . . interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs"). Indeed, we are not aware of any case invalidating an antidiscrimination law under a free exercise strict scrutiny analysis.

Nevertheless, Stutzman argues that strict scrutiny is not satisfied in this case. She reasons that since other florists were willing to serve Ingersoll, no real harm will come from her refusal. And she maintains that the government therefore can't have any compelling interest in applying the WLAD to her shop. In other words, Stutzman contends that there is no reason to enforce the WLAD when, as she puts it, "[N]o access problem exists." Br. of Appellants at 46.

We emphatically reject this argument. We agree with Ingersoll and Freed that "[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches." Br. of Resp'ts Ingersoll & Freed at 32. As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of

exceptions for ostensibly justified discrimination,[27] that purpose would be fatally undermined.

In conclusion, we assume without deciding that strict scrutiny applies to the WLAD in this article I, section 11 challenge, and we hold that the law satisfies that standard.

E. As Applied in This Case, the WLAD Does Not Violate Stutzman's Right to Free Association under the First Amendment to the United States Constitution

Stutzman argues that the WLAD, as applied by the trial court in her case, violates her First Amendment right to freedom of association. But to support that argument, she relies exclusively on cases addressing membership in private clubs: *Boy Scouts of America v. Dale*, 530 U.S. 640, 653, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); *Hurley*, 515 U.S. at 574; and *Roberts*, 468 U.S. at 618.[28] These cases expressly distinguish a business' customer service (subject to

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[27] Stutzman argues that discrimination cannot be "invidious"—and thus subject to governmental prohibition—if it is based on religious beliefs. Br. of Appellants at 40-43. But she cites no relevant legal authority for this novel theory. In fact, the relevant legal history is to the contrary. *E.g.*, *Piggie Park*, 390 U.S. at 402 n.5. She also argues that the government has no compelling interest in forcing her to speak or associate with Ingersoll or any other customer. But, as explained elsewhere in this opinion, the WLAD does not implicate Stutzman's rights of speech or association.

[28] Stutzman also cites one case addressing speech: *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). Reply Br. of Appellants at 28. This opinion addresses Stutzman's free expression claim elsewhere.

generally applicable antidiscrimination laws) from expressive conduct (protected from such laws by the First Amendment). *Dale*, 530 U.S. at 648, 656-57 ("To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association'"; antidiscrimination law violated the Boy Scouts' First Amendment freedom of association in part because the Boy Scouts was a membership organization instead of a "clearly commercial entit[y]."); *Hurley*, 515 U.S. at 572, 571 (state antidiscrimination law at issue traditionally applied to "the provision of publicly available goods, privileges, and services" by, "[a]t common law, innkeepers, smiths, and others who 'made profession of a public employment'"; but it would be "peculiar" to extend that law beyond the customer service context so that it applied to the inherently expressive conduct of marching in a parade).

In fact, the United States Supreme Court has even held that states may enforce antidiscrimination laws against certain private organizations, defined by particular goals and ideologies, if the enforcement will not impair the group's ability to pursue those goals and espouse those ideologies. *Roberts*, 468 U.S. at 628 (even though First Amendment protects private groups, those groups are subject to antidiscrimination laws to the extent that enforcement "will [not] change the content or impact of the organization's speech").

But the Supreme Court has never held that a commercial enterprise, open to the general public, is an "'expressive association'" for purposes of First

Amendment protections, *Dale*, 530 U.S. at 648. We therefore reject Stutzman's free association claim.

F. As Applied in This Case, the WLAD Does Not Violate Stutzman's Constitutional Protections under the "Hybrid Rights" Doctrine

Stutzman also argues that the WLAD, as applied to her in this case, triggers strict scrutiny because it implicates "hybrid rights." Br. of Appellants at 40. As noted above, a law triggers strict scrutiny if it burdens *both* religious free exercise *and* another fundamental right such as speech or association. *First Covenant II*, 120 Wn.2d at 217-18 ("[t]he less protective free exercise standard set forth in *Smith* . . . does not apply because the case presents a 'hybrid situation': First Covenant's claim involves the free exercise clause in conjunction with free speech" (citing *Smith*, 494 U.S. at 904 (O'Connor, J., concurring in judgment))). But Stutzman's claim fails for two reasons. First, the only fundamental right implicated in this case is the right to religious free exercise. Stutzman's rights to speech and association are not burdened. *See supra* Sections IV.B, E. Second, even if the WLAD does trigger strict scrutiny in this case, it satisfies that standard. *See supra* Section IV.D.ii.

G. The Trial Court Did Not Err by Imposing Personal Liability on Stutzman Instead of Solely on Her Corporation, Arlene's Flowers Inc.

In addition to finding that Stutzman violated the WLAD, the trial court also found that Stutzman violated the CPA. This is because the WLAD provides

that an act of public accommodation discrimination is an "unfair practice" and a per se violation of the CPA. RCW 49.60.030(3).[29] Stutzman concedes that if she violated the WLAD, then Arlene's Flowers is liable for a CPA violation.

But Stutzman argues that she cannot be *personally* liable for violating the CPA because (1) she kept her affairs separate from Arlene's Flowers' and (2) no Washington court has ever applied the "responsible-corporate-officer doctrine" outside the fraud context. Br. of Appellants at 49 (citing *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552-53, 599 P.2d 1271 (1979); *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 108 Wn. App. 330, 347-48, 30 P.3d 504 (2001), *aff'd in part and rev'd in part*, 148 Wn.2d 319, 61 P.3d 1094 (2002)).

The authority Stutzman cites does not support this argument. In *Grayson*, this court held that the defendant could be personally liable for his company's CPA violation *even though* there were no grounds for piercing the corporate veil. 92 Wn.2d at 553-54. This directly contradicts Stutzman's theory that she cannot be personally liable under the CPA unless she commingled her finances with Arlene's Flowers'. And

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[29] The trial court also found that Stutzman's actions violated the CPA—because they were an "'unfair or deceptive act or practice . . . occurring in trade or commerce, and [impacting the] public interest'"—even if she did not also violate the WLAD. CP at 2634-37 (quoting *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011)). This ruling is questionable, but because we conclude that Stutzman did violate the WLAD, and because Stutzman did not assign error to this ruling in her opening brief, we do not address it.

the other case, *One Pac. Towers*, 108 Wn. App. 330, does not address a CPA claim.

On the other hand, there is long-standing precedent in Washington holding that individuals may be personally liable for a CPA violation if they "participate[ ] in the wrongful conduct, or with knowledge approve[ ] of the conduct." *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976). Liability for such participation or approval does not depend on piercing the corporate veil. *Id.* This is consistent with the CPA's plain language, which authorizes the attorney general to bring an action "against any *person* to restrain and prevent the doing of any act herein prohibited or declared to be unlawful," RCW 19.86.080(1) (emphasis added), and which defines "person" to include, "where applicable, natural persons," as well as corporate entities, RCW 19.86.010(1).

Such individual liability does not constitute an application of, or expansion of, the responsible corporate officer doctrine. That doctrine expands liability from a corporation to an individual officer who would not otherwise be liable "where the officer stands 'in responsible relation to a public danger.'" *Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 243, 971 P.2d 948 (1999) (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S. Ct. 134, 88 L. Ed. 48 (1943)). Here, the trial court did not find Stutzman (the individual) vicariously or secondarily liable based on conduct of Arlene's Flowers (the corporation). It found her liable because of acts that she herself committed.

V. We previously ordered that any award of attorney fees and costs shall include attorney fees and costs on appeal, and that order remains in effect

Respondents Freed and Ingersoll request an award of attorney fees and costs on remand. After we issued our first opinion in this case, we ordered the trial court to include attorney fees and costs on appeal in its award of attorney fees and costs to Freed and Ingersoll. This order remains in effect; the trial court shall determine the amount of attorney fees and costs on appeal.

CONCLUSION

The State of Washington bars discrimination in public accommodations on the basis of sexual orientation. Discrimination based on same-sex marriage constitutes discrimination on the basis of sexual orientation. We therefore hold that the conduct for which Stutzman was cited and fined in this case—refusing her commercially marketed wedding floral services to Ingersoll and Freed because theirs would be a same-sex wedding—constitutes sexual orientation discrimination under the WLAD. We also hold that the WLAD may be enforced against Stutzman because it does not infringe any constitutional protection. As applied in this case, the WLAD does not compel speech or association. And assuming that it substantially burdens Stutzman's religious free exercise, the WLAD does not violate her right to religious free exercise under either the First Amendment or article I, section 11 because it is a neutral, generally applicable law that serves our state

government's compelling interest in eradicating discrimination in public accommodations.

After careful review on remand, we are confident that the courts resolved this dispute with tolerance, and we therefore find no reason to change our original judgment in light of *Masterpiece Cakeshop*. We again affirm the trial court's rulings.

WE CONCUR:

138 S. Ct. 2671

Supreme Court of the United States

ARLENE'S FLOWERS, INC., dba Arlene's Flowers and Gifts, et al., petitioners,

v.

WASHINGTON, et al.

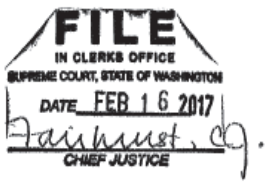
No. 17–108.

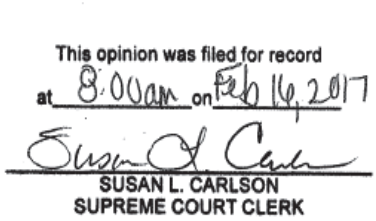
|

June 25, 2018.

Opinion

On petition for writ of certiorari to the Supreme Court of Washington. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Washington for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. ——, 138 S.Ct. 1719, —— L.Ed.2d—— (2018).





IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, AND GIFTS, and BARRONELLE STUTZMAN, Appellants.	NO. 91615-2 EN BANC Filed Feb. 16, 2017
ROBERT INGERSOLL and CURT FREED, Respondents, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Appellants.	

GORDON McCLOUD, J.—The State of Washington bars discrimination in "public . . . accommodation[s]" on the basis of "sexual orientation." RCW 49.60.215 (Washington Law Against Discrimination (WLAD)). Barronelle Stutzman owns and operates a place of public accommodation in our state: Arlene's Flowers Inc. Stutzman and her public business, Arlene's Flowers and Gifts, refused to sell wedding flowers to Robert Ingersoll because his betrothed, Curt Freed, is a man. The State and the couple sued, each alleging violations of the WLAD and the Consumer Protection Act (CPA), ch. 19.86 RCW. Stutzman defended on the grounds that the WLAD and CPA do not apply to her conduct and that, if they do, those statutes violate her state and federal constitutional rights to free speech, free exercise, and free association.

The Benton County Superior Court granted summary judgment to the State and the couple, rejecting all of Stutzman's claims. We granted review and now affirm.

FACTS

In 2004, Ingersoll and Freed began a committed, romantic relationship. In 2012, the people of our state voted to recognize equal civil marriage rights for same-sex couples. LAWS OF 2012, ch. 3, § 1. Freed proposed marriage to Ingersoll that same year. The two intended to marry on their ninth anniversary, in September 2013, and were "excited about organizing [their] wedding." Clerk's Papers (CP) at 350. Their plans included inviting "[a] hundred plus" guests to celebrate with them at Bella Fiori Gardens, complete with a dinner or reception, a photographer, a caterer, a wedding cake, and flowers. *Id.* at 1775-77.

By the time he and Freed became engaged, Ingersoll had been a customer at Arlene's Flowers for at least nine years, purchasing numerous floral arrangements from Stutzman and spending an estimated several thousand dollars at her shop. Stutzman is the owner and president of Arlene's Flowers. She employs approximately 10 people, depending on the season, including three floral designers, one of whom is herself. Stutzman knew that Ingersoll is gay and that he had been in a relationship with Freed for several years. The two men considered Arlene's Flowers to be "[their] florist." *Id.* at 350.

Stutzman is an active member of the Southern Baptist church. It is uncontested that her sincerely held religious beliefs include a belief that marriage can exist only between one man and one woman.

On February 28, 2013, Ingersoll went to Arlene's Flowers on his way home from work, hoping to talk to Stutzman about purchasing flowers for his upcoming wedding. Ingersoll told an Arlene's Flowers employee that he was engaged to marry Freed and that they wanted Arlene's Flowers to provide the flowers for their wedding. The employee informed Ingersoll that Stutzman was not at the shop and that he would need to speak directly with her. The next day, Ingersoll returned to speak with Ms. Stutzman. At that time, Stutzman told Ingersoll that she would be unable to do the flowers for his wedding because of her religious beliefs, specifically, because of "her relationship with Jesus Christ." *Id.* at 155, 351, 1741-42, 1744-45, 1763. Ingersoll did not have a chance to specify what kind of flowers or floral arrangements he was seeking before Stutzman told him that she would not serve him. They also did not discuss whether Stutzman would be asked to bring the arrangements to the wedding location or whether the flowers would be picked up from her shop.

Stutzman asserts that she gave Ingersoll the name of other florists who might be willing to serve him, and that the two hugged before Ingersoll left her store. Ingersoll maintains that he walked away from that conversation "feeling very hurt and upset emotionally." *Id.* at 1743.

Early the next morning, after a sleepless night, Freed posted a status update on his personal Facebook feed regarding Stutzman's refusal to sell him wedding flowers. The update observed, without specifically naming Arlene's Flowers, that the couple's "favorite Richland Lee Boulevard flower

shop" had declined to provide flowers for their wedding on religious grounds, and noted that Freed felt "so deeply offended that apparently our business is no longer good business," because "[his] loved one [did not fit] within their personal beliefs." *Id.* at 1262. This message was apparently widely circulated, though Ingersoll testified that their Facebook settings were such that the message was "only intended for our friends and family." *Id.* at 1760, 1785. Eventually, the story drew the attention of numerous media outlets.

As a result of the "emotional toll" Stutzman's refusal took on Freed and Ingersoll, they "lost enthusiasm for a large ceremony" as initially imagined. *Id.* at 1490. In fact, the two "stopped planning for a wedding in September 2013 because [they] feared being denied service by other wedding vendors." *Id.* at 351. The couple also feared that in light of increasing public attention—some of which caused them to be concerned for their own safety—as well as then-ongoing litigation, a larger wedding might require a security presence or attract protesters, such as the Westboro Baptist group. So they were married on July 21, 2013, in a modest ceremony at their home. There were 11 people in attendance. For the occasion, Freed and Ingersoll purchased one bouquet of flowers from a different florist and boutonnieres from their friend. When word of this story got out in the media, a handful of florists offered to provide their wedding flowers free of charge.

Stutzman also received a great deal of attention from the publicity surrounding this case, including threats to her business and other unkind messages.

Prior to Ingersoll's request, Arlene's Flowers had never had a request to provide flowers for a same-sex wedding, and the only time Stutzman has ever refused to serve a customer is when Ingersoll and Freed asked her to provide flowers for their wedding. The decision not to serve Ingersoll was made strictly by Stutzman and her husband. After Ingersoll's and Freed's request, Stutzman developed an "unwritten policy" for Arlene's Flowers that they "don't take same sex marriages." *Id.* at 120. Stutzman states that the only reason for this policy is her conviction that "biblically marriage is between a man and a woman." *Id.* at 120-21. Aside from Ingersoll and Freed, she has served gay and lesbian customers in the past for other, non-wedding-related flower orders.

Stutzman maintains that she would not sell Ingersoll any arranged flowers for his wedding, even if he were asking her only to replicate a prearranged bouquet from a picture book of sample arrangements. She believes that participating, or allowing any employee of her store to participate, in a same-sex wedding by providing custom floral arrangements and related customer service is tantamount to endorsing marriage equality for same-sex couples. She draws a distinction between creating floral arrangements—even those designed by someone else—and selling bulk flowers and "raw materials," which she would be happy to do for Ingersoll and Freed. *Id.* at 546-47. Stutzman believes that to create floral arrangements is to use her "imagination and

artistic skill to intimately participate in a same-sex wedding ceremony." *Id.* at 547. However, Stutzman acknowledged that selling flowers for an atheistic or Muslim wedding would not be tantamount to endorsing those systems of belief.

By Stutzman's best estimate, approximately three percent of her business comes from weddings. Stutzman is not currently providing any wedding floral services (other than for members of her immediate family) during the pendency of this case.

PROCEDURAL HISTORY

After the State became aware of Stutzman's refusal to sell flowers to Ingersoll and Freed, the Attorney General's Office sent Stutzman a letter. It sought her agreement to stop discriminating against customers on the basis of their sexual orientation and noted that doing so would prevent further formal action or costs against her. The letter asked her to sign an "Assurance of Discontinuance," which stated that she would no longer discriminate in the provision of wedding floral services. Stutzman refused to sign the letter.

As a result, the State filed a complaint for injunctive and other relief under the CPA and WLAD against both Stutzman and Arlene's Flowers, in Benton County Superior Court on April 9, 2013. Stutzman filed an answer on May 16, 2013, asserting, among other defenses, that her refusal to furnish Ingersoll with wedding services was protected by the state and federal constitutions' free exercise, free speech, and freedom of association guaranties.

Ingersoll and Freed filed a private lawsuit against Arlene's Flowers and Stutzman on April 18, 2013, which the trial court consolidated with the State's case on July 24, 2013. The parties filed various cross motions for summary judgment. The trial court ultimately entered judgment for the plaintiffs in both cases, awarding permanent injunctive relief, as well as monetary damages for Ingersoll and Freed to cover actual damages, attorneys' fees, and costs, and finding Stutzman personally liable.

When it granted the plaintiffs' motions for summary judgment, the trial court made seven rulings that are at issue in this appeal. First, it issued two purely statutory rulings: (1) that Stutzman violated the WLAD's public accommodations provision (RCW 49.60.215(1)) and the CPA (see RCW 19.86.020 and RCW 49.60.030) by refusing to sell floral services for same-sex weddings and (2) that both Stutzman (personally) and Arlene's Flowers (the corporate defendant) were liable for these violations. CP at 2566-600. Next, the court made five constitutional rulings. It concluded that the application of the WLAD's public accommodations provision to Stutzman in this case (1) did not violate Stutzman's right to free speech under the First Amendment to the United States Constitution or article I, section 5 of the Washington Constitution, (2) did not violate Stutzman's right to religious free exercise under the First Amendment, (3) did not violate her right to free association under the First Amendment, (4) did not violate First Amendment protections under the hybrid rights doctrine, and (5) did not violate Stutzman's right to religious free

exercise under article I, section 11 of the Washington Constitution. *Id.* at 2601-60.

Stutzman appealed directly to this court, assigning error to all seven of those rulings. We granted direct review. Order, *Ingersoll v. Arlene's Flowers*, No. 91615-2 (Wash. Mar. 2, 2016). With respect to most of the claims, Stutzman and Arlene's Flowers make identical arguments—in other words, Stutzman asserts that both she and her corporation enjoy identical rights of free speech, free exercise, and free association. It is only with respect to the CPA claim that Stutzman asserts a separate defense: she argues that even if Arlene's Flowers is liable for the CPA violation, she cannot be *personally* liable for a violation of that statute.

ANALYSIS

As noted above, this case presents both statutory and constitutional questions. Both are reviewed de novo. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012) ("[s]tatutory interpretation is a question of law reviewed de novo" (citing *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003))); *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503, 198 P.3d 1021 (2009) (appellate court "review[s] all constitutional challenges de novo" (citing *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006))).

I. Stutzman's Refusal To Provide Custom Floral Arrangements for a Same-Sex Wedding Violated the WLAD's Prohibition on Discrimination in Public Accommodations, RCW 49.60.215

Stutzman's first statutory argument implicates the WLAD, chapter 49.60 RCW. The trial court ruled that Stutzman violated RCW 49.60.215, which prohibits discrimination in the realm of public accommodations. That statute provides:

> (1) It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of . . . sexual orientation . . . .

RCW 49.60.215. The protected class status of "sexual orientation" was added to this provision in 2006. LAWS OF 2006, ch. 4, § 13.

The WLAD defines places of public accommodation to include places maintained "for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services . . . ." RCW 49.60.040(2). Protected individuals are guaranteed "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges" of such places. RCW 49.60.030(1)(b). Additionally, the WLAD states that "[t]he right to be free from discrimination *because of* . . . sexual orientation . . . is recognized as and declared to be a civil right," RCW 49.60.030(1) (emphasis added). The WLAD prohibits discrimination on the different basis of "marital status" in the employment context, but not in the context of public accommodations. *Compare* RCW 49.60.180 (listing "marital status" as a protected class in section governing unfair practices of employers) *with* RCW 49.60.215 (omitting marital status from analogous public accommodations statute).

RCW 49.60.030(2) authorizes private plaintiffs to bring suit for violations of the WLAD. To make out a prima facie case under the WLAD for discrimination in the public accommodations context, the plaintiff must establish four elements: (1) that the plaintiff is a member of a protected class, RCW 49.60.030(1); (2) that the defendant is a place of public accommodation, RCW 49.60.215; (3) that the defendant discriminated against the plaintiff, whether directly or indirectly, *id.*; and (4) that the discrimination occurred "because of" the plaintiff's status or, in other words, that the protected status was a substantial factor causing the discrimination, RCW 49.60.030. *See also Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d

1319 (1996) (setting forth elements of prima facie case for disability discrimination under RCW 49.60.215).

Stutzman contests only the last element: she contends that she did not discriminate against Ingersoll "because of" his protected class status under the WLAD. *See* Br. of Appellants at 19-21.[1] She offers three arguments in support of this interpretation of the statute.

First, Stutzman argues that if she discriminated against Ingersoll, it was on the basis of his "marital status," not his "sexual orientation." Br. of Appellants at 19-21. Second, she argues that the legislature could not have intended the 2006 amendments to protect people seeking same-sex wedding services since same-sex marriages were "illegal" in Washington in 2006. *Id.* at 15-17. She points out that when the legislature amended the public accommodations provisions of the WLAD in 2006, it also added language stating that the chapter "shall not be construed to endorse any specific belief, practice, behavior, or orientation," and affirming that the addition "shall not be construed to modify or supersede state law relating to marriage." *Id.* at 17-18, 15 (quoting LAWS OF 2006, ch. 4, § 2 (codified at

[1] No one disputes that Ingersoll and Freed are gay men who sought to marry in recognition of their nearly nine-year committed relationship. And Stutzman admits that she is the "sole owner and operator of Arlene's Flowers, Inc.," CP at 535, which is "a Washington for-profit corporation engaged in the sale of goods and services, including flowers for weddings," to the public. *Id.* at 2, 7-8. Furthermore, Stutzman confirms that she declined to do the flowers for Ingersoll's wedding because of her religious convictions.

RCW 49.60.020)). Third, Stutzman argues that because the WLAD protects both sexual orientation and religion, it requires that courts balance those rights when they conflict.[2] These arguments fail.

A. By refusing to provide services for a same-sex wedding, Stutzman discriminated on the basis of "sexual orientation" under the WLAD

Stutzman argues that the WLAD distinguishes between discrimination on the basis of "sexual orientation"—which the statute prohibits—and discrimination against those who marry members of the same sex. But numerous courts—including our own—have rejected this kind of status/conduct distinction in cases involving statutory and constitutional claims of discrimination. *E.g.*, *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007) ("under the plain language of the WLAD and its interpretative regulations, pregnancy related employment discrimination claims are matters of sex discrimination"); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53 (2013) (rejecting argument identical to Stutzman's, in

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[2] Stutzman also argues that by compelling her to furnish flowers for a same-sex marriage ceremony, the State "endorses" same-sex marriages and also requires her to "endorse" them. Br. of Appellants at 18. She claims that this conflicts with the WLAD provision stating that "[t]his chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation." RCW 49.60.020. But Stutzman cites no legal authority for this interpretation of the term "endorse" in the WLAD.

context of New Mexico's Human Rights Act (NMHRA), N.M. STAT. ANN. §§ 28-1-1 to 28-1-13)[3]; *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 672, 688, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (student organization was discriminating based on sexual orientation, not belief or conduct, when it excluded from membership any person who engaged in "'unrepentant homosexual conduct'"; thus, University's antidiscrimination policy did not violate First Amendment protections); *see also Lawrence v. Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (by criminalizing conduct typically undertaken by gay people, a state

[3] In *Elane Photography*, the New Mexico Supreme Court addressed the question of whether a wedding photographer discriminated against a lesbian couple on the basis of their sexual orientation by refusing to photograph their wedding under a state public accommodations law similar to Washington's WLAD. 309 P.3d 53. The proprietor of Elane Photography argued, much like Stutzman here, that she was not discriminating against Willock and her fiancée based on their sexual orientation, but rather was choosing not to "endorse" same-sex marriage by photographing one in conflict with her religious beliefs. *Id.* at 61. The court rejected Elane Photography's attempt to distinguish status from conduct, finding that "[t]o allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the NMHRA." *Id.* Elane Photography was represented on appeal by the same organization—Alliance Defending Freedom—that represents Stutzman before this court. *Id.* at 58; *see also Mullins v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶¶ 1-2, 370 P.3d 272 (2015) (holding that baker's refusal to make wedding cake for same-sex marriage violated public accommodations provision of state Anti-Discrimination Act (CO. REV. STAT. §§ 24-34-401 to 24-34-406) and rejecting free speech and free exercise defenses), *cert. denied*, No. 15SC738 (Colo. Apr. 25, 2016).

discriminates against gay people in violation of protections under the Fourteenth Amendment to the federal constitution); *Romer v. Evans*, 517 U.S. 620, 641, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (Scalia, J., dissenting) ("'After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.'" (quoting *Padula v. Webster*, 261 U.S. App. D.C. 365, 371, 822 F.2d 97 (1987))); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (summarizing that some conduct is so linked to a particular group of people that targeting it can readily be interpreted as an attempt to disfavor that group by stating that "[a] tax on wearing yarmulkes is a tax on Jews");[4] *Bob Jones Univ. v.*

[4] Stutzman argues that *Bray* actually supports her position because the *Bray* Court rejected the argument that a group's antiabortion protests outside clinics reflected an "'invidiously discriminatory animus'" towards women in general. 506 U.S. at 269 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971)); Reply Br. of Appellants at 39. This is related to her argument in the opening brief that because she generally lacks animus towards gay people, and because her refusal to provide service to Mr. Ingersoll was motivated by religious beliefs, she cannot be said to have discriminated "because of" sexual orientation as required by the WLAD. *See* Br. of Appellants at 19-21. From *Bray*, Stutzman concludes that her decision to decline Mr. Ingersoll's "artistic commission" was acceptable because it was "reasonable" and she bore "no underlying animus" towards gay people in general. Reply Br. of Appellants at 40. However, *Bray* dealt with a question of statutory interpretation of 42 U.S.C. § 1985(3), which has been interpreted to require a showing of animus. *See Bray*, 506 U.S. at 267-68; *Griffin*, 403 U.S. at 102. In contrast, we have already addressed this question of an animus requirement with regards

United States, 461 U.S. 574, 605, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) ("discrimination on the basis of racial affiliation and association is a form of racial discrimination").[5] Finally, last year, the Supreme Court likened the denial of marriage equality to same-sex couples itself to discrimination, noting that such denial "works a grave and continuing harm," and is a "disability on gays and lesbians [that] serves to disrespect and subordinate them." *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 2604, 2607-08, 192 L. Ed. 2d 609 (2015) (fundamental right to marry includes same-sex couples and is protected by due process and equal protection clauses of Fourteenth Amendment; abrogating the equal protection and due process holdings in *Andersen v. King County*, 158 Wn.2d 1, 30, 138 P.3d 963 (2006) (plurality opinion) to the contrary).[6]

In accordance with this precedent, we reject Stutzman's proposed distinction between status and conduct fundamentally linked to that status. This is consistent with the language of the WLAD itself,

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to the WLAD and have held that it contains no such requirement (see discussion below).

[5] *See also Blackburn v. Dep't of Social & Health Servs.*, 186 Wn.2d 250, 258-59, 375 P.3d 1076 (2016) (discrimination on basis of race occurs even where racially motivated staffing decision might have been based on benign reason).

[6] In response to the authority cited here, Stutzman cites two cases for the proposition that other courts have drawn a distinction between conduct and status. *See* Reply Br. of Appellants at 36-37. She draws our attention to two trial court decisions from Kentucky and Virginia. *Id.*

which, as respondents observe, states that it is to be construed liberally, RCW 49.60.020; that all people, regardless of sexual orientation are to have "*full enjoyment* of any of the accommodations, advantages, facilities, or privileges" of any place of public accommodation, RCW 49.60.030 (emphasis added); and that *all* discriminatory acts, including any act "which directly *or indirectly* results in any distinction, restriction, or discrimination" based on a person's sexual orientation is an unfair practice in violation of the WLAD, RCW 49.60.215 (emphasis added).

B. There is no same-sex wedding exception to the WLAD's public accommodation provision, RCW 49.60.215

For the reasons given in Section I.A above, the plain language of RCW 49.60.215 prohibits Stutzman's refusal to provide same-sex wedding services to Ingersoll; such refusal constitutes discrimination on the basis of "sexual orientation," in violation of RCW 49.60.215. The same analysis applies to her corporation.

Stutzman asks us to read an implied same-sex wedding exception into this statute. She argues that the legislature could not have intended to require equal access to public accommodations for same-sex wedding services because when it amended RCW 49.60.215 to prohibit sexual orientation discrimination, same-sex marriage was "illegal" in Washington.

We reject this argument for two reasons. First, the WLAD already contains an *express* exemption to RCW 49.60.215 for "religious organization[s][7] that object to providing public accommodations for same-sex weddings. LAWS OF 2012, ch. 3, § 1(5) ("[n]o religious organization is required to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage"). If the WLAD *already* excluded same-sex wedding services from the public accommodations covered under RCW 49.60.215, this exemption would be superfluous. We interpret statutes to avoid such superfluity whenever possible. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (in giving meaning to ambiguous statutory provisions, "we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous").

Second, for purposes of the analysis Stutzman would like us to adopt, same-sex marriage has never been "illegal" in Washington. Stutzman cites our decision in *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 750, 953 P.2d 88 (1998), which rejected a claim of marital status discrimination by two people terminated from their jobs for cohabiting in contravention of their workplace antinepotism policy. Waggoner argued that "cohabitation" fit within the meaning of the term "marital status." In examining

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[7] This exemption does not extend to Arlene's Flowers, which does not meet the WLAD's definition of a "religious organization." *Id.* at § 1(7)(b) (defining "religious organization" to include "entities whose principal purpose is the study, practice, or advancement of religion," such as "churches, mosques, synagogues, temples," etc.).

this question of statutory interpretation, we determined that the plain meaning of the word "marital"—that is, pertaining to "the status of being married, separated, divorced, or widowed"—was sufficient to resolve the question against petitioners. *Id.* at 753. We thus rejected Waggoner's argument because "[w]e presume legislative consistency when called upon to construe statutory enactments or new amendments to old ones" and our legislature had criminalized cohabitation prior to protecting marital status under the WLAD. *Id.* at 754. Of significance here, we noted that cohabitation remained a *crime* for a full three years after marital status was included as a protected status, and observed that "[i]t would be most anomalous for the Legislature to *criminalize* and protect the same conduct at the same time." *Id.* (emphasis added). Stutzman argues that we should treat same-sex marriage the same way and hold that the legislature could not possibly have intended to protect that *practice* when it protected sexual orientation as a *status*.

But Stutzman's reliance on *Waggoner* is misplaced. Washington's Defense of Marriage Act did not criminalize same-sex marriage. Former RCW 9.79.120 (1973), *repealed by* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(211). Rather, it codified, as a matter of state law, that the only legally *recognized* marriages in the State of Washington were those between a man and a woman. *See* LAWS OF 1998, ch. 1, § 2 ("It is the intent of the legislature . . . to establish public policy against same-sex marriage in statutory law that clearly and definitively declares same-sex marriages will not be recognized in Washington"). Former RCW 26.04.010 (1998) enacted no criminal

penalties for attempts by two individuals of the same sex to wed; those individuals would simply not have had a valid "marriage" under Washington law. *See* LAWS OF 1998, ch. 1, § 3. Former RCW 9.79.120, on the other hand, specified that cohabitation was "a gross misdemeanor." *Waggoner*, 134 Wn.2d at 754 n.4. Our reasoning in *Waggoner* turned on the presence of a criminal statute targeting the conduct at issue, which is absent here.

We hold that there is no same-sex wedding exception to the WLAD's public accommodations provisions.

C. The WLAD contains no mandate to balance religious rights against the rights of protected class members

In her final statutory argument regarding the WLAD, Stutzman contends that the superior court erred by failing to balance her right to religious free exercise against Ingersoll's right to equal service. Stutzman argues that because the WLAD also protects patrons of public accommodations from discrimination based on "creed," RCW 49.60.030(1), and because this court has recognized that the WLAD "sets forth a *nonexclusive* list of rights," *Marquis v. City of Spokane*, 130 Wn.2d 97, 107, 922 P.2d 43 (1996), the statute actually grants conflicting rights. As a consequence, she argues, courts should conduct a balancing inquiry "on a case-by-case basis," Reply Br. of Appellants at 43. She cites *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982),

for the rule that this court uses balancing tests to resolve claims of competing rights in other contexts.[8]

But Stutzman cites no authority for her contention that the WLAD protects proprietors of public accommodations to the same extent as it protects their patrons, nor for her contention that a balancing test should be adopted for the WLAD. And, to the extent that Stutzman relies on *Ishikawa*, that case is inapposite: it dealt with two competing rights—the right to a fair trial and the right to open courts—*both* of which are *constitutional*, not statutory. 97 Wn.2d at 37.

When faced with a question of statutory interpretation, we "'must not add words where the legislature has chosen not to include them.'" *Lake v. Woodcreek Homeowners Ass'n*, 169 Wash.2d 516, 526,

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[8] Although Stutzman refers to the balancing test set forth in *Ishikawa*, that is not the test that she applies in her briefing. Instead, Stutzman articulates a three-part balancing inquiry that (1) prioritizes "[r]ights of express constitutional magnitude . . . over other rights when they conflict," (2) evaluates whether infringement on the rights of the opposing party are narrowly tailored to protect the rights of the claimant, and (3) weighs the benefits and burdens on each party. Br. of Appellants at 23-24. In conducting this inquiry, Stutzman concludes that her rights "should take precedence" here because they are of constitutional magnitude, rather than derived from police power as are Ingersoll's; the exception for weddings only (as opposed to refusal to serve the gay community for any purpose) is narrowly tailored to protect her religious rights; and she is more significantly burdened in that she is forced to choose between losing business or violating her religious beliefs, whereas "Mr. Ingersoll and Mr. Freed are able to obtain custom floral designs for their same-sex wedding from nearby florists." *Id.*

243 P.3d 1283 (2010) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Here, the legislature has provided no indication in the text of the WLAD that it intended to import a fact-specific, case-by-case, constitutional balancing test into the statute. Moreover, the plain terms of the WLAD's public accommodations provision—the statute at issue here—protect patrons, not business owners. In other regulatory contexts, this court and the United States Supreme Court have held that individuals who engage in commerce necessarily accept some limitations on their conduct as a result. *See United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment) (declining to extend Social Security exemption to Amish employers on religious grounds because "[w]hen 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"); *Backlund v. Bd. of Comm'rs of King County Hosp. Dist. No. 2*, 106 Wn.2d 632, 648, 724 P.2d 981 (1986) (rejecting religious grounds as valid basis for physician to decline liability insurance because "[t]hose who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct"); *In re Marriage of Didier*, 134 Wn. App. 490, 499, 140 P.3d 607 (2006).

Because it is inconsistent with the WLAD's plain terms and unsupported by any precedent, we decline to adopt Stutzman's proposed balancing test. In sum,

Stutzman's refusal to provide custom floral arrangements for a same-sex wedding violated the WLAD's prohibition on discrimination in public accommodations.[9]

II. Stutzman Fails To Show That the WLAD, as Applied in This Case, Violates Her State or Federal Constitutional Right to Free Speech

As noted above, Stutzman raises five constitutional challenges to the WLAD as applied to her. She is correct that if the State statute violated a constitutional right, the constitutional right would certainly prevail. U.S. CONST. art. VI, cl. 2 (federal constitutional supremacy); *Davis v. Cox*, 183 Wn.2d 269, 294-95, 351 P.3d 862 (2015) (state constitutional provision prevails over state statute to the contrary). We therefore analyze each of Stutzman's constitutional defenses carefully.

The first of these defenses is a free speech challenge: Stutzman contends that her floral arrangements are artistic expressions protected by the state and federal constitutions and that the WLAD impermissibly compels her to speak in favor of same-sex marriage.

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[9] To the extent Stutzman argues that her religious free exercise rights supersede Ingersoll's and Freed's statutory protections, we address that argument in the constitutional analyses below.

A. As applied to Stutzman in this case, the WLAD does not violate First Amendment speech protections

"Free speech is revered as the 'Constitution's most majestic guarantee,' central to the preservation of all other rights." *Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 624, 957 P.2d 691 (1998) (plurality opinion) (quoting *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 536, 936 P.2d 1123 (1997)). "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, __ U.S. __, 132 S. Ct. 2277, 2288, 183 L. Ed. 2d 281 (2012). Indeed, the First Amendment protects even hate speech, provided it is not "fighting words" or a "'true threat.'" *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (quoting *Watts v. United States*, 394 U.S. 705,708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (per curiam)).

Stutzman argues that the WLAD, as applied to her in this case, violates First Amendment protections against "compelled speech" because it forces her to endorse same-sex marriage. Br. of Appellants at 24-31. To succeed in this argument, she must first demonstrate that the conduct at issue here—her commercial sale of floral wedding arrangements—amounts to "expression" protected by the First Amendment. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment

even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive.").

She fails to meet this burden. The First Amendment's plain terms protect "speech," not conduct. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). But the line between speech and conduct in this context is not always clear. Stutzman contends that her floral arrangements are "speech" for purposes of First Amendment protections because they involve her artistic decisions. Br. of Appellants at 24. Relying on the dictionary definition of "art," as well as expert testimony regarding her creativity and expressive style, she argues for a broad reading of protected speech that encompasses her "unique expression," crafted in "petal, leaf, and loam." *Id.* at 25-26. Ingersoll and the State counter that Stutzman's arrangements are simply one facet of conduct—selling goods and services for weddings in the commercial marketplace—that does not implicate First Amendment protections at all.

We agree that the regulated activity at issue in this case—Stutzman's sale of wedding floral arrangements—is not "speech" in a literal sense and is thus properly characterized as conduct. But that does not end our inquiry. The Supreme Court has protected conduct *as* speech if two conditions are met: "[(1)] [a]n intent to convey a particularized message was present, and [(2)] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (per curiam). Recent

cases have characterized this as an inquiry into whether the conduct at issue was "inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 64, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006).

Stutzman's floral arrangements do not meet this definition. Certainly, she argues that she *intends* to communicate a message through her floral arrangements. But the major contest is over whether Stutzman's intended communications actually communicated something to the public at large—whether her conduct was "inherently expressive." *Spence*, 418 U.S. at 410-11; *FAIR*, 547 U.S. at 64. And her actions in creating floral arrangements for wedding ceremonies do not satisfy this standard.

The leading case on the "inherently expressive" standard is *FAIR*. The plaintiffs in *FAIR*—an association of law schools and faculty members—challenged the constitutionality of a law that required higher education institutions to provide military recruiters on campus with access to facilities and students that was at least equivalent to that of the most favorably treated nonmilitary recruiter. 547 U.S. at 52, 55. The *FAIR* Court ruled that the law schools' conduct in denying military recruiters most-favorable-recruiter access to students was *not* protected by the First Amendment because it was not "inherently expressive." *Id.* at 66. It explained that additional speech would be required for an outside observer to understand that the schools' reason for denying military recruiters favorable access was to protest the military's "Don't Ask, Don't Tell" policy. *Id.*

Stutzman's refusal is analogous. The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding. As Stutzman acknowledged at deposition, providing flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism. Stutzman also testified that she has previously declined wedding business on "[m]ajor holidays, when we don't have the staff or if they want particular flowers that we can't get in the time frame they need." CP at 120. Accordingly, an outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock.

Stutzman argues that *FAIR* is inapposite and that we should instead apply *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). *Hurley* held that a state antidiscrimination law could not be applied so as to require a private parade to include marchers displaying a gay pride message. *Id.* at 568. Stutzman claims *Hurley* recognizes her First Amendment right "to exclude a message [she] did not like from the communication [she] chose to make." Reply Br. of Appellants at 11 (citing *Hurley*, 515 U.S. at 574).[10]

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[10] Stutzman relies on *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888 (1st Cir. 1988), in which the Boston Symphony (BSO) refused to perform with Vanessa Redgrave in light of her support of the Palestine Liberation Organization. Redgrave sued the BSO for breach of contract and consequential

Hurley is similar to this case in one respect: it involved a public accommodations law like the WLAD.[11] But the Massachusetts trial court had ruled

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damages in federal court. *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985), *affirming judgment in part, vacated in part*, 855 F.2d 888 (1st Cir. 1988). The First Amendment issue in that case arose from the district court's concern that Redgrave's novel theory of consequential damages was sufficiently related to defamation cases so as to implicate First Amendment concerns. *Id.* at 1201.

However, as the attorney general here notes, the First Circuit resolved that case on statutory interpretation of the Massachusetts Civil Rights Act, MASS. GEN. LAWS, ch. 12, §§ 11H-11J, not on First Amendment grounds. Att'y Gen.'s Resp. Br. at 26. In fact, the court ultimately chose to "decline to reach the federal constitutional issues," given the complex interaction between First Amendment doctrine and state law, and saw "no need to discuss the existence or content of a First Amendment right not to perform an artistic endeavor." 855 F.2d at 911. Accordingly, Stutzman's references are, at best, out-of-circuit dicta.

[11] Stutzman cites both *Hurley* and *Boy Scouts of America v. Dale*, 530 U.S. 640, 657, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), as examples of cases in which the Supreme Court vindicated First Amendment rights over state antidiscrimination public accommodations laws. In fact, both cases involved state courts applying public accommodations laws in unusually expansive ways, such that an individual, private, expressive association of people fell under the law. *Dale*, 530 U.S. at 657, (New Jersey Court "went a step further" from an already "extremely broad" public accommodations law in applying it "to a private entity without even attempting to tie the term 'place' to a physical location"); *Hurley*, 515 U.S. at 572, (noting that Massachusetts trial court applied a public accommodations law "in a peculiar way" to encompass a privately sponsored parade). This case is distinguishable because Arlene's Flowers is a paradigmatic public accommodation.

that the *parade itself* was a place of public accommodation under state antidiscrimination law—a ruling that the Supreme Court called "peculiar." 515 U.S. at 561-62, 573. The Court noted that the parade's "inherent expressiveness" distinguished it from the places traditionally subject to public accommodations laws—places that provide "publicly available goods, privileges, and services." *Id.* at 568-72. *Hurley* is therefore unavailing to Stutzman: her store is the kind of public accommodation that has traditionally been subject to antidiscrimination laws. *See Elane Photography*, 309 P.3d at 68 (rejecting photographer's reliance on *Hurley* because state antidiscrimination law applies not to defendant's photographs but to "its business decision not to offer its services to protected classes of people"; concluding that "[w]hile photography may be expressive, the operation of a photography business is not").[12]

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[12] The Supreme Court has drawn this distinction between expressive conduct and commercial activity in the context of First Amendment freedom of association claims, and likewise rejected the notion that the First Amendment precludes enforcement of antidiscrimination public accommodations laws in that context as well. *E.g.*, *Dale*, 530 U.S. at 657 (distinguishing between "clearly commercial entities" and "membership organizations" in cases involving the intersection between state public accommodations laws and First Amendment rights); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (finding that even private membership organizations may be regulated by public accommodations laws where such regulations will not impair its ability "to disseminate its preferred views" and holding that there was no such impairment where young men's social organization was required to accept women members).

United States Supreme Court decisions that accord free speech protections to conduct under the First Amendment have all dealt with conduct that is clearly expressive, in and of itself, without further explanation. *See Hurley*, 515 U.S. at 568 (parades); *United States v. Eichman*, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990) (burning the American flag); *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (burning the American flag); *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) (distributing leaflets outside Supreme Court building in violation of federal statute); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) (per curiam) ("[m]arching, walking, or parading" while wearing Nazi uniforms); *Smith v. Goguen*, 415 U.S. 566, 588, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974) (White, J., concurring in judgment) (treating flag "'contemptuously'" by wearing a small American flag sewn into the seat of one's pants); *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (state motto on license plates); *Spence*, 418 U.S. 405 (displaying American flag upside down on private property with peace sign superimposed on it to express feelings about Cambodian invasion and Kent State University shootings); *Cohen v. California*, 403 U.S. 15, 26, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (wearing jacket emblazoned with the words "'F—k the Draft'"); *Schacht v. United States*, 398 U.S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970) (wearing army uniform in short play criticizing United States involvement in Vietnam, inasmuch as it does not tend to discredit the armed forces); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 89 S. Ct.

733, 21 L. Ed. 2d 731 (1969) (wearing black armbands to protest Vietnam conflict); *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966) (sit-in to protest "whites only" area in public library during civil rights struggle); *Cox v. Louisiana*, 379 U.S. 536, 552, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965) (giving speech and leading group of protesters in song and prayer in opposition to segregation); *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963) (peaceful march on sidewalk around State House grounds in protest of discrimination); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (refusing to salute the American flag while saying pledge of allegiance); *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) (peaceful display of red flag as a sign of opposition to organized government). Stutzman's conduct—whether it is characterized as creating floral arrangements, providing floral arrangement services for opposite-sex weddings, or denying those services for same-sex weddings—is not like the inherently expressive activities at issue in these cases. Instead, it is like the unprotected conduct in *FAIR*, 547 U.S. at 66.[13]

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[13] Stutzman and amici point to a handful of cases protecting various forms of art—and some of them do seem to provide surface support for their argument. *See* Br. of Appellants at 6-7; Mot. for Leave to File Br. & Br. for Cato Inst. as Amicus Curiae in Supp. of Appellants (Cato) at 7 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (music without words); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (theater); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); *Piarowski v. Ill. Cmty.*

Finally, Stutzman asserts that even if her case doesn't fall neatly within the contours of these prior holdings, we should nevertheless place her floral artistry within a new, narrow protection. The "narrow" exception she requests would apply to "businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression" as opposed to gift items, raw products, or prearranged [items]. Reply Br. of Appellants at 45. In her case, she proposes that she would be willing to sell Mr. Ingersoll "uncut flowers and premade arrangements." *Id.* at 46. But, as amicus Americans United for Separation of Church and State (Americans United) points out, Stutzman's rule would create a "two-tiered system" that carves out an enormous hole from public accommodations laws: under such a system, a "dime-store lunch counter would be required to serve interracial couples but an upscale bistro could turn them away." Br. of Amicus

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Coll. Dist. 515, 759 F.2d 625, 627-28 (7th Cir. 1985) (stained glass windows on display in an art gallery at a junior college)).

But, on closer examination, those cases do not expand the definition of "expressive conduct." For example, *Piarowski* held that stained glass windows were protected in the context of a college's demands that the artist move some of his pieces from a gallery to an alternate location on campus because they were objected to as "sexually explicit and racially offensive." 759 F.2d at 632. And the *Anderson* court reached its finding that tattoos receive First Amendment protections by pointing out that they "are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection." 621 F.3d at 1061. Stutzman's floral arrangements do not implicate any similar concerns.

Curiae Ams. United in Supp. of Resp'ts at 13. Indeed, the New Mexico Supreme Court also grappled with this question, ultimately finding that "[c]ourts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws," and noting that this concern was hardly hypothetical in light of the proliferation of cases requesting exceptions for "florists, bakeries, and other wedding vendors" who refused to serve gay couples. *Elane Photography*, 309 P.3d at 71.

Because Stutzman's sale of floral arrangements is not expressive conduct protected by the First Amendment, we affirm the trial court and hold that the WLAD does not violate free speech protections as applied to Stutzman in this case.

B. Stutzman does not argue that article I, section 5 of the Washington Constitution provides any greater protection than the First Amendment in this context; we therefore affirm the trial court's ruling that no article I, section 5 violation occurred in this case

Stutzman asserts violations of both state and federal free speech constitutional provisions, though she does not distinguish between them.

As the Superior Court correctly points out, we interpret article I, section 5 independently from the First Amendment. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 800, 231 P.3d 166 (2010). In some cases, we have found article I, section 5 to be

more protective than its federal counterpart, and in some cases, we have held the two to contain equivalent protections. *Id.* In this case, however, Stutzman has not assigned error to the Superior Court's use of a First Amendment analysis rather than a separate state constitutional analysis. We therefore decline to reach the issue of whether article I, section 5 rights in this context are coextensive with First Amendment rights.

III. As Applied in This Case, the WLAD Does Not Violate Stutzman's Right to Religious Free Exercise under the First Amendment to the United States Constitution

In her second constitutional claim, Stutzman argues that the WLAD, as applied to her in this case, violated her First Amendment right to religious free exercise. We disagree.

The free exercise clause of the First Amendment, which applies to the States through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Laws that burden religion are subject to two different levels of scrutiny under the free exercise clause. U.S. CONST. amend I. Neutral, generally applicable laws burdening religion are subject to rational basis review,[14] while laws that discriminate against some or all religions (or regulate

[14] *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

conduct *because* it is undertaken for religious reasons) are subject to strict scrutiny.[15]

Stutzman argues that the WLAD is subject to strict scrutiny under a First Amendment free exercise analysis because it is neither neutral nor generally applicable. She is incorrect.

A law is not neutral, for purposes of a First Amendment free exercise challenge if "the object of [the] law is to infringe upon or restrict practices *because* of their religious motivation." *Church of the 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). Stutzman does not argue that our legislature passed the WLAD in order to target religious people or people whose religions dictate opposition to gay marriage. Instead, she argues that the WLAD is unfair because it grants exemptions for "religious organizations"[16]—permitting these organizations to refuse marriage services—but does

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[15] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

[16] *See* RCW 26.04.010(6) ("A religious organization shall be immune from any civil claim or cause of action, including a claim pursuant to chapter 49.60 RCW, based on its refusal to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage."). "Religious organization" is defined as including, "but . . . not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, and other entities whose principal purpose is the study, practice, or advancement of religion." RCW 26.04.010(7)(b).

not extend those same exemptions to her. Br. of Appellants at 37.

We disagree. The cases on which Stutzman relies all address laws that single out for onerous regulation either religious conduct in general or conduct linked to a particular religion, while exempting secular conduct or conduct associated with other, nontargeted religions. *E.g.*, *Lukumi Babalu Aye*, 508 U.S. at 532-42 (law was not neutral where legislative history, including enactment of numerous exemptions for members of other religions, evidenced a clear intent to target practitioners of Santeria faith). They recognize that the "[t]he Free Exercise Clause forbids any regulation of beliefs as such," and that this unconstitutional regulation may sometimes be accomplished through a law that *appears* facially neutral. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208-09 (3d Cir. 2004). But blanket exemptions for religious organizations do not evidence an intent to target religion. Instead, they indicate the opposite. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-38, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (exemption in Civil Rights Act for religious organizations does not violate the establishment clause because it serves a secular purpose—to minimize governmental interference with religion—and neither advances nor inhibits religion); *Elane Photography*, 309 P.3d at 74-75 ("Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion.").

Stutzman also argues that the WLAD is not "generally applicable" because it does not apply to businesses that employ fewer than eight persons, employees working for a close family member or in domestic service, people renting out certain multifamily dwellings, and distinctly private organizations.

Again, the authority Stutzman cites is inapposite. That authority stands for two principles, neither of which is implicated here.

First, a law may fail the "general applicability" test, and thus trigger strict scrutiny, if it adopts a patchwork of specific exemptions that conspicuously omits certain religiously motivated conduct. As with nonneutral laws, such an omission is evidence that the government has deliberately targeted religious conduct for onerous regulation, or at the very least devalued religion as a ground for exemption. *Lukumi Babalu Aye*, 508 U.S. at 544-46 (holding that ordinance was not generally applicable because it "pursues the city's governmental interests *only* against conduct motivated by religious belief" (emphasis added)); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-66 (3d Cir. 1999) (police department policy prohibiting officers from wearing beards triggered strict scrutiny because it allowed individual exemptions for medical but not religious reasons; because the medical exemption undermined the policy's purpose—to create uniformity of appearance among its officers—just as much as a religious exemption would, the disparity evidenced the department's preference for medical (secular) objections over religious ones).

Second, a law is not "generally applicable" if it permits individual exemptions but is then applied in a manner that is needlessly prejudicial to religion. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d. Cir. 2007) ("What makes a system of individualized exemptions suspicious is the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons. In *Blackhawk*, it was not the mere existence of an exemption procedure that gave us pause but rather the fact that the Commonwealth could not coherently explain what, other than the religious *motivation* of Blackhawk's conduct, justified the unavailability of an exemption." (citing *Blackhawk*, 381 F.3d at 211)).

In this case, Stutzman seeks an exemption that would allow her to refuse certain customer services to members of a WLAD-protected class on religious grounds. Under a First Amendment free exercise analysis, the WLAD would trigger strict scrutiny if it permitted that sort of discrimination only for nonreligious reasons, and thus indicated the government's preference for secular discrimination. But the WLAD does not do this.

Three of the alleged "exemptions" Stutzman cites have nothing at all to do with the exemption she seeks (an exemption permitting discrimination in public accommodations). The exemption for "[people] renting [out] certain multifamily dwellings," Br. of Appellants at 38 (citing RCW 49.60.040(5))—is not really an exemption from the WLAD at all. RCW 49.60.040(5) defines a "'[c]overed multifamily dwelling'" to exclude all buildings with fewer than four units and certain

buildings with no elevators. In conjunction with RCW 49.60.222(2)(c), this provision requires that "covered multifamily dwellings" be designed and constructed in compliance with state and federal disability access laws. This is not a license for certain landlords to discriminate. With respect to public accommodations, the same is true of the WLAD's "exemptions" for individuals employed in domestic service or by family members and for "employers" with fewer than eight employees. See Br. of Appellants at 38 (citing RCW 49.60.040(10), (11)). These exemptions protect *employers* from WLAD liability *as employers*—that is, liability to their employees—in the context of family relationships, domestic service, and very small businesses; they have nothing to do with Stutzman's liability as the proprietor of a public accommodation. *Compare* RCW 49.60.180 (listing prohibited "[u]nfair practices of employers," all of which discriminate against employees or potential employees—not customers), *with* RCW 49.60.215 (listing prohibited "[u]nfair practices of places of public resort, accommodation, assemblage, amusement"; completely omitting any reference to "employers"). Thus, these exemptions are distinguishable from the exemptions at issue in *Lukumi Babalu Aye*, *Blackhawk*, or *Fraternal Order of Police* because none is an exemption that Stutzman would actually like to invoke.

And the other "exemption" Stutzman identifies—for distinctly private organizations, Br. of Appellants at 38 (citing RCW 49.60.040(2))—does not undermine the purposes of the WLAD's public accommodations provision: to prevent discrimination in *public* accommodations. Thus, it does not trigger strict

scrutiny under a First Amendment free exercise analysis, either. *Fraternal Order of Police*, 170 F.3d at 366 (contrasting exemptions that undermine a law's purpose—and thus trigger strict scrutiny—with exemptions for "activities that [the government] does not have an interest in preventing"; holding that police department's exemption permitting undercover officers to wear beards did not trigger strict scrutiny because the governmental interest served by the shaving requirement—making officers readily recognizable as officers—did not apply to undercover officers).

For these reasons, we reject Stutzman's claim that the WLAD, as applied to her, triggers strict scrutiny under the free exercise clause of the First Amendment. The WLAD is a neutral, generally applicable law subject to rational basis review. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). And the WLAD clearly meets that standard: it is rationally related to the government's legitimate interest in ensuring equal access to public accommodations. *See Lighthouse*, 510 F.3d at 277 (to withstand free exercise challenge, neutral, generally applicable law "must be reasonable and not arbitrary and it must bear 'a rational relationship to a [permissible] state objective'" (alteration in original) (quoting *Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974))).

IV. As Applied in This Case, the WLAD Did Not Violate Stutzman's Right to Religious Free Exercise under Article I, Section 11 of the Washington Constitution

A. This court has applied strict judicial scrutiny to certain article I, section 11 claims

Stutzman also raises a state constitutional challenge to the WLAD as applied to her religiously motivated conduct in this case. Article I, section 11 of the Washington Constitution provides, in relevant part:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Obviously, this language differs from the language of the First Amendment's free exercise clause.

In the past, however, we interpreted article I, section 11 to provide the same protection as the First Amendment's free exercise clause. *See First Covenant Church of Seattle v. City of Seattle*, 114 Wn.2d 392,

402, 787 P.2d 1352 (1990) *(First Covenant* I*)*, *vacated and remanded*, 499 U.S. 901, 111 S. Ct. 1097, 113 L. Ed. 2d 208 (1991). Thus, for many years this court relied on First Amendment free exercise case law in article I, section 11 challenges and applied strict scrutiny to laws burdening religion. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987) (law burdening religion must serve "compelling state interest" and "constitute[ ] the least restrictive means to achieve the government's objective")).[17]

In 1990, however, things changed. That was the year that the United States Supreme Court adopted rational basis review for claims that neutral, generally applicable laws (like the WLAD) incidentally burden religion, in *Smith*, 494 U.S. at

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[17] Some scholarship distinguishes between the "compelling interest" test and "strict scrutiny." *E.g.*, Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359-60 (2008) (describing the "compelling interest" standard as one of three barriers that legislation must overcome under strict scrutiny). But this court has always treated them as synonymous in religious free exercise cases. *E.g.*, *Backlund*, 106 Wn.2d at 641 ("Since [the plaintiff's] beliefs are protected by the free exercise clause of the First Amendment, the burden of proof shifts to the Board to prove that (1) a compelling governmental interest justifies the regulation in question and (2) the regulation is the least restrictive imposition on the *practice* of his belief to satisfy that interest." (citing *United States v. Lee*, 455 U.S. 252, 257, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982); *State v. Meacham*, 93 Wn.2d 735, 740, 612 P.2d 795 (1980))).

878-90. *Smith* definitively repudiated strict scrutiny for neutral, generally applicable laws prohibiting "socially harmful conduct." *Id.* at 884-85. It reasoned that applying heightened scrutiny—which requires a balancing of governmental against personal interests—would pose two problems. *Id.* First, it would vitiate the state's ability to regulate, allowing every individual "'to become a law unto himself.'" *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 167, 25 L. Ed. 244 (1878)). Second, it would entangle civil courts in religion by requiring them to evaluate the significance of a particular practice to a faith. *Smith*, 494 U.S. at 887 ("[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"). The *Smith* Court reasoned that such a balancing test would be incompatible with the religious pluralism that is fundamental to our national identity. 494 U.S. at 888.

Smith's holding is limited in two ways. First, it left in place prior First Amendment case law applying the "compelling interest" balancing test where the statute in question "lent itself to individualized . . . assessment"—e.g., an unemployment benefits statute under which an administrative court determines, on a case-by-case basis, whether a person was fired for good cause. *Id.* at 884. In such cases, the Court explained that "the State [already] has in place a system of individual exemptions"—thus, the challenged law is not "generally applicable" for purposes of First Amendment free exercise analysis. *Id.* Where an individual requests a religious exemption from such a law, the government must

have a compelling reason for denying it. *Id.* Second, the *Smith* Court distinguished cases involving "hybrid" claims—e.g., challenges to laws that burdened *both* religious freedom *and* another right such as free speech. *Id.* at 881 (collecting cases).

We revisited our article I, section 11 test following *Smith* in *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 840 P.2d 174 (1992) (*First Covenant* II). In that case, the plaintiff church argued that its designation as a historical landmark (subject to "controls" limiting alterations to its building) violated both First Amendment and article I, section 11 protections. *Id.* at 208-09. In *First Covenant* I, we applied strict scrutiny to both constitutional challenges and held that the zoning law was unconstitutional. 114 Wn.2d at 401-02, 410. On remand from the United States Supreme Court following *Smith*, we addressed the state and federal free exercise claims again. Regarding the First Amendment claim, the *First Covenant* II court held that the challenged statute fell within both of the exceptions to rational basis review recognized in *Smith*: it created a system of "individualized assessments" *and* it raised "hybrid" constitutional concerns (by restricting speech as well as religious free exercise). 120 Wn.2d at 214-17. The court therefore held that the historical landmark statute was subject to strict scrutiny under the First Amendment. *Id.* at 217-18.

But after determining that the statute failed strict scrutiny as applied to the plaintiff church—because a city's purely aesthetic or cultural interest in preserving historical landmarks is not

compelling—the *First Covenant* II court went on to separately analyze the church's article I, section 11 claim. *Id.* at 223 ("The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom . . . [and] [a]lthough we might . . . base our decision solely on federal grounds, we decline to do so."). It performed a *Gunwall*[18] analysis and concluded that article I, section 11 "extends broader protection than the [F]irst [A]mendment . . . and precludes the City from imposing [the disputed] Landmarks Preservation Ordinance on First Covenant's church." *Id.* at 229-30.

Since that time, our court has addressed four article I, section 11 claims—all by churches challenging land use regulations[19]—and has subjected the challenged law to strict scrutiny in each

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[18] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). A *Gunwall* analysis determines whether a state constitutional provision is more protective than its federal counterpart by considering six nonexclusive factors: (1) the text of the state constitutional provision at issue, (2) significant differences between the text of parallel state and federal constitutional provisions, (3) state constitutional and common law history, (4) state law predating the state constitution, (5) structural differences between the state and federal constitutions, and (6) matters of particular state or local concern. *Id.* at 61-62.

[19] *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 644-45, 211 P.3d 406 (2009); *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 156-60, 995 P.2d 33 (2000); *Munns v. Martin*, 131 Wn.2d 192, 195, 930 P.2d 318 (1997); *First United Methodist Church of Seattle v. Hr'g Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 249-50, 252-53, 916 P.2d 374 (1996).

case. Thus, both before and after *Smith* and *First Covenant* II, we have applied the same four-prong analysis in an article I, section 11 challenge: where a party has (1) a sincere religious belief and (2) the exercise of that belief is substantially burdened by the challenged law, the law is enforceable against that party only if it (3) serves a compelling government interest and (4) is the least restrictive means of achieving that interest. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009); *Backlund*, 106 Wn.2d at 641. And we have specifically held—in the context of a church's challenge to a zoning law—that article I, section 11 is more protective of religious free exercise than the First Amendment is. *E.g.*, *First Covenant* II, 120 Wn.2d at 224 (applying strict scrutiny to zoning ordinance as a matter of state constitutional law because "[o]ur state constitutional and common law history support a broader reading of article [I], section 11, than of the First Amendment").[20]

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[20] The attorney general correctly notes that this court has never held that a corporate defendant such as Arlene's Flowers has a "conscience" or "sentiment" subject to article I, section 11 protections. *See* Att'y Gen. Resp. Br. at 31 ("Indeed the plain language of article I, section 11 guarantees its protections to 'every individual,' making no mention of protection for businesses."); Att'y Gen.'s Ans. to Brs. of Amici Curiae at 19 ("Neither Defendants nor their amici point to any Washington authority to support the notion that for-profit corporations are protected by article I, section 11."). But Stutzman argues only that she may assert her *own* free exercise rights on behalf of her corporation. Br. of Appellants at 32 n.24 ('protecting the free-exercise rights of [closely held] corporations . . . protects the religious liberty *of the humans who own and control those companies*'" (emphasis added) (quoting *Burwell v. Hobby Lobby*

The parties dispute the significance of these post-*Smith* holdings to this case. Ingersoll and the attorney general argue that they are limited to zoning laws, as applied to churches, and thus make no difference to the outcome under our longstanding four-prong test. They maintain that a neutral health and safety regulation like the WLAD creates no substantial burden on free exercise—and thus does not trigger strict scrutiny—when it operates in the commercial marketplace. Stutzman contends that under *First Covenant* II and its progeny, "strict scrutiny applies even if the regulation 'indirectly burdens the exercise of religion.'" Br. of Appellants at 33 (quoting *First Covenant* II, 120 Wn.2d at 226).

We decline to resolve that dispute here because we conclude that Stutzman's free exercise claim fails even under the test she advances. Even if article I, section 11 provides Stutzman with the strongest possible protections, subjecting the WLAD to strict scrutiny in this case, her state constitutional challenge must still fail.

B. The WLAD survives strict scrutiny

In the decades before *First Covenant* II, this court upheld numerous health and safety regulations under strict scrutiny—the test that we then assumed was required under the First Amendment. *E.g.*, *Backlund*, 106 Wn.2d at 641 (requirement that physician

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Stores, Inc., __ U.S. __, 134 S. Ct. 2751, 2768, 189 L. Ed. 2d 675 (2014))). Thus, we address only Stutzman's individual claim that *her* article I, section 11 rights have been violated. We do not address whether Arlene's Flowers (the corporation) has any such rights.

purchase professional liability insurance did not violate First Amendment; State had a compelling interest in licensure requirement and the requirement was "the least restrictive imposition on the *practice* of [the plaintiff's] belief to satisfy that interest"); *State v. Meacham*, 93 Wn.2d 735, 740-41, 612 P.2d 795 (1980) (court-ordered blood test for putative fathers did not violate First Amendment; State had a compelling interest in securing child support and that interest could not "be achieved by measures less drastic"); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 861, 863-64, 239 P.2d 545 (1952) (neither First Amendment nor prior version of article I, section 11 barred mandatory tuberculosis testing as condition of admission to University of Washington; "the public interest [served] is the health of all of the students and employees of the university[;] . . . [t]he danger to this interest is clear and present, grave and immediate [and] . . . [i]nfringement of appellant's rights is a necessary consequence of a practical attempt to avoid the danger"); *see also State v. Clifford*, 57 Wn. App. 127, 132-34, 787 P.2d 571 (1990) (law mandating that drivers be licensed does not violate First Amendment; "[t]here is no less restrictive means available to satisfy the State's compelling interest in regulating the driving of motor vehicles"). Like all of the laws at issue in those cases, the WLAD's public accommodations provision is a neutral health and safety regulation. Under our long-standing precedent, such laws satisfy strict scrutiny in an article I, section 11 challenge.

To be sure, none of our previous article I, section 11 cases addressed an antidiscrimination law. But numerous other courts have heard religious free exercise challenges to such laws and upheld them under strict scrutiny. *E.g.*, *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 281-83 (Alaska 1994) (in rental housing context, state antidiscrimination law passed strict scrutiny—meaning that defendants were not entitled to a religious exemption—because "[t]he government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing"; moreover, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity"); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 852-54 (Minn. 1985) (in employment context, state antidiscrimination law passed strict scrutiny in religious free exercise challenge because "[t]he state's overriding compelling interest of eliminating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes"); *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158-59, 81 Cal. Rptr. 3d 708, 189 P.3d 959 (2008) (assuming that strict scrutiny applied as a matter of state constitutional law, it would not invalidate statute barring discrimination on the basis of sexual orientation as applied to fertility clinic with religious objections to helping gay patients conceive: "[t]he 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 Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 31-39 (D.C. Ct. App. 1987) (District of Columbia's Human Rights Act, former D.C. CODE § 1-2520 (1981), *recodified as* D.C. CODE § 2-1402.41, as applied to prohibit defendant university from denying equal recognition and support to gay student groups, survived strict scrutiny in university's pre-*Smith* free exercise challenge: "[t]o tailor the Human Rights Act to require less of the University than equal access to its 'facilities and services,' without regard to sexual orientation, would be to defeat its compelling purpose[:] [t]he District of Columbia's overriding interest in eradicating sexual orientation discrimination, if it is ever to be converted from aspiration to reality, requires that Georgetown equally distribute tangible benefits to the student groups"); *see also Bob Jones Univ.*, 461 U.S. at 602-04 (federal government's denial of tax exempt status to schools that enforced religiously motivated racially discriminatory policies survived strict scrutiny: "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . [and] that . . . interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs"). Indeed, we are not aware of any case invalidating an antidiscrimination law under a free exercise strict scrutiny analysis.

Nevertheless, Stutzman argues that strict scrutiny is not satisfied in this case. She reasons that since other florists were willing to serve Ingersoll, no real harm will come from her refusal. And she

maintains that the government therefore can't have any compelling interest in applying the WLAD to her shop. In other words, Stutzman contends that there is no reason to enforce the WLAD when, as she puts it, "[N]o access problem exists." Br. of Appellants at 46.

We emphatically reject this argument. We agree with Ingersoll and Freed that "[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches." Br. of Resp'ts Ingersoll and Freed at 32. As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination[21] that purpose would be fatally undermined.

In conclusion, we assume without deciding that strict scrutiny applies to the WLAD in this article I, section 11 challenge, and we hold that the law satisfies that standard.

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[21] Stutzman argues that discrimination cannot be "invidious"—and thus subject to governmental prohibition—if it is based on religious beliefs. Br. of Appellants at 40-43. But she cites no relevant legal authority for this novel theory. She also argues that the government has no compelling interest in forcing her to speak or associate with Ingersoll or any other customer. But, as explained elsewhere in this opinion, the WLAD does not implicate Stutzman's rights of speech or association.

V. As Applied in This Case, the WLAD Does Not Violate Stutzman's Right to Free Association under the First Amendment to the United States Constitution

Stutzman argues that the WLAD, as applied by the trial court in her case, violates her First Amendment right to freedom of association. But to support that argument, she relies exclusively on cases addressing membership in private clubs: *Boy Scouts of America v. Dale*, 530 U.S. 640, 653, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); *Hurley*, 515 U.S. at 574; and *Roberts*, 468 U.S. at 618.[22] These cases expressly distinguish a business' customer service (subject to generally applicable antidiscrimination laws) from expressive conduct (protected from such laws by the First Amendment). *Dale*, 530 U.S. at 648, 656-57 ("To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association'"; antidiscrimination law violated the Boy Scouts' First Amendment freedom of association in part because the Boy Scouts was a membership organization instead of a "clearly commercial entit[y]."); *Hurley*, 515 U.S. at 572, 571 (state antidiscrimination law at issue traditionally applied to "the provision of publicly available goods, privileges, and services" by, "[a]t common law, innkeepers, smiths, and others who 'made profession

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[22] Stutzman also cites one case addressing speech: *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). Reply Br. of Appellants at 28. This opinion addresses Stutzman's free expression claim elsewhere.

of a public employment'"; but it would be "peculiar" to extend that law beyond the customer service context so that it applied to the inherently expressive conduct of marching in a parade).

In fact, the United States Supreme Court has even held that states may enforce antidiscrimination laws against certain private organizations, defined by particular goals and ideologies, if the enforcement will not impair the group's ability to pursue those goals and espouse those ideologies. *Roberts*, 468 U.S. at 628 (even though First Amendment protects private groups, those groups are subject to antidiscrimination laws to the extent that enforcement "will [not] change the content or impact of the organization's speech").

But the Supreme Court has never held that a commercial enterprise, open to the general public, is an "'expressive association'" for purposes of First Amendment protections, *Dale*, 530 U.S. at 648. We therefore reject Stutzman's free association claim.

VI. As Applied in This Case, the WLAD Does Not Violate Stutzman's Constitutional Protections under the "Hybrid Rights" Doctrine

Stutzman also argues that the WLAD, as applied to her in this case, triggers strict scrutiny because it implicates "hybrid rights." Br. of Appellants at 40. As noted above, a law triggers strict scrutiny if it burdens *both* religious free exercise *and* another fundamental right such as speech or association. *First Covenant* II, 120 Wn.2d at 217-18 ("[t]he less protective free

exercise standard set forth in *Smith* . . . does not apply because the case presents a 'hybrid situation': First Covenant's claim involves the free exercise clause in conjunction with free speech" (citing *Smith*, 494 U.S. at 904 (O'Connor, J., concurring in judgment))). But Stutzman's claim fails for two reasons. First, the only fundamental right implicated in this case is the right to religious free exercise. Stutzman's rights to speech and association are not burdened. *See supra* Parts II, V. Second, even if the WLAD does trigger strict scrutiny in this case, it satisfies that standard. *See supra* Section IV.B.

VII. The Trial Court Did Not Err by Imposing Personal Liability on Stutzman Instead of Solely on Her Corporation, Arlene's Flowers Inc.

In addition to finding that Stutzman violated the WLAD, the trial court also found that Stutzman violated the CPA. This is because the WLAD provides that an act of public accommodation discrimination is an "unfair practice" and a per se violation of the CPA. RCW 49.60.030(3).[23] Stutzman concedes that if she violated the WLAD, then Arlene's Flowers is liable for a CPA violation.

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[23] The trial court also found that Stutzman's actions violated the CPA—because they were an "'unfair or deceptive act or practice . . . occurring in trade or commerce, and [impacting the] public interest'"—even if she did not also violate the WLAD. CP at 2634-37 (quoting *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011)). This ruling is questionable, but because we conclude that Stutzman did violate the WLAD, and because Stutzman did not assign error to this ruling in her opening brief, we do not address it.

But Stutzman argues that she cannot be *personally* liable for violating the CPA because (1) she kept her affairs separate from Arlene's Flowers' and (2) no Washington court has ever applied the "responsible-corporate-officer doctrine" outside the fraud context. Br. of Appellants at 49 (citing *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552-53, 599 P.2d 1271 (1979); *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 108 Wn. App. 330, 347-48, 30 P.3d 504 (2001), *aff'd in part and rev'd in part*, 148 Wn.2d 319, 61 P.3d 1094 (2002)).

The authority Stutzman cites does not support this argument. In *Grayson*, this court held that the defendant could be personally liable for his company's CPA violation *even though* there were no grounds for piercing the corporate veil. 92 Wn.2d at 553-54. This directly contradicts Stutzman's theory that she cannot be personally liable under the CPA unless she commingled her finances with Arlene's Flowers'. And the other case, *One Pac. Towers*, 108 Wn. App. 330, does not address a CPA claim.

On the other hand, there is long-standing precedent in Washington holding that individuals may be personally liable for a CPA violation if they "participate[] in the wrongful conduct, or with knowledge approve[] of the conduct." *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976). Liability for such participation or approval does not depend on piercing the corporate veil. *Id.* This is consistent with the CPA's plain language, which authorizes the attorney general to bring an action "against any *person* to restrain and prevent the doing of any act herein

prohibited or declared to be unlawful," RCW 19.86.080(1) (emphasis added), and which defines "person" to include "where applicable, natural persons," as well as corporate entities, RCW 19.86.010(1).

Such individual liability does not constitute an application of, or expansion of, the responsible corporate officer doctrine. That doctrine expands liability from a corporation to an individual officer who would not otherwise be liable "where the officer stands 'in responsible relation to a public danger.'" *Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 243, 971 P.2d 948 (1999) (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S. Ct. 134, 88 L. Ed. 48 (1943)). Here, the trial court did not find Stutzman (the individual) vicariously or secondarily liable based on conduct of Arlene's Flowers (the corporation). It found her liable because of acts that she herself committed.

CONCLUSION

The State of Washington bars discrimination in public accommodations on the basis of sexual orientation. Discrimination based on same-sex marriage constitutes discrimination on the basis of sexual orientation. We therefore hold that the conduct for which Stutzman was cited and fined in this case—refusing her commercially marketed wedding floral services to Ingersoll and Freed because theirs would be a same-sex wedding—constitutes sexual orientation discrimination under the WLAD. We also hold that the WLAD may be enforced against Stutzman because it does not infringe any

constitutional protection. As applied in this case, the WLAD does not compel speech or association. And assuming that it substantially burdens Stutzman's religious free exercise, the WLAD does not violate her right to religious free exercise under either the First Amendment or article I, section 11 because it is a neutral, generally applicable law that serves our state government's compelling interest in eradicating discrimination in public accommodations. We affirm the trial court's rulings.

WE CONCUR:

THE HONORABLE JUDGE ALEX EKSTROM

STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS; and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 JUDGMENT FOR PLAINTIFF STATE OF WASHINGTON ON PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT **(CLERK'S ACTION REQUIRED)** ~~[PROPOSED]~~

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information shall be entered in the Clerk's Execution Docket:

1.	Judgment Creditor:	State of Washington
2.	Attorneys for Judgment Creditor:	Todd Bowers, Senior Counsel; Kimberlee Gunning, Assistant Attorney General; Noah Purcell, Solicitor General
3.	Judgment Debtors:	Arlene's Flowers d/b/a Arlene's Flowers and Gifts; Barronelle Stutzman
4.	Attorneys for Judgment Debtors:	Kristen K. Waggoner; Jonathan Scruggs, *pro hac vice*; Austin Nimocks, *pro hac vice*; Kellie Fiedorek, *pro hac vice*; Alicia M. Berry

5.	Principal Judgment Amount (Penalties):	$1,000.00
	Attorneys' Fees and Costs:	$1.00
	Total Judgment Amount:	$1,001.00
6.	Amount of Interest Owed to Date on Judgment:	$0.00
7.	Total of Taxable Costs and Attorneys Fees:	$1.00

This matter came before the Court on Plaintiff State of Washington's presentation of a judgment on the Court's orders of January 7, 2015 (Memorandum Decision and Order Granting Plaintiff State of Washington's Motion for Partial Summary Judgment on Defendants' Non-Constitutional Defenses) [Dkt. 205], and February 18, 2015 (Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment Based on Plaintiffs' Lack of Standing, Granting Plaintiff State of Washington's Motion for Partial Summary Judgment on Liability and Constitutional Defenses) [Dkt. 218]. These orders granted summary judgment to the Plaintiff State of Washington on its Consumer Protection Act (CPA) claim against Defendants and denied Defendants' motions for summary judgment.

The Court heard the argument of counsel for the Plaintiff State of Washington, Todd Bowers, and Kristen K. Waggoner, counsel for Defendants. The Court considered its aforementioned orders on the Plaintiff's motions for summary judgment, the parties' memoranda regarding the imposition of penalties, as well as the pleadings and other papers filed in this matter. Based on all of this and the argument of counsel, the Court hereby enters judgment as follows:

JUDGMENT

1. Pursuant to RCW 19.86.080(1) and CR 65, Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, are permanently enjoined and restrained from violating RCW 19.86, the Consumer Protection Act, by discriminating against any person because of their sexual orientation. The terms of this permanent injunction include a prohibition against any disparate treatment in the offering or sale of goods, merchandise, or services to any person because of their sexual orientation, including but not limited to the offering or sale of goods, merchandise, or services to same-sex couples. All goods, merchandise, and services offered or sold by Defendants shall be offered or sold on the same terms to all customers without regard to sexual orientation. All goods, merchandise and services offered or sold to opposite sex couples shall be offered or sold on the same terms to same-sex couples, including but not limited to goods, merchandise and services for weddings and

commitment ceremonies. Defendants shall immediately inform all of their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them of the terms and conditions of this judgment and permanent injunction.

2. Defendants shall pay $1,000.00 to the Plaintiff State of Washington. Defendants are jointly and severally liable for this amount, which is imposed as a civil penalty pursuant to RCW 19.86.140. The parties agree and the Court orders that Defendants' payment is due 60 days after any appeal in this cause becomes final. Payment shall be made via a valid check paid to the order of the "Attorney General—State of Washington" and shall be due and owing upon entry of this judgment and shall be sent to the Office of the Attorney General, Attention: Cynthia Lockridge, Administrative Office Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington, 98104-3188.

3. Plaintiff State of Washington is awarded costs and reasonable attorneys' fees of $1.00.

4. The Court retains continuing jurisdiction of this action to enforce the terms of the permanent injunction.

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DONE IN OPEN COURT this

27th day of March, 2015.

HONORABLE JUDGE ALEXANDER EKSTROM
Judge of the Superior Court

Presented by:	Approved to Form: Notice of Presentation Waived:
ROBERT W. FERGUSON Attorney General	ALLIANCE DEFENDING FREEDOM
s/Todd Bowers TODD BOWERS, WSBA #25274 Senior Counsel KIMBERLEE GUNNING, WSBA #35366 Assistant Attorney General Attorneys for Plaintiff State of Washington	_____ KRISTEN K. WAGGONER, WSBA #27790 Attorney for Defendants

THE HONORABLE ALEXANDER C. EKSTROM

IN THE SUPERIOR COURT OF WASHINGTON
FOR BENTON COUNTY

ROBERT INGERSOLL AND CURT FREED, Plaintiffs, V. ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS; AND BARRONELLE STUTZMAN, Defendants.	No. 13-2-00953-3 **JUDGMENT AND ORDER OF PERMANENT INJUNCTION**

THIS MATTER comes before the Court on Plaintiffs' Motion for Partial Summary Judgment and other motions for summary judgment as fully described in this Court's Memorandum Decision and Order Granting Plaintiff State of Washington's Motion for Partial Summary Judgment on Defendants' Non-Constitutional Defenses; Denying Defendants' First Motion for Summary Judgment Against Plaintiff State of Washington, and Denying in Part and Granting in Part Defendants' Motion for Partial Summary Judgment on Plaintiffs' Claims Against Barronelle Stutzman in Her Personal Capacity, entered on January 7, 2015 (Dkt. 205), and its Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment Based on Plaintiffs' Lack of Standing, Granting Plaintiff State of Washington's Motion for Partial Summary Judgment on Liability and Constitutional Defenses, and Granting Plaintiffs Ingersoll and Freed's Motion for Partial Summary Judgment, entered on February 18**,** 2015 (Dkt. 220).

As explained in detail in the Memorandum Decisions and Orders described above, the Court finds and concludes that, by refusing to "do the flowers" for Ingersoll's and Freed's wedding, Defendants Barronelle Stutzman and Arlene's Flowers, Inc. violated the Washington Law Against Discrimination, RCW 49.60.010, *et seq.,* and the Washington Consumer Protection Act, RCW 19.86.010, *et seq*.

Accordingly, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, are permanently enjoined and restrained from violating the Washington Law Against Discrimination, RCW ch. 49.60, and the Consumer Protection Act, RCW ch. 19.86, by discriminating against any person because of their sexual orientation. The terms of this permanent injunction include a prohibition against any disparate treatment in the offering or sale of goods, merchandise, or services to any person because of their sexual orientation, including but not limited to the offering or sale of goods, merchandise, or services to same-sex couples. All goods, merchandise, and services offered or sold by Defendants shall be offered and sold on the same terms to all customers without regard to sexual orientation. All goods, merchandise, and services offered ~~and~~ or sold to opposite sex couples shall be offered ~~and~~ or sold on the same terms to same-sex couples, including but not limited to goods, merchandise and services for weddings & commitment ceremonies. Defendants shall immediately inform all of their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, of the terms and conditions of this Judgment and Permanent Injunction.

2. Plaintiffs Robert Ingersoll and Curt Freed are entitled to an award of actual damages from Defendants, jointly and severally, under RCW 49.60.030 and RCW 19.86.090. The Court reserves determination of the amount of actual damages until after any appeal of this Judgment and Permanent Injunction has been exhausted.

3. Plaintiffs are entitled to an award of costs of suit, including reasonable attorneys' fees, pursuant to RCW 49.030 and RCW 19.86.090. The Court reserves determination of the amount of costs and fees to be awarded until after any appeal of this Judgment and Permanent Injunction has been exhausted.

4. The Court finds that there is no just reason for delay, and directs the entry of this Judgment and Permanent Injunction as a final judgment pursuant to Civil Rule 54(b).

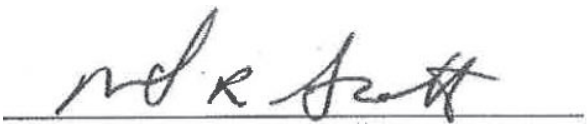
5. The Court retains continuing jurisdiction of this action to enforce the terms of the Permanent Injunction.

DATED this 27th day of March, 2015.

THE HONORABLE ALEXANDER C. EKSTROM
BENTON COUNTY SUPERIOR COURT JUDGE

Presented by:

HILLIS CLARK MARTIN & PETERSON P.S.

By 

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LGBT & AIDS Project
Attorneys for Plaintiffs
Robert Ingersoll and Curt Freed

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

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

Defendants.

ROBERT INGERSOLL and CURT FREED,

Plaintiffs,

vs.

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

Defendants.

No. 13-2-00871-5
(Consolidated with 13-2-00953-3)

MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFFS' LACK OF STANDING, GRANTING PLAINTIFF STATE OF WASHINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND CONSTITUTIONAL DEFENSES, AND GRANTING PLAINTIFFS INGERSOLL AND FREED'S MOTION FOR PARTIAL SUMMARY JUDGMENT

A motion hearing occurred in the above-captioned matter on December 19, 2014, in Kennewick, Washington. The Plaintiff, State of Washington, by and through the Attorney General, was represented through argument[1] by Todd Bowers, Senior Counsel and Noah Purcell, Solicitor General. The Plaintiffs Robert Ingersoll and Curt Freed were present, and were represented through argument by Jake Ewart and Michael R. Scott, both of Hillis Clark Martin & Peterson, P.S. The Defendants, Arlene's Flowers, Inc., d/b/a/ Arlene's Flowers and Gifts, and Barronelle Stutzman, were present, represented by Alicia Berry, Liebler, Connor, Berry & St. Hilaire, PS, through argument of Kellie Fiedorek and Kristen Waggoner, of Alliance Defending Freedom, appearing *pro hac vice*.

Before the court were three motions: 1) Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing, 2) Plaintiff State Of Washington's Motion For Partial Summary Judgment On Liability And Constitutional Defenses, and 3) Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment. At the motions hearing, the Court heard argument from all parties and took the motions under advisement. After further consideration, the Court now denies and grants these motions, respectively.

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[1] Additional counsel assisted in preparation of the briefing and declarations for both the Plaintiffs and Defendants.

I. INTRODUCTION

A. Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing

In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3, Defendants moved for summary judgment, asking this Court to dismiss all claims brought against them by both the Attorney General (hereinafter AG) and the Individual Plaintiffs. Defendants assert that despite the actual interaction that occurred on March 1, 2013 between Stutzman and Ingersoll, further discovery has shown that Ingersoll and Freed only wanted to purchase raw materials for their ceremony, which Stutzman was an is willing to provide. As such, they argue that there is in fact no concrete dispute between the parties, Ingersoll and Freed are now married, and thus the claims are moot and there is nothing for this Court to decide. Further, Defendants argue that what other individuals may want from Defendants in the future is speculative. Thus Defendants assert that the matter should be dismissed on summary judgment.

Both the AG and Individual Plaintiffs respond that Defendants ignore what did happen, a refusal to sell arranged flowers to Ingersoll, and the Defendants' *post hoc* understanding of what Ingersoll may have wanted cannot undo the refusal. Further, they point out the Defendants' unwritten policy to engage in the same practice in the future also supports a finding that the cases are not moot. For the

reasons set out below, the Court concludes[2] that the material facts of this case are what actually happened on March 1, 2013, not what might have happened. Given these facts and the Defendants' unwritten policy to engage in the same conduct in the future, the cases are not moot. The Court therefore denies the Defendants' motion.

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[2] In reaching this conclusion, the Court reviewed and considered the Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack of Standing, filed October 6, 2014 (along with the Declaration of Kristen Waggoner and attachments thereto), Plaintiffs Robert Ingersoll and Kurt Freed's Opposition To Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing, filed December 8, 2014 (along with the Declaration of Jake Ewart and attachments thereto), the State's Response To Defendants' Motion For Summary Judgment On Standing, filed December 8, 2014 (along with the Declaration of Todd Bowers and attachments thereto), as well as Defendants' Reply Supporting Their Motion For Summary Judgment On Plaintiffs' Lack Of Standing, filed December 15, 2014. As to all pending motions, the Court has also reviewed and considered Defendants' Supplemental Summary Judgment Briefing On Four Non-Constitutional Affirmative Defenses, filed on February 13, 2015, Plaintiffs' Notice Of Supplemental Authority, filed February 12, 2015 (along with the attachment thereto) and Plaintiff Robert Ingersoll And Curt Freed's Brief Regarding Procedural Posture Of Four Remaining Non-Constitutional Affirmative Defenses In Individual Actions, filed February 13, 2015.

B. Plaintiff's Motion For Partial Summary Judgment On Liability And Constitutional Defenses (Considered With Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment And Memorandum Of Authorities)

In Benton County Cause Number 13-2-00871-5, the AG has moved for partial summary judgment, arguing that Defendants have admitted acts that constitute a violation of the Washington Law Against Discrimination (hereinafter WLAD) in trade or commerce, and thus constitute a *per se* violation of the Consumer Protection Act (hereinafter CPA) as a matter of law. Further, the AG argues that the Defendants' four remaining constitutional affirmative defenses in their Answer[3] fail as a matter of law, and must therefore be dismissed. Those affirmative defenses are as follows: 1) this action, as applied to the Defendants' conduct, is preempted by the First Amendment to the United States Constitution; 2) this action, as applied to the Defendants' conduct, violates Article 1, Section 11 of the Washington State Constitution (and as to the Individual Plaintiff's Action it violates Article 1, Section 5); 3) the AG's decision to bring this action constitutes selective

[3] The AG's Complaint in Benton County Cause Number 13-2-00871-5 was filed on April 9, 2013. The Defendants' Answer, containing the affirmative defenses reference above, was filed on May 16, 2013. A Complaint by the Individual Plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed on April 18, 2013, to which the Defendants' answered on May 20, 2013. These matters were previously consolidated for consideration of these motions.

enforcement in violation of the Fourteenth Amendment to the United States Constitution; and 4) justification. Specifically, the AG alleges that Stutzman's conceded statement to Ingersoll that she couldn't do the flowers for his wedding on March 1, 2013 on the premises of Arlene's Flowers constitutes an admission to committing a violation of the WLAD in trade or commerce, and as such is a *per se* violation of the CPA as a matter of law. Further, the AG argues that the courts have routinely rejected Defendants' affirmative defenses for the following reasons: one cannot escape a claim of discrimination by seeking to distinguish between status and conduct of the protected party; entry into the state-licensed commercial arena imposes limits on religiously motivated conduct (as opposed to belief); and defining one's commercial activity as expressive does not change the propriety of that regulation.

The Individual Plaintiffs, in Benton County Cause Number 13-2-00953-3, have also moved for partial summary judgment, also arguing that Defendants have admitted acts that constitute a violation of the WLAD in trade or commerce, and thus constitute a per se violation of the CPA as a matter of law, with the exception of the issue of damages.[4] Further, the Individual Plaintiffs join in the AG's arguments with respect to the aforementioned constitutional affirmative defenses.

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[4] As indicated below and in this Court's prior Order, unlike the AG, the Individual Plaintiffs must satisfy additional elements of damage (injury) and causation to sustain their CPA claim. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (further citation omitted).

The Defendants respond and allege material factual disputes about what Stutzman did on March 1, 2013, and the motivation behind her actions. The Defendants argue Stutzman simply declined to participate in a gay wedding, and that compelling her participation in this event violates her rights of free speech and free exercise of religion under both the First Amendment to the United States Constitution as well as Article 1, Section 11 and Section 5 of the Washington State Constitution. For the reasons set out below, the Court concludes that to accept any [of] the Defendants' arguments would be to disregard well-settled law and therefore grants the AG's and Individual Plaintiffs' motion.[5]

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[5] In reaching this conclusion, the Court reviewed and considered the Plaintiff State of Washington's Motion For Partial Summary Judgment On Liability And Constitutional Defenses, filed November 21, 2014 (along with the Declaration of Kimberlee Gunning and attachments thereto), Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment And Memorandum Of Authorities, filed November 21, 2014 (along with the Declaration of Jake Ewart and attachments thereto), the Defendants' Response To Plaintiffs' Two Motions For Partial Summary Judgment On Liability, filed December 8, 2014 (along with the Declarations of Kristen K. Waggoner, Nickole Perry, Barronelle Stutzman, David Mulkey, Dr. Mark David Hall, Professor Dennis Burk and Jennifer Robbins and any attachments thereto), as well as Plaintiff State of Washington's Reply (along with the Declaration of Michael R. Scott and attachments thereto) and the Reply In Support of Plaintiffs Ingersoll and Freed's Motion (along with the Declaration of Todd Bowers and attachments thereto), both filed December 15, 2014. As to all pending motions, the Court has also reviewed and considered Defendants' Supplemental Summary Judgment Briefing On Four Non-Constitutional Affirmative Defenses, filed on February 13, 2015, Plaintiffs' Notice Of

II. FACTUAL BACKGROUND[6]

Defendant Barronelle Stutzman is the president, owner and operator of Defendant Arlene's Flowers, Inc. d/b/a Arlene's Flowers and Gifts. This closely-held Washington for-profit corporation has Stutzman and her husband as the sole corporate officers. From its retail store in Richland, Washington, it advertises and sells flowers and other goods to the public. The corporation sells flowers for events including, among others, weddings. For the five-year period before March of 2013, weddings constituted approximately three percent of the corporation's business. The corporation, originally incorporated in 1989, was previously owned and operated by Stutzman's mother, from whom she purchased the corporation almost 13 years ago. The corporation was and is licensed to do business in the State of Washington.

Stutzman has a firmly held religious belief, based on her adherence to the principals of her Christian faith, that marriage can only be between a man and a woman. Specifically, as part of the Southern Baptist tradition, Stutzman asserts that she is compelled to follow Resolutions of the Southern Baptist

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Supplemental Authority, filed February 12, 2015 (along with the attachment thereto), and Plaintiff Robert Ingersoll And Curt Freed's Brief Regarding Procedural Posture Of Four Remaining Non- Constitutional Affirmative Defenses In Individual Actions, filed February 13, 2015.

[6] In a stipulation between the parties on October 18, 2013, the parties agreed, pursuant to the order consolidating the cases for pre-trial purposes, that the record of the AG's case should be made part of the Individual Defendant's case.

Convention Resolutions [sic] (hereinafter Resolutions of SBC). Those resolutions include both a definition of marriage that excludes same-sex marriage, and an explicit rejection of same-sex marriage as a civil right.[7] As a result, Stutzman asserts that she cannot participate in a same-sex wedding.

Stutzman draws a distinction between the provision of raw materials for such an event (or even flower arrangements that she receives pre-made from wholesalers) and the provision of flower arrangements that she has herself arranged for the same event. Said more precisely, Stutzman does not believe that she can, consistent with tenets of her faith (as expressed in the Resolutions of the SBC), use her professional skill to make an arrangement of flowers and other materials for use at a same-sex wedding. That which she believes she cannot do directly she also believes she cannot allow to occur on the premises of her company with her knowledge. Therefore she believes she cannot allow others in her employ to prepare such arrangements in her company's name. Stutzman believes that such participation would constitute a demonstration of approval for the wedding itself.

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[7] The relevant Resolution of the SBC, "On 'Same-Sex Marriage' And Civil Rights Rhetoric" New Orleans – 2012, resolves that Southern Baptists express "love of those who struggle with same-sex attraction" and condemns "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" toward gay men or women.

Plaintiff Robert Ingersoll is a gay man who was an established customer of Arlene's Flowers. During the approximately nine years leading up to the present action, Stutzman, on behalf of Arlene's Flowers, regularly designed and created flower arrangements for Ingersoll. Ingersoll estimated that, with respect to the purchase of flowers only, Stutzman had served him approximately 20 times or more and that he had spent in the range of $4,500 at Arlene's Flowers. Stutzman prepared these arrangements knowing both that Ingersoll was gay and that the arrangements were for Ingersoll's same-sex partner, Curt Freed for occasions such as birthdays, anniversaries and Valentine's Day.

On November 6, 2012, the voters confirmed, through Referendum 74, the Legislature's earlier enactment of same-sex marriage. *See* Revised Code of Washington (hereinafter RCW) 26.04.010(1) (*as amended by* Laws of Washington 2012, Ch. 3, § 1(1)); *see also*, Referendum Measure 74, approved Nov. 6, 2012. Shortly thereafter, Ingersoll and Freed were engaged to be married. Ingersoll and Freed had selected a date in September of 2013 for the wedding and anticipated inviting approximately 100 people to the ceremony and reception to be held at an established wedding venue. Ingersoll and Freed anticipated a wedding with all of the customary trappings thereof: invitations, guestbook, a photographer, a licensed or ordained officiant, a catered dinner at the reception, and a cake. Ingersoll and Freed planned to buy flowers for the wedding, including boutonnieres, from Stutzman and Arlene's Flowers.

On February 28, 2013, Ingersoll drove to Arlene's Flowers to inquire about having Stutzman do the flowers for his and Freed's wedding. Stutzman was not present. An employee who spoke with Ingersoll communicated the request to Stutzman, and stated he would return the next day. That employee advised Stutzman that Ingersoll "would be in to talk about wedding flowers."

After speaking with her husband, Stutzman decided that she could not create arrangements for Ingersoll and Freed's wedding without violating her beliefs. On March 1, 2013, Ingersoll left from his place of employment during his lunch hour and drove to Arlene's Flowers, where Stutzman informed Ingersoll that because of her beliefs, she could not do the flowers for his wedding. In deposition testimony Stutzman described the encounter as follows:

Q: Tell me what you remember about your conversation with [Ingersoll].

A: He came in and we were just chitchatting and he said that he was going to get married. Wanted something really simple, khaki I believe he said. And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.

Q: Did you tell him that before he finished telling you what he wanted?

A: He said it was going to be very simple.

Q: Did he tell you what types of flowers he would want?

A: We didn't get into that.

There was no discussion between the parties about any particulars regarding whether Defendants were being asked to deliver flowers to the wedding (as opposed to picking them up from the store) or whether Stutzman was being asked to attend the wedding. Stutzman's position was that she "chose not to be a part of his event," because she believed that Ingersoll "wanted me to do his wedding flowers which would have been part of the event." Stutzman did state in her deposition testimony that had Ingersoll communicated to her that he wanted to purchase raw materials (variously described as "stems" and "branches" throughout the depositions and declarations), she would have provided those items.

Ingersoll's recollection of the interaction is not materially different. In deposition testimony, when asked what he had contemplated having Stutzman provide for his wedding, he indicated:

A: Just some sticks or twigs in a vase and then we were going to do candles. We wanted to be very simple and understated.

Q: Did you tell Barronelle that you wanted to do sticks or twigs?

A: Barronelle never gave me the opportunity to discuss the flower arrangements.

Ingersoll left Arlene's Flowers shortly thereafter, upset because he had thought Stutzman would "do my flowers." This interaction effectively severed the relationship between the parties and ultimately gave rise to the present actions. Ingersoll and Freed were married during the pendency of this action in a much smaller ceremony in their home, with 11 attendees, friends taking pictures, and a flower arrangement from another florist. The Ingersoll and Freed alleged $7.91 in out-of-pocket expenses (mileage at the U.S. Internal Revenue Service rate) relating to finding an alternative source of flowers for their wedding.

Prior to March 1, 2013, and presumably continuing up to this day, Arlene's Flowers has had a written nondiscrimination policy that 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." Stutzman was aware of the voter's passage of Referendum Measure 74 in the fall of 2012, approving same sex marriage as the law in Washington. That said, following the events of March 1, 2013, Stutzman instituted an unwritten policy at Arlene's Flowers that "we don't take same sex marriages."

Efforts toward a negotiated resolution between the AG and Defendants proved fruitless in March and April of 2013. The AG sought to have Defendants sign an Assurance of Discontinuance (hereinafter AOD),

stipulating that the conduct at issue here occurred and would not be repeated. While the AOD indicated it did not constitute an admission of a violation, it did not limit the rights or remedies of other persons, i.e., the Individual Plaintiffs, against Defendants. Defendants refused to sign the AOD, taking a position consistent with their past and present arguments in this action.

The AG then commenced its action in Benton County Cause Number 13-2-00871-5 by the filing of a Complaint on April 9, 2013. Therein, the AG alleged a violation of the CPA, both under the Act itself, and pursuant to the WLAD, a violation of which is a per se violation of the CPA. Defendants' Answer, containing the affirmative defenses that are the subject of one of these pending motions, was filed on May 16, 2013.

A Complaint by the Individual Plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed nine days later, on April 18, 2013. The Individual Plaintiffs alleged three causes of action, two of which survived a prior motion for summary judgment: 1) Violation of the WLAD; and 2) Violation of the CPA. Defendants answered on May 20, 2013, also asserting affirmative defenses at issue here. The cases were consolidated for consideration of these motions by the previously assigned judicial officer.

III. LEGAL BACKGROUND

A. The Consumer Protection Act (CPA)

The CPA provides:

> [u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.020. The CPA, "on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (italics in original).

In enacting the CPA, the Legislature sought "to protect the public and foster fair and honest competition." RCW 19.86.920. Consistent with its purpose, the Legislature has directed that the CPA "shall be liberally construed that its beneficial purposes may be served." *Id.* This statement from the Legislature "is a command that the coverage of [the CPA's] provision in fact be liberally construed and that its exceptions be narrowly confined." *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). The statute's purpose statement concludes as follows:

> *[i]t is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices* which are reasonable in relation to the development and preservation

> of business or *which are not injurious to the public interest, nor be construed to authorize those acts or practices which* unreasonably restrain trade *or are unreasonable per se*.

RCW 19.86.920 (italics added).

Actions for alleged violations of the CPA may be commenced by an individual or individuals. RCW 19.86.093. Individual plaintiffs must establish the following elements to prove their case: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to business or property, and (5) causation." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (further citation omitted). While undefined in the CPA, "[w]hether a particular act or practice is 'unfair or deceptive' is a question of law," to be determined by the Court. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d at 47; *see also State v. Schwab*, 103 Wn.2d 542, 546, 693 P.2d 108 (1985). That said, certain acts or practices have been declared by the Legislature to be per se violations of the CPA, and "private litigants are empowered to utilize the remedies provided them by the act." *Schwab*, 103 Wn.2d at 546-7.

Actions alleging violations of the CPA may also be brought by the AG. RCW 19.86.080(1). The scope of the AG's authority to act under the statute is broad:

> [t]he attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, *against any person* to restrain and *prevent*

> *the doing of any act* herein prohibited or declared to be unlawful…

Id. (italics added). Unlike an individual plaintiff, the AG must establish only three elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011). In bringing actions under the CPA, the AG's role is different than that of the private litigants:

> [t]he Attorney General's responsibility in bringing cases of this kind is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.

Seaboard Surety Co. v. Ralph Williams' NW Chrysler Plymouth (hereinafter Ralph Williams' (I)), 81 Wn.2d 740, 746, 504 P.2d 1139 (1973). The Legislature's declaration of *per se* violations of the CPA "authorize[s]" the AG to bring actions under the CPA for these acts or practices the Legislature declares as *per se* unfair or deceptive. *Schwab*, 103 Wn.2d at 546-7.

B. The Washington Law Against Discrimination (WLAD)

The WLAD provides:

> (1) *[t]he right to be free from discrimination because of* race, creed, color, national origin, sex, honorably discharged veteran or military status, *sexual orientation…is recognized as and declared to be a civil right.* This right shall include, but not be limited to:
>
> …
>
> (b) *The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation,* assemblage, or amusement…

RCW 49.60.030(1)(b) (italics added). The purpose statement for the law states:

> [the WLAD] 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, in the 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…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 foundations of a free democratic state….

RCW 49.60.010. As with the CPA, the Legislature has directed this Court that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. The statute specifically prohibits discrimination as follows:

> (1) *[i]t shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination…or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, staying, or lodging in any place of public resort, accommodation,* assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, *regardless of race, creed, color, national origin, sexual orientation…*

RCW 49.60.215(1) (italics added).

C. Violation Of The Washington Law Against Discrimination (WLAD) As A *Per Se* Violation of the Consumer Protection Act (CPA)

The WLAD explicitly provides that a violation of the WLAD is a per se violation of the CPA:

> …any unfair practice prohibited by this chapter which is 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). Therefore, in addition to an individual's WLAD right of action, both the AG and private individuals are authorized by the Legislature's designation of a WLAD violation as *per se* violations of the CPA to file a CPA action. *Schwab*, 103 Wn.2d at 546-7 (listing "discriminatory practices" under the WLAD (RCW 49.60.030(3)) as example of violations of other statutes that constitute *per se* violations of the CPA).

D. United State Constitution, Amendment I

The Free Exercise Clause provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…

U.S. Const., amend. I. Free exercise is not, however, without its limits. Religious motivation does not excuse compliance with the law because:

> [l]laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices….Can a man excuse his practices to the contrary because of his religious belief? To permit this 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. Government could exist only in name under such circumstances.

Reynolds v. United States, 98 U.S. 145, 166-167, 25 L. Ed. 244 (1878) (prosecution under Utah Territory bigamy law). Free exercise does not relieve an individual from the obligation to comply with a valid and neutral law of general applicability that forbids conduct that a religion requires. *Employment Division, Department of Human Resources Of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (religious use of Peyote does not entitle individual to exemption from state unemployment laws which prohibit granting benefits

to individual who is fired for drug use). Consistent with the rationale of *Reynolds*, requiring any form of justification for such a law greater than rationale basis inquiry, when a law is challenged under free exercise, "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 884-85.[8] This is the case because:

> [t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."

Id. at 885 (further citation omitted).

In particular, with respect to participation in commerce, the Supreme Court has stated:

> [w]hen 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. Granting an exemption…operates to impose [the follower's] religious faith on

[8] Justice Scalia, writing for the majority, relied on *Reynolds* to hold the "compelling governmental interest" balancing test in *Sherbert v. Verner*, 384 U.S. 398 (1963) is inapplicable to a free exercise challenge to an across-the-board criminal prohibition of a particular form of conduct.

> the [person sought to be protected by the law].

United States v. Lee, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Amish employer must collect social security tax for those in their employ).

E. Washington State Constitution, Article I, Section 11

Article I, Section 11 of the Washington State Constitution provides as follows:

> [a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Wash. Const. Article 1, Section 11. Article I, Section 11 provides "broader protection than the first amendment to the federal constitution." *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009). A party challenging government action under Article I, Section 11 must show both a sincere belief and a substantial burden upon free exercise as a result of the government action. *City of Woodinville*, 166 Wn.2d at 642-43. Where a substantial burden exists, the government must show that its action is "a narrow

means for achieving a compelling goal." *Id.* All burdens are evaluated "in the context in which [they] arise. *Id.* at 644. As the Court has indicated by way of analogy, while healing the sick may be connected to worship, "a church must still comply with reasonable permitting process if it wants to operate a hospital or clinic." *Id*. This limitation is consistent with the final clause of Article I, Section 11, providing that "the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state." In this regard, "the key question is not whether a religious practice is inhibited, but whether a religious tenet can still be observed." *State v. Motherwell*, 114 Wn.2d 353, 362-63, 788 P.2d 1066 (1990) (non-clergy counselors required to report suspected child abuse).

The Legislature's invocation of its police power to prohibit conduct on grounds that a law is necessary to protect Washington citizens from harm and to promote public health and welfare has withstood prior challenges based on Article I, section 11. *State v. Balzer*, 91 Wn.App. 44, 60-61, 91 P.2d 931 (1998) (Rainbow Tribe and Rastafarian beliefs with respect to Marijuana did not prevent state from placing Marijuana in Schedule I). When the legislature acts under its police power and constrains individual freedom, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints." *Balzer*, 91 Wn.App. at 60-61 (*citing State v. Smith*, 93 Wn.2d 329, 338, 610 P.2d 869 (1980)).

Article I, Section 11 is also not a bar to regulation of commerce, such as where a physician objects on religious grounds to being required to purchase professional liability insurance as a condition of being granted privileges at a hospital. *Backlund v. Board Of Commissioners Of King County Hospital District 2*, 106 Wn.2d 632, 724 P.2d 981 (1986). As the Court observed in the context of the hospital's administrative action:

> Dr. Backlund freely chose to enter the profession of medicine. Those 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, 106 Wn.2d at 648.

IV. ANALYSIS

A. Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing

In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3 Defendants have moved for summary judgment, asking this Court to dismiss all claims brought against them by both the AG and the Individual Plaintiffs as moot. Defendants argue that the actual interaction that occurred on March 1, 2013 between Stutzman and Ingersoll was the result of a misunderstanding. The misunderstanding resulted from the fact that Ingersoll asked to speak with

Stutzman personally and from the fact that Stutzman normally designed and created custom flower arrangements for Ingersoll. As a result, Stutzman reasonably assumed that was what Ingersoll wanted on this occasion. Had Stutzman known that Ingersoll would have been satisfied with the provision of raw materials for this wedding, she would have provided them. But for the fact that Ingersoll and Freed are now married, Defendants assert she would provide them today. The only way the controversy could reoccur, Defendants argue, would be if Ingersoll and Freed were to divorce and remarry. Thus, an injunction would serve no purpose. While the Defendants acknowledge that injunctions are appropriate for matters of continuing and substantial public interest, they argue that what other individuals may want from Defendants in the future is purely speculative. Thus Defendants assert that there is no live controversy. They argue that the matter is moot, none of the Plaintiffs have standing, and the matter should be dismissed on summary judgment.

Either party may move for summary judgment. Superior Court Civil Rule (hereinafter CR) 56(a-c). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn.App.157, 161, 872 P.2d 69 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See State Farm Ins. Co. v. Emerson*, 102

Wn.2d 477, 480, 687 P.2d 1139 (1984); *see also Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) ("A material fact is one upon which the outcome of the litigation depends."). To the extent that there are disputes between the parties, they are disputes as to which facts are to be applied to decide the issue. The matter is appropriate for summary judgment.

1. Lack Of Standing On The Part of Both Plaintiffs

The Defendants posit the case as one based on a mistake of fact, or as they term it a "misunderstanding." As indicated above, they argue that had Stutzman known that Ingersoll would have been satisfied with something other than what she customarily provided, that is to say arranged flowers, she would not have immediately told him that she couldn't "do his wedding." Defendants thus argue that Plaintiffs are asking the Court to decide the case based on what they term a "hypothetical 'expectancy.'"

On March 1, 2013, Stutzman, who had provided the service of flower arranging to Ingersoll in the past, refused, albeit politely, to provide that service. She did so because she believed Ingersoll wanted her to create flower arrangements for his wedding. The Defendants assert in their reply brief regarding the motions that follow that Stutzman "could hardly think otherwise" based on their lengthy prior personal and commercial relationship. As a result, Stutzman refused before Ingersoll could explain precisely what he wanted.

The hypothetical facts are those things that might have, could have, or would have had happened, but didn't. The actual facts are the things that did happen. While the Court is required for the purposes of the motion to view "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party," here the facts are reasonably susceptible to only one construction, an actual refusal to provide services on the part of Stutzman. *Ward*, 74 Wn.App. at 161.

"One who is not adversely affected by a statute may not question its validity." *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987), *as amended by*, 750 P.2d 254 (1988). The basic rule of standing "prohibits a litigant…from asserting the legal rights of others," and requires that a party have a "real interest therein." *Dean v. Lehman*, 143 Wn.2d 12, 18-19, 18 P.3d 523 (2001) (internal citations and quotation marks omitted).

In support of its position that it has standing in its own right, the AG points to RCW 19.86.080(1), which authorizes the AG under the CPA to:

> bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful…"

RCW 19.86.080(1). Further, in support of the position that it has a real interest, separate and apart from the

Individual action under the CPA, there is *Ralph Williams' (I)*, which provides:

> [t]he Attorney General's responsibility in bringing cases of this kind is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.

Ralph Williams' (I), 81 Wn.2d at 746. The AG is correct. It has a real interest and meets the basic test for standing. Any lingering doubt as to whether the requirement of standing is subsumed within the elements of the CPA action itself, as to both the AG and Individual action, is removed by *Panag*, where the Court, discussing the five-part test for individual actions, states as follows:

> [w]e will not adopt a sixth element, requiring proof of a consumer transaction between the parties, under the guise of a separate standing inquiry.

Panag, 166 Wn.2d at 33. Individual CPA actions establish standing through public interest impact and injury: the AG proves it through public interest alone. *Id.* at 38; *see also* RCW 19.86.080(1); *and see State v. Kaiser*, 161 Wn.App. at 719.

Here, the WLAD, a violation of which is alleged in the CPA action, carries with it its own "specific

legislative declaration of public interest impact." *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company*, 105 Wn.2d 778, 791, 719 P.2d 531 (1986). Further, public interest may be satisfied by actions having a potential to injure others in the course of a defendant's business. *Hangman Ridge*, 105 Wn.2d at 790-91. Plaintiffs point out that Defendants have an unwritten policy that they will refuse to provide arranged flowers to the next same-sex couple that requests this service of them. Also, as indicated above, the Individual Plaintiffs have alleged damages in mileage traveled to secure flowers from another vendor. Both the AG and Individual Plaintiffs have established standing in the first instance in their respective CPA actions.

The Individual Plaintiffs, addressing standing in their WLAD and CPA actions, make two points. First, they point out that under the CPA, nominal economic damages are sufficient to support standing. *Smith v. Stockdale*, 166 Wn.App. 557, 565, 271 P.3d 917 (2012) ($5 claim of economic damages sufficient to support claim of injury in CPA claim). Second, as to the WLAD action, the Individual Plaintiffs note that courts have "long recognized damage is inherent[9] in a discriminatory act." *Negron v. Snoqualmie Valley Hospital*, 86 Wn.App. 579, 587, 936 P.2d 55 (1997). For a WLAD claim, nominal damages are established "merely by showing a deprivation of a civil right." *Minger v. Reinhard Distribution Company, Inc.*, 87

[9] That said, the Individual Plaintiffs affirm that, outside of the standing context, they are not asserting or seeking actual damages with respect to non-economic harms.

Wn.App.941, 947, 943 P.2d 400 (1997) (quotation omitted).

Defendants have misapprehended what actually happened on March 1, 2013. On that day, Stutzman refused to provide to Ingersoll a service she provided to others. While it is certainly true that a case is moot if a court "cannot provide the basic relief originally sought…or can no longer provide effective relief," that is not the case here. *Darkenwald v. Employment Security Department*, 182 Wn.App. 157, 165, 328 P.3d 977 (2014) (internal citation omitted). Should all of the elements of Plaintiff's claims be proven, based on this refusal to provide services, the Court may order relief, including injunctive relief.[10]

As to the Defendants' contention that the case is moot because Ingersoll and Freed are now married, both Plaintiffs counter that case law holds otherwise. The idea that an individual plaintiff can only enjoin future actions as to themselves is contrary to the purpose of the CPA, which is preventing the practice in the future. *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973) ("This broad public policy [the purpose of the CPA] is best served by permitting an injured individual to enjoin future violations of RCW 19.86, *even if such violations would not directly affect the individual's own private rights.*" (emphasis added).

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[10] Defendants argue that these actions are not justiciable under the Uniform Declaratory Judgment Act (hereinafter UDJA), RCW 7.24. While both the AG and Individual Plaintiffs make well-reasoned arguments to the contrary, as they point out, these actions were not brought under the UDJA.

The AG also points to *Ralph Williams' (III)*, where the defendant car dealership, having been found to have violated the CPA with respect to advertising and sales practices, appealed the trial court's granting of broad injunctive relief preventing those practices, appealed the trial court's granting of broad injunctive relief preventing those practices in the future. *State v. Ralph Williams' North West Chrysler Plymouth Inc. (Ralph Williams' (III))*, 87 Wn.2d 298, 553 P.2d 423 (1976). The defendant dealership argued that there was no basis for injunctive relief. The business had closed, thus any future violations were unlikely. It is true that an injunction may be moot if a defendant can demonstrate that "events make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Ralph Williams' (III)*, 87 Wn.2d at 312 (internal quotations omitted). That said, "[c]ourts must beware efforts to defeat injunctive relief by protestations of reform." *Id*. In that case, because the practices were discontinued only after institution of the suit and the business was free to reenter the market and continue its past practices, an injunction was proper. *Id*. Here, the practice complained of by Plaintiffs will be continued by way of an unwritten but acknowledged policy of the Defendants. If the past violation of a shuttered business, not specifically disclaimed, supports a finding of a danger of future violation to substantiate an injunction in *Ralph Williams' (III)*, Defendants' action, now made policy[11] of Arlene's Flowers, an

[11] In point of fact, the totality of the current anti-discrimination policy of Arlene's Flowers is internally inconsistent. The written policy purports to comply with the WLAD and CPA, by including within its prohibition, "any other

active business, would support an injunction if the Plaintiffs prove their CPA claim.

Defendants point to *Orwick v. City of Seattle* in support of their position that the matter is moot, arguing that the exception for mootness for "matters of continuing and substantial public interest," only applies to "cases which became moot…after a hearing on the merits of the claim," *i.e.*, when "the facts and legal issues had been fully litigated by parties with a state in the outcome of a live controversy." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984) (*en banc*) (quotations removed). Defendants state that there has been no hearing on the merits, any inconvenience to Ingersoll and Freed cannot be corrected, and thus it is a waste of resources to continue to address as case that has not been fully litigated.

As the Individual Plaintiffs note, Defendants misread *Orwick*. A finding of a hearing on the merits is not mandatory. It is a fourth, *optional*, factor in determining whether the public importance exception is to be applied.[12] The reason it is optional, is made

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status protected by applicable law." The unwritten policy creates an exception for same sex marriage. Defendants' assertion that the business is not doing weddings during the pendency of this case, i.e. "voluntary cessation," does not change the analysis under *Ralph Williams' (III). Ralph Williams' (III)*, 87 Wn.2d at 272.

[12] The first three factors are: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Westerman*, 125 Wn.2d at 286 *(quoting Hart*, 111 Wn.2d at 448). As indicated above, the Legislature has, in the purpose and statements

clear in subsequent case law. A hearing on the merits is shorthand for the Court's concern regarding "the level of genuine adverseness and the quality of the advocacy of the issues." *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994) (*quoting Hart v. Department of Social & Health Services*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). An issue not properly developed and presented, even if it is of public importance, cannot be properly decided.

Defendants' own diligence and that of the AG and Individual Plaintiffs works against Defendants on this point. The briefing in this matter is voluminous, thorough and of excellent quality. The briefing for this summary judgment motion alone consists of 63 pages of briefing by the parties, with 176 pages of declarations and attachments thereto. The briefing for the last six summary judgment motions in this case total 443 pages of briefing by the parties, with 2,202 pages of declarations and attachments thereto. The briefing does not lack for citation to authority. The attachments include the depositions of the parties, as well as declarations of the parties and experts, and supporting source material. Oral argument was had for a total of a full court day on the motions, spread out over two days. These motions are being resolved on summary judgment because only issues of law remain, and the legal issues have been

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regarding construction of the CPA and WLAD indicated that the elimination of discrimination in trade or commerce is of public importance. *See e.g.*, RCW 49.60.010, "discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state...."

well argued by zealous advocates representing genuinely adverse parties. *See Westerman*, 125 Wn.2d at 287 (reviewing bail issue where bail order had been replaced by another order, in part because "the briefs before this court are of good quality").

Further, even if the Court were to find that the matter was otherwise moot, a fifth optional factor would weigh heavily in favor of the public importance exception. The Court may consider "the likelihood that the issue will escape review because the facts of the controversy are short-lived." *See Id*. at 286-87 (*citing with approval Seattle v. State*, 100 Wash.2d 232, 250, 668 P.2d 1266 (1983) (Rosellini, J., dissenting)). As the Court indicated above, the matter is not moot in light of the basic rules of standing, the nature of the causes of action themselves, the harms alleged and remedies available, and the Court's injunctive power as made clear in *Ralph Williams' (III)*. But even if the case were otherwise moot, *Orwick* is no bar to hearing the case in light of *Westerman* and *Hart*, above.

Finally, common sense dictates that the Defendants' position, however analyzed, must be rejected. Otherwise, a funeral parlor could counter that any CPA or WLAD claim against it was moot, as the deceased would presumably be interred or cremated during the initial pleading of the case. This, despite a policy, written or unwritten, that they would repeat their conduct in the future.

Neither the CPA nor the WLAD actions are moot and Plaintiffs have standing. Even if the matters were moot, they are matters of important public

interest that due to their nature would otherwise escape review. The Defendants' motion for summary judgment on Plaintiffs' standing is denied.

B. Plaintiff's Motion For Partial Summary Judgment On Liability And Constitutional Defenses (Considered With Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment)[13]

In Benton County Cause Number 13-2-00871-5, the AG has moved for partial summary judgment, arguing that Defendants have admitted acts that constitute a violation of the WLAD in trade or commerce, and thus constitute a per se violation of the CPA as a matter of law. Further, the AG argues that the Defendants' four remaining constitutional affirmative defenses in their Answer fail as a matter of law. The Individual Plaintiffs, in Benton County Cause Number 13-2-00953-3, have also moved for partial summary judgment, also arguing that Defendants have admitted acts that constitute a violation of the WLAD in trade or commerce, and thus constitute a *per se* violation of the CPA as a matter of law, with the exception of the issue of damages. Further, the Individual Plaintiffs join in the AG's arguments with respect to the aforementioned constitutional affirmative defenses.

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[13] While the above motions were filed separately, they are substantially similar in their arguments: so much so that Defendants responded to the motions in a single filing. The Court will consider and resolve the motions together.

Either party may move for summary judgment. CR 56(a-c). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Ward*, 74 Wn.App. at 161 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See Emerson*, 102 Wn.2d at 480; *see also Clements*, 121 Wn.2d at 249 ("A material fact is one upon which the outcome of the litigation depends."). While the Defendants argue that there are material factual disputes, the Court concludes otherwise. As indicated above, the material facts are what actually happened, not what would have happened. Further, the distinction drawn by Defendants as to conduct (same sex marriage) and status (being gay), as it relates to what Defendants actually did on March 1, 2013, has been rejected by the Supreme Court of the United States. As to why Defendants did what they did, other than the extent to which religious motivation may provide an affirmative defense, Defendants' motivation is irrelevant under both the CPA and WLAD. Thus, the matter is appropriate for summary judgment.

1. <u>Violation Of The CPA And WLAD As A Matter Of Law</u>

a. <u>Individual Plaintiffs' WLAD Claim Against Defendants</u>

The WLAD specifically prohibits discrimination as follows:

> (1) *[i]t shall be an unfair practice for any person or the person's agent or employee to commit* an *act which directly or indirectly results in any distinction, restriction, or discrimination…or the refusing or withholding from any person the admission, patronage, custom presence, frequenting, staying, or lodging in any place of public resort*, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, *regardless of race, creed, color, national origin, sexual orientation…*

RCW 49.60.215(1) (italics added). Defendants, in their Answer, admit that Arlene's Flowers is a "for-profit Washington corporation that sells goods and services to the general public" and admit that Stutzman is the "president, owner, and operator of Arlene's flowers." *Defendants' Answer* (13-2-00953-3), pg. 2, paras. 2-3. As indicated in this Court's prior Order, both Arlene's Flowers and Stutzman may be held liable for the actions of Stutzman under the clear meaning of the WLAD. *See* RCW 49.6.040(19) (defining "person" to include individuals and

corporations); *see also Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 354-57, 20 P.3d 921 (2001) (individual supervisor and corporation liable based on supervisor's actions).

Defendants admit in their Answer and in deposition testimony, that Stutzman denied[14] services to Ingersoll on March 1, 2013, for religious reasons. *See Stutzman Deposition* (…And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.).

Because Defendants have admitted to a prima facie case[15] of discrimination pre-trial, this motion is controlled by *Lewis v. Doll*. Lewis, a young black man, sued Doll, the owner of a 7-Eleven store, for

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[14] As the Court has indicated previously, while the Defendants in their answer use the word "declined" in place of "denied," both in argument and in its Answer, for the purposes of this motion, it is a distinction without a difference. *See Defendants' Answer* (13-2-00871-5), pg. 4, para. 5.4 ("....It is ADMITTED that Arlene's Flowers declined to design and create floral arrangements to decorate and beautify Mr. Ingersoll's upcoming wedding.").

[15] While not specifically addressed by the parties, the elements of the WLAD claim alleging discrimination against an individual in a public accommodation are as follows: "l) the plaintiff is a member of a protected class; 2) the defendant's establishment is a place of public accommodation; 3) the defendant discriminated against plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class; and 4) the protested status was a substantial factor causing the discrimination." *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 525, 20 P.3d 447 (2001).

discrimination under the WLAD. *Lewis v. Doll*, 53 Wn.App. 203, 765 P.2d 1341 (1989). The testimony at trial was that, upon orders of Doll, because of past instances of shoplifting at the store attributed to black patrons, Lewis was denied the ability to purchase "a couple of [S]lurpees" by the store's clerk.[16] *Lewis*, 53 Wn.App. at 204. This occurred despite the fact that Lewis was not identified as a suspected shoplifter, and white patrons entered and were served during this refusal. *Id.* at 205. Lewis' motion for a directed verdict at the close of the evidence was denied, and the jury returned a verdict for the defendant business owner, Doll. *Id.* at 204. The Court reversed, granted the motion for a directed verdict in favor of Lewis (finding a violation of the WLAD as a matter of law), and remanded the matter for a trial on damages only. *Id.*

The Court, citing with approval findings of discrimination based on sexual orientation by another state court,[17] stated "[a]fter establishing a prima facie

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[16] The 7-Eleven clerk told Lewis at the time of the refusal, "[n]o, we have a policy. Boss left strict orders not to serve any blacks." The clerk further indicated, "[w]e have been having problems with blacks coming in shoplifting." *Id.*

[17] Those two cases are significant in that they sustained findings of discrimination based on sexual orientation, and that one of the cases upheld application of Minneapolis anti-discrimination ordinance against the club owner, a born-again Christian's, free exercise claim as the ordinance applied to his religious freedom in the operation of his business. *See Potter v. LaSalle Sports & Health Club*, 368 N.W.2d 413 (Minn.Ct.App. 1985), *affirmed by*, 384 N.W.2d 873 (Minn. 1986) (affirming Civil Rights Commission finding of discrimination); *see also Blanding v. Sports & Health club, Inc.*, 373 N.W.2d 784, 789 (Minn.Ct.App.

case [of discrimination under the WLAD] the burden of going forward shifts to the defense which must attempt to justify the alleged discriminatory policy." *Id.* at 208. The Court pointed out that only discriminatory impact, not motivation, need be shown, stating "[n]or is the fact Ms. Doll did not intend a discriminatory effect relevant." *Id.* at 210. The Court found that this policy, denying service to all black potential patrons did not constitute a legitimate business policy, as allowed under RCW 49.60.215. *Id.* at 209-12. The Court concluded:

> [t]hus, after viewing the evidence and all reasonable inferences drawn therefrom in favor of Ms. Doll, we conclude as a matter of law, the defense raised was without a legal foundation. The court erred when it submitted the question of discrimination to the jury.

Id. at 211-12. Defendants do not claim that their refusal falls under the final clause of RCW 49.60.215, which provides that "behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice."

Defendants admit that Ingersoll was denied the right to purchase a service, and freely admit that their unwritten policy will result in a future denial should another gay or lesbian couple seek their services. Defendants defend their action as one aimed at

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1985), *affirmed by*, 389 N.W.2d 205 (Minn. 1986) ("...the Minneapolis ordinance as applied does not impose a burden upon the principals' free exercise of religion.")

opposition to conduct (same sex-marriages), rather than opposition to or discrimination against gay or lesbian individuals generally (the status of sexual orientation). As indicated above, a tenet of Stutzman's faith makes precisely this distinction. *See* Resolution of SBC, "On 'Same-Sex Marriage' And Civil Rights Rhetoric" New Orleans – 2012. The Individual Plaintiffs do not accuse Stutzman of acting inconsistently with this tenet of her faith, they instead counter that this distinction between conduct and status has previously been rejected in discrimination claims. The Individual Plaintiffs are correct.

The United States Supreme Court has long held that discrimination based on conduct associated with a protected characteristic constitutes discrimination on the basis of that characteristic. *Bob Jones University v. United States*, 461 U.S. 574, 605, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (Defendant could not avoid result by allowing all races to enroll, subject to conduct restrictions regarding interracial association and marriage because "discrimination on the basis of racial affiliation and association is a form of racial discrimination"); *see also Christian Legal Society Chapter of the Univ. of Cal., hasting Coll. of the Law v. Martinez*, 561 U.S. 661, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (University student group's claim that it did not prohibit gay members, only those who engage in or support same-sex intimacy rejected because prior decisions "have declined to distinguish between status and conduct in this context."). Further, as the Individual Plaintiffs correctly observed, there is no authority for the proposition that substantial compliance with discrimination laws

excuses any individual act of discrimination. *See, e.g.*, *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) ("For example, 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."). In fact, in *Elane Photography*, under a cognate New Mexico anti-discrimination law, the Court held, "when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct [such as marriage] that is inextricably tied to sexual orientation." *Elane Photography*, 309 P.3d at 62. While Defendants at oral argument argued that *Elane Photography* was wrongly decided, it is consistent with existing case law and construes a state statute that is not meaningfully different than the WLAD. *Id*. at 61 (Construing provision of New Mexico Human Rights Act (hereinafter NMHRA), which, in relevant part, prohibits "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services…because of…sexual orientation."); *compare*, WLAD, RCW 49.60.215 (1) (prohibiting "any person…to commit an act which directly or indirectly results in…the refusing or withholding from any person…patronage…in any place of public …accommodation…regardless of…sexual orientation …"). *Elane Photography* did not allow a wedding photographer to make Defendants' conduct versus status distinction on religious grounds with respect to photographing a same sex marriage in the face of an anti-discrimination law. Defendants have offered no reason for a different result here. Defendants'

additional arguments to the contrary, based on examples of radio contests and movie plots, cannot be seriously considered as a legal argument by the Court. Defendants' refusal to "do the flowers" for Ingersoll and Freed's wedding based on her religious opposition to same sex marriage is, as a matter of law, a refusal based on Ingersoll and Freed's sexual orientation in violation of the WLAD.[18]

In *Lewis*, it was error for the trial court to fail to grant a directed verdict based on a trial record of an act that constituted discrimination within the meaning of the WLAD without valid excuse under the statute. Defendants have similarly admitted to conduct that constitutes a violation of the statute, and provide no legally cognizable defense to their actions. *Lewis*, 53 Wn.App at 212. While *Lewis* involved a motion for a directed verdict (as well as a later motion for a judgment notwithstanding the verdict), because there are no disputed material facts, Individual Plaintiffs are, consistent with *Lewis*, entitled to summary judgment on liability. Actual damages are not an element of a WLAD claim, and, as indicated below, Defendants' other affirmative defenses that are the subject of this motion fail as a matter of law.

Because the Individual Plaintiffs have not sought actual damages under the WLAD, the only remaining matters are remedies to be determined by the Court:

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[18] A violation of the WLAD can additionally be shown by "any distinction, restriction, or discrimination" based on a protected class. RCW 49.60.215(1). The Individual Plaintiffs pled this case as a "refusal." *See, e.g.*, *Individual Plaintiffs' Complaint* (13-2-00953-3), pg. 5, para. 26.

nominal damages, injunctive relief,[19] attorney's fees, and costs. *Minger*, 87 Wn.App. at 946-47.

b. Individual Plaintiffs' CPA Claim Against Defendants

The Individual Plaintiffs point out that, having established their WLAD action, little more is required to establish their CPA action, because a violation of the WLAD "committed in the course of trade or commerce" is a *per se* violation of the CPA where the violation causes injury to business or property. *See* RCW 49.60.030(3); *see also Panag*, 166 Wn.2d at 37. Both Stutzman and Arlene's Flowers are liable under the CPA, with Stutzman being personally liable in both her individual and corporate capacity. *See* RCW 19.86.010(1) ("'Person' shall include, where applicable, natural persons, corporations…"); *see also Ralph Williams' (III)*, 87 Wn.2d at 322 ("If a corporate officer participates in the wrongful conduct, or with

[19] Defendants assert that additional fact-finding is necessary for the Court to fashion injunctive relief. Defendants are mistaken. As the Individual Plaintiffs observe, an injunction in this context would not prescribe or proscribe the nature of the goods or services to be sold by a business (it would not order a Kosher deli to stock bacon or not stock matzah), it would simply require a business to offer its customarily provided services on a non-discriminatory basis (it would require in practice that the Kosher deli make *all of the products or services that business chose to sell* available for purchase by everyone without discrimination). While Defendants assert that there are additional levels of involvement in weddings that Stutzman finds fulfilling and religiously significant which create a factual dispute, the issue in an injunctive context is simply whether the involvement is a service provided for a fee, in which [case] it must be offered on a non-discriminatory basis under the WLAD.

knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties.").

The Individual Plaintiffs must establish five elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to business or property, and (5) causation." *Id*. (further citation omitted). The uncontested material facts demonstrate that the events of March 1, 2013 occurred in trade or commerce, in particular inside the Arlene's Flowers, in Richland, Washington. *See* RCW 19.86.010(2) ("'Trade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington."). This satisfies the second element of their CPA claim. Because the Individual Plaintiffs have demonstrated a violation of the WLAD in trade or commerce, the violation is, for the purpose of applying the CPA, "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). This satisfies the first and third elements of the CPA claim.

As to the fourth and fifth element, the judicial officer previously assigned to these matters addressed this issue in a prior summary judgment motion by Defendants. As part of that judicial officer's ruling, two orders were entered following a hearing on October 4, 2013. Both orders make clear that the Court was reviewing the facts, the Individual Plaintiffs' claimed mileage of $7.91 as economic damages caused by Defendants' refusal to provide

services, in the light most favorable to the non-moving party. The first Order, entered on October 7, 2013, indicated that "this Court concludes that the fourth and fifth elements as required by *Hangman Ridge* are established." The Amended Order, entered on December 17, 2013, makes clear that the Court was not making a finding as a matter of law regarding the establishment of elements four and five. The Amended Order removes the language above and replaces it with the following: "this Court concludes that the facts are sufficient to defeat Defendants' Motion for Partial Summary Judgment." It is therefore clear that the prior judicial officer did not, due to the nature of prior summary judgment (and lack of a cross motion), make a determination regarding the sufficiency of the claimed loss of $7.91 to establish the fourth and fifth elements of the Individual Plaintiffs' CPA claim as a matter of law.

While the supporting legal authority appears in the footnote, and the Individual Plaintiffs indicate that the "extent of Plaintiff's damage will be presented to the court at another time," they indicate they were injured by Defendants' actions and that they are seeking summary judgment on liability under the CPA claim. Because a ruling on damage and causation, the fourth and fifth element, are necessary to resolve the issue of liability, the Court will address these elements as well. Defendants do not contest in their response the assertion by the Individual Plaintiffs that they incurred costs of $7.91 in mileage, as a result of Defendants' denial of services (which they term declining and referring) in securing alternate replacement services for the wedding. In point of fact, Defendants'

characterization of Stutzman's act as a declination and referral impliedly admits that additional cost and effort would be required to secure alternative services. Under the CPA, nominal economic damages are sufficient to support standing. *Smith v. Stockdale*, 166 Wn.App. at 565 ($5 entry fee sufficient to support claim of injury to property in CPA claim); *see also Amback v. French*, 167 Wn.2d 167, 171, 216 P.3d 405 (2009) (quoting *Hangman Ridge* for proposition that injury does not need to be great or quantifiable). Simply put, if a $5 entry fee is sufficient to satisfy the element of injury to property, the greater (albeit only slightly greater) amount of $7.91 in mileage must be sufficient as a matter of law. Causation is not contested, satisfying the fifth element. On their CPA claim, Individual Plaintiffs are also entitled to summary judgment on liability.

c. AG's CPA Claim Against Defendants

The AG is only required to prove three elements in a CPA claim: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. at 719. Defendants, both in their Answer and in deposition testimony, assert and/or admit a course of conduct on the part of Stutzman that legally constitutes a refusal to provide services to Ingersoll on March 1, 2013, for religious reasons. *See Defendants' Answer* (13-2-00871-5), pg. 3, para. 4.4 ("….Ms. Stutzman informed Robert Ingersoll that her religious convictions precluded her from designing and creating floral arrangements to decorate a same-sex wedding"); *see also Stutzman*

Deposition (….And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.).

As indicated above, the uncontested material facts establish a violation of the WLAD in trade or commerce, and thus a *per se* violation of the CPA. *See* RCW 49.60.030(3); RCW 19.86.010(2). Also, as indicated above, both Stutzman and Arlene's Flowers are liable under the CPA, with Stutzman being personally liable in bother individual and corporate capacity. *See* RCW 19.86.010(1); *see also Ralph Williams' (III)*, 87 Wn.2d at 322.

The AG makes one additional point with respect to the conduct (same sex marriage) versus status (being gay) distinction Defendants seek to make with respect to Stutzman's actions under the WLAD, which provides the predicate for the *per se* CPA claim. This is that, assuming for the purposes of argument that the Courts have allowed such a distinction (and they have not), it would make no difference regarding the Defendants' liability under the WLAD. This is because the WLAD does not require the distinction, restriction or discrimination to be the direct result of Stutzman's actions. *See* RCW 49.60.215 ("[i]t shall be an unfair practice for any person or the person's agent or employee *to commit an act which directly or indirectly results in any distinction, restriction, or discrimination*…"). The indirect discriminatory result flowing from Stutzman's actions satisfies the WLAD and constitutes a violation. On the *per se* CPA claim, the AG is entitled to summary judgment on liability.

This does not end the Court's analysis. As previously indicated, the AG pled its CPA claim in the alternative: both as a *per se* CPA violation and as a generic CPA violation. The AG moves for summary judgment on the alternative generic CPA violation as well. The elements remain the same: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. at 719. However, as opposed to satisfying all three elements by showing a WLAD violation in trade or commerce, each element must be satisfied individually.[20]

As to the first element, while not defined in the statute, "[w]hether a particular act or practice is 'unfair or deceptive' is a question of law," to be determined by the Court. *Panag*, 166 Wn.2d at 47. The AG cites to *Blake v. Federal Way Cycle Center* which established criteria for determining whether an act or practice is "unfair" as follows:

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy, as it has been established by statutes, the common law, or

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[20] The Defendants describe these means of proof as "coextensive," to which the AG takes exception. Whatever Defendants mean by "co-extensive," it is clear that the three elements of a CPA claim brought by the AG can be satisfied by showing a *per se* violation of a qualifying predicate statute occurring in trade or commerce, or by proving qualifying acts independent of a *per se* violation of a qualifying predicate statute.

> otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury to consumers…; (3) whether it cause substantial injury to consumers…

Blake v. Federal Way Cycle Center, 40 Wn.App. 302, 310, 698 P.2d 578 (1985) (further quotation omitted); *see, e.g.*, *Demelash v. Ross Stores, Inc.*,[21] 105 Wn.App. 508, 523-524, 20 P.3d 447 (2001) (reversing grant of summary judgment for defendant, an Ethiopian immigrant with limited English skills, where store refused to return his coat and accused Plaintiff of shoplifting even after he provided receipt, and holding that plaintiff successfully established, among others, first element of "unfair or deceptive act or practice" on prima facie basis). Even in the absence of the WLAD's declaration, the Court finds that treating a customer differently because of their membership in a protected class is unfair as a matter of law pursuant to the first listed criteria in *Blake*. Any other results would be inconsistent with Washington law. *See* RCW 26.04.010(1) (defining marriage to include same-sex

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[21] *Demelash* comes close to resolving the issue, in that in discussing the WLAD claim therein, it is clear that it is based on race and national origin as the protective classes at issue. That said, the discussion of the CPA claim makes no mention of the protective class at issue in the CPA claim. Inferentially, they have to have the same basis, but in an abundance of caution, the Court does not rely on this inference.

couples); *see also*, RCW 9A.36.078[22] (legislative finding in criminal malicious harassment statute). The first element is satisfied.

Defendant's argument that Stutzman was acting within the bounds of public policy because she and Arlene's Flowers do or should fit within the exclusions for ministers and religious organizations under RCW 26.04.010(4-6) is unconvincing. First, as the AG rightly points out, the statutes address *conduct*, not beliefs, so the fact that the law makes a distinction between her actions in a public accommodation and that of a minister or priest in a house of worship is in no way unfair. Further, Stutzman is not a minister, nor is Arlene's Flowers a religious organization when they sell flowers to the general public in trade or

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[22] The first full paragraph of the legislative finding reads as follows: "The legislature finds that crimes and threats against persons because of their race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicaps are serious and increasing. The legislature also finds that crimes and threats are often directed against interracial couples and their children or couples of mixed religions, colors, ancestries, or national origins because of bias and bigotry against the race, color, religion, ancestry, or national origin of one person in the couple or family. The legislature finds that the state interest in preventing crimes and threats motivated by bigotry and bias goes beyond the state interest in preventing other felonies or misdemeanors such as criminal trespass, malicious mischief, assault, or other crimes that are not motivated by hatred, bigotry, and bias, and that prosecution of those other crimes inadequately protects citizens from crimes and threats motivated by bigotry and bias. Therefore, the legislature finds that protection of those citizens from threats of harm due to bias and bigotry is a compelling state interest."

commerce from a public accommodation. *See* RCW 26.04.010(4). Defendants advance a construction by which the exception defeats the purpose of the rule: it also makes a trifle of the profound distinction between the clergy and the laity. This must be considered an absurd result. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 778, 280 P.3d 1078 (2012) (court to avoid absurd results in construing any statute).

The second element is also satisfied, as the uncontested material facts demonstrate that the events of March 1, 2013 occurred in trade or commerce. *See* RCW 19.86.010(2) (defining "trade" and "commerce"). As to the third element, public interest impact, the Court believes the AG reads too much in *Lightfoot v. MacDonald*, an individual CPA action, when it asserts that the case clearly establishes a presumption that the element is established when the AG acts. *Lightfoot v. McDonald*, 86 Wn.2d 331, 335, 544 P.2d 88 (1976). The Court reaches this conclusion based on the current briefing: the AG has cited no case law subsequent to *Lightfoot* that says this is what the case means. That said, the uncontested material fact of the unwritten policy to refuse to provide services to any future same-sex wedding establishes the third element as it would in an individual action, as the practice "has the capacity to injure other persons." RCW 19.86.093(3)I. On the alternative generic CPA claim, the AG is also entitled to summary judgment on liability.

2. Preemption Of CPA And WLAD As Applied To Defendants' Conduct Under First Amendment To United States Constitution

In both actions, Defendants assert the affirmative defense of preemption under the United State Constitution. In the Answer to the AG's action, the affirmative defense is listed as follows:

> 6.6 As applied preemption under the First Amendment to the United States Constitution.

Defendants' Answer (13-2-00871-5) (AG Action), pg. 6, para. 6.6. In the Individual Plaintiffs' action, the same affirmative defense is raised, but the defense is more specifically delineated:

> 32. Preemption: As applied violation of the Free Speech, Free Exercise and Free Association provisions of the First Amendment to the United States Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 32. While the Defendants have vigorously contested all aspects of these actions, their primary defense to both actions appears to be that a central tenet of Stutzman's firmly-held religious belief is in direct conflict with the Laws of the State of Washington, and that her religious beliefs should prevail. Her beliefs include both a definition of marriage that excludes same-sex marriage and an explicit rejection of same-sex marriage as a civil right.

See Resolution of SBC, "On 'Same-Sex Marriage' And Civil Rights Rhetoric" New Orleans – 2012. The State of Washington has declared discrimination against individuals on the basis of sexual orientation to be a menace to "the institutions and foundations of a free democratic state," and has included same-sex marriage as one of the civil rights accorded to gay and lesbian residents. *See* RCW 49.60.010 (purpose statement of WLAD); *see also* RCW 26.04.010(1) (*as amended by* Laws of Washington 2012, Ch. 3, § 1(1)); *see also* Referendum Measure 74, approved Nov. 6, 2012. Because Stutzman owns and operates a Washington State corporation that provides arranged flowers for weddings, the conflict between Stutzman's religiously motivated conduct in commerce and the law is insoluble.

a. Free Speech

Defendants argue that the act of arranging flowers is inherently artistic and expressive and thus protected speech. Stutzman asserts that, after consulting with her customers, she creates floral arrangements that are designed to communicate the couple's vision or theme for the event. Defendants have attached to their declaration materials in support of this proposition, including reference material explaining the religious significance of flower arrangement dating back to the ancient Egyptians and instructional material on flower arranging. They argue that this artistic expression is protected speech.[23] *See, e.g.*, *Hurley v. Irish-American*

[23] Stutzman also claims that other aspects of her involvement in weddings are speech, including singing, standing

Gay, Lesbian And Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed.2d 487 (1995) (explaining that "a narrow, succinctly articulable message is not a condition of constitutional protection" and citing example of Jackson Pollock painting). They therefore assert that Stutzman and Arlene's Flowers cannot be compelled to "speak" through arranged flowers at a same-sex wedding.

The AG counters with *Rumsfeld*, which holds:

> it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or

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for the bride, clapping to celebrate the marriage, and in one instance counseling the bride. Tellingly, Stutzman does not claim that she was being paid to do any of these things. Said another way, she does not claim that these are services that she is providing for a fee to her customers such that they would be covered by an injunction. The degree to which she voluntarily involves herself in an event outside of the scope of services she must provide to all customers on a non-discriminatory basis (if she provides the service in the first instance) is not before the Court. This is not to ignore Stutzman's objection to involvement through mere presence at an event and how that presence is seen as an expressive act validating the event itself: the deposition testimony makes clear that Stutzman and Arlene's Flowers customarily provided services include preparing wedding flowers for pickup as well as delivering the flowers to the event, including set up. This same objection was considered and rejected in *Elane Photography*, where the argument of validation through involvement on the part of a wedding photographer, who must actively participate in the event to ply her trade, was even stronger. *Elane Photography*, 309 P.3d at 63-72 (N.M. 2013) (discussing Free Speech claim).

> carried out by means of language, either spoken, written or printed.

Rumsfeld v. Forum For Academic & Instructional Rights, Inc., 547 U.S. 47, 62, 126 S. Ct. 1297, 164 L. Ed.2d 156 (2006) (Congress may require law schools to provide equal access to military recruiters) (*quoting Giboney v. Empire Storage & Ice. Co*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed.2d 834 (1949)). As the Supreme Court further explained, Congress can prohibit racial discrimination in employment and:

> [t]he fact that this will require an employer to take down a sign reading "White Applicants Only" *hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct*.

Id. (italics added). Because anti-discrimination laws by their nature require equal treatment, they cannot be defeated by the claim that equal treatment requires communication or expression of a message with which the speaker disagrees. The Defendants offer no persuasive authority in support of a free speech exception (be it creative, artistic, or otherwise) to anti-discrimination laws applied to public accommodations. *See Elane Photography*, 309 P.3d at 72 ("Even if the services it offers are creative or expressive, *Elane Photography* must offer its services to customers without regard for…sexual orientation…") (no violation of Free Speech when required to comply with NMHRA). The existing jurisprudence on this issue, including the most recent

and comparable case, *Elane Photography*,[24] is soundly against the Defendants.

b. Free Exercise

As indicated above, the Free Exercise Clause is not without its limits. Religious motivation does not excuse compliance with the law. *Reynolds*, 98 U.S. at 166-167 (prosecution under Utah Territory bigamy law). An individual may be made to comply with a valid and neutral law of general applicability that forbids conduct that an individual's religion requires. *Smith*, 494 U.S. at 879 (religious use of Peyote). Such laws are subject to a rational basis inquiry only, because the government's ability to prohibit socially harmful conduct "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 884-85 (further citation omitted); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Haialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed.2d 472 (1993) (Even where it burdens religious practice "a law that is neutral and of general applicability need not be justified by a compelling government interest."). The Supreme Court has clearly stated:

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[24] In *Elane Photography*, the Court addressed and ultimately rejected in detail a Free Speech challenge including sub- challenges that New Mexico's anti-discrimination law (the NMHRA) violated the right to refrain from speaking the Government's message and that the NMHRA compelled Elane Photography to host or accommodate the message of another speaker. *Elane Photography*, 309 P.3d at 63-72.

> [w]hen 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. Granting an exemption…operates to impose [the follower's] religious faith on the [person sought to be protected by the law].

United States v. Lee, 455 U.S. at 261 (Amish employer must collect social security tax for those in their employ).

To pass constitutional muster against a free exercise challenge, a law must be both neutral and generally applicable. Because infringement or restriction upon a religious motivated practice (conduct) is implicit in the challenge, the focus when addressing neutrality is as follows: "if the object of a law is to infringe upon or restrict practices *because* of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 433 (emphasis added). The WLAD looks to discriminatory impact and the CPA prohibits acts because of unfairness or capacity to deceive a consumer. *Lewis*, 53 Wn.App. at 208 (WLAD prohibits discriminatory impact and discriminatory motivation is irrelevant); *see also*, *Kaiser*, 161 Wn.App. at 719 ("To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the *capacity* to deceive a substantial portion of the public.") (emphasis in original). The motivation for discrimination or for unfair or deceptive conduct is

limited only by the human condition, but is ultimately irrelevant. Neither the WLAD nor the CPA restrict conduct because of motivation, religious or otherwise.

"A law is not generally applicable when the government, 'in a selective manner[,] imposes[s] burdens only on conduct motivated by religious belief." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (*quoting Lukumi*, 508 U.S. at 543). For the same reasons, because the WLAD and the CPA apply to relevant conduct in reference to its effect, not the motivation of the actor, both are generally applicable. *See* RCW 49.60.010 (WLAD purpose statement), *see also Parker v. Hurley*, 514 F.3d 87, 96 (1st Cir. 2008) ("The fact that a school promotes tolerance of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting" of the religious groups), *cert. denied*, 555 U.S. 815 (2008). The provisions of the WLAD and the CPA are clearly rationally related to their goals of eliminating discrimination and preventing unfair or deceptive practices in commerce. *Compare* RCW 49.60.010 (WLAD purpose statement), *with* RCW 49.60.215(1) (WLAD prohibitions creating right of action); *and compare* RCW 19.86.920 (CPA purpose statement), *with* RCW 19.86.020, 080(1) and .093 (CPA prohibitions creating right of action for AG and Individual Plaintiffs respectively). The argument to the contrary is foreclosed by *Burwell*, where, Justice Scalia, writing for the majority, found that the interest of combatting discrimination in the area of race to meet an even higher level of scrutiny as follows:

> [t]he principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post*, at 2804-2805. Our decision today provides no such shield. *The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.*

Burwell v. Hobby Lobby Stores, Inc., __ U.S. __, 134 S. Ct. 2751, 2783, 189 L. Ed.2d 675 (2014) (italics added). This is the latest in a long line of cases that found the eradication of discrimination to be a compelling state interest. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed.2d 474 (1987) (finding state public accommodation laws that combat gender discrimination serve "compelling interest of the highest order.") (internal quotation and citation omitted).

Defendants' argument that the WLAD is not neutral or generally applicable because it is "riddled" with religious exemptions and because marriage laws contain an exemption for ministers and religious organizations with respect to same sex marriage is unconvincing. RCW 26.04.010(4) and (5) simply say a minister does not have perform a same sex wedding, nor does a religious organization have to host one. RCW 26.04.010(4) and (5). It does not say that ministers or religious organizations are, if they get a business license and run a public accommodation, are

[sic] immune from the WLAD. The WLAD exempts a "bone fide religious or sectarian institution" when it runs an "educational facility," but not a flower shop. RCW 49.60.040(2). These exemptions for the clergy and religious organizations are required, and the WLAD remains neutral and generally applicable with them. *See Elane Photography*, 309 P.3d at 74-75 (rejecting same argument); *see also Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. __, 132 S. Ct. 694, 181 L. Ed.2d 650 (2012) (Religious organizations exempt from some anti-discrimination laws so that they may choose own leaders). The same is true of other exceptions, simply by way of example, the fact that colleges may designate dorms for members of one sex only do not show hostility to or targeting of religiously motivate conduct. *See* RCW 49.60.222(3); *see also Elane Photography*, 309 P.3d at 74-75. Defendant again mixes the distinction between belief and conduct, clergy and laity, and the distinction between accommodation and public accommodation, and as a result cites to cases that are distinguishable on their facts.

c. Free Association

The result is no different if the asserted interest is freedom of association. Even in private organizations:

> [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Hishon v. King & Spalding, 467 U.S. 69, 104 S. Ct. 2229, 81 L. Ed.2d 59 (1984) (*quoting Norwood v. Harrison*, 413 U.S. 455, 470, 93 S. Ct. 2804, 37 L. Ed.2d 723 (1973)).

d. Hybrid Right

Where a neutral and generally applicable law applies not only to the Free Exercise Clause, but also to other constitutional protections, such as freedom of speech, a "hybrid rights" claim is presented, and any such law must satisfy strict scrutiny. *See Smith*, 494 U.S. at 881 (*citing Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed.2d 1292 (1943) (invalidating flat tax on solicitation as applied to the dissemination of religious ideas)). Just as no such claim was raised in *Smith*, there is no such claim here. The WLAD in combination with the CPA does not compel Stutzman or Arlene's Flowers to offer any goods or services, expressive or otherwise in trade or commerce, it simply requires that any services provided to one from a public accommodation be provided to all. As the Court observed in *Smith*:

> [o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.

Smith, 494 U.S. at 882 (*quoting Gillette v. United States*, 401 U.S. 437, 461, 91 S. Ct. 828, 28 L. Ed.2d 168 (1971)). For a free exercise claim to be subject to strict scrutiny on a "hybrid rights" claim, the proponent must show "a likelihood…of success on the

merits" of the free speech claim. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). As indicated above, this the Defendants have not done, the cases they cite are distinguishable: they do not deal with public accommodations or for the two public accommodation (albeit non-profit) cases cited, they are distinguishable on their facts. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed.2d 554 (2000) (New Jersey could not force group to admit members they did not desire (gay members) to join group); *see also Hurley*, 515 U.S. at 566 (State could not force parade organizers to include gay-rights organization in parade but could not prevent gays or lesbians from marching in parade). Further, both cases are distinguished by the later decided cases of *Rumsfeld*[25] and *Martinez*.[26] However, as indicated below, even if strict scrutiny applied to their First Amendment claim, the WLAD and CPA would survive. None of the claims in these two actions offend free speech, free exercise or free association under the First Amendment to the United States Constitution, and thus the Defendants' affirmative defense fails as a matter of law.

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[25] *See Rumsfeld*, 547 U.S. at 69 (Holding that Congress may require law schools to provide equal access to military recruiters and distinguishing *Dale* as an instance where the State was forcing Defendants "to accept members they did not desire.")

[26] *Martinez*, 561 U.S. at 689 (University student group's claim that it did not prohibit gay members, only those who engaged in or supported same-sex intimacy rejected because prior decisions "have declined to distinguish between status and conduct in this context.").

3. Violation Of Article I, Section 11 and Section 5 of Washington State Constitution As Applied To Defendants' Conduct Through Application of CPA And WLAD

Also both actions, Defendants assert as an affirmative defense that the claims violate the Washington Constitution. In the Answer to the AG's action, the affirmative defense is listed as follows:

> 6.7 As applied violation of Article I Section 11 of the Washington State Constitution.

Defendants' Answer (13-2-00871-5) (AG Action), pg. 6, para. 6.7. In the Individual Plaintiffs' action, the affirmative defense is raised, but the defense includes two claims:

> 33. Justification: As applied violation of Article I Section 11 and Article I, Section 5 of the Washington State Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 33.

a. Free Exercise

While Article I, Section 11 provides broader protection than the First Amendment, it also is not without its limits. *City of Woodinville*, 166 Wn.2d at 642. As the AG and Individual Plaintiffs observe, the distinction between freedom to believe, which is absolute, and the freedom to act, which is not, is clear in the text of the Washington State Constitution itself:

> [a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; *but the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.*

Wash. Const. Article 1, Section 11 (italics added). Without explanation, the Defendants fail to include the complete text, stopping at the word "worship." Unlike religious belief, religiously motivated action (conduct) is subject to limitations when the state acts pursuant to its police power. When the state acts pursuant to its police power to prohibit conduct it deems harmful to its citizens, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints."[27] *Balzer*, 91 Wn.App. at 60-61 (*citing State v. Smith*, 93 Wn.2d 329, 338, 610 P.2d 869 (1980)).

A party challenging government action must show both a sincere belief and a substantial burden upon free exercise as a result of the government action. *City of Woodinville*, 166 Wn.2d at 642-43. The AG and Individual Plaintiffs do not contest that Stutzman has a sincerely-held religious belief, nor

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[27] The parties do not agree on the scope of the problem of discrimination historically suffered by individuals as the result of sexual orientation. But as *Blazer* makes clear, this is an issue for the Legislative Branch.

could they: the doctrinal statement of her church is clearly delineated in the record, her actions are entirely consistent therewith, and the Court should not inquire further in the matter. *See Backlund*, 106 Wn.2d at 640 ("Courts have nothing to do with determining the reasonableness of belief."). They argue in the alternative that the application of the WLAD and CPA to her conduct does not constitute a substantial burden on her exercise of religion, or if a substantial burden exists, the WLAD and the CPA are "a narrow means for achieving [Washington's] compelling goal" of eradicating discrimination in public accommodations. *City of Woodinville*, 166 Wn.2d at 642-43.

All burdens are evaluated "in the context in which [they arise]" which "necessarily encompasses impact on others." *Id.* at 6444 (healing the sick may be connected to worship but "a church must still comply with reasonable permitting process if it wants to operate a hospital or clinic."). "[T]he key question is not whether a religious practice is inhibited, but whether a religious tenet can still be observed." *State v. Motherwell*, 114 Wn.2d 353, 362-63, 788 P.2d 1066 (1990) (non-clergy counselors required to report suspected child abuse); *see also Backlund*, 106 Wn.2d 632 (hospital may require physician to purchase professional liability insurance despite his religious objection). As the Court observed in *Backlund*:

> Dr. Blacklund freely chose to enter the profession of medicine. *Those 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, 106 Wn.2d at 648 (italics added).

While the AG argues that neither the WLAD nor the CPA constitute substantial burdens upon Stutzman's exercise of her religion, given that she could simply have an employee perform the task, in light of Burwell, which supports proposition that a closely-held corporation can raise the free exercise claim, and *Backlund*, which assumes that a substantial burden exists when the exercise of a licensed profession is contingent on compliance with a rule requiring specific conduct, the Court will assume for the purposes of analysis that a substantial burden exists and the proposed alternative is not one Stutzman must avail herself of because her closely-held corporation may also advance her free exercise rights. *See Burwell*, 134 S. Ct. at 2769-2772 (business practices compelled or limited by tenets of a religious doctrine fall within the understanding of the "free exercise of religion" under *Smith*);[28] *see also*

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[28] The AG points out that Article I, Section 11 guarantees its protections to "every individual," but not to corporations, and that the Defendants have provided no *Gunwall* analysis in support of an expansion of the right from the individual to the closely-held corporation. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). While true, *Burwell* states that the "lawful purpose" which a corporation can pursue under a state's incorporation statues includes "pursuit of profit in conformity with the owners' religious principles." *Burwell*, 134 S. Ct. at 2772. Like Hobby Lobby, Arlene's Flowers is clearly a closely-held corporation. Elane Photography, decided before *Burwell*,

Backlund, 106 Wn.2d at 647 ("Further, the facts demonstrate that the bylaw's purpose could not be achieved by any less drastic restriction of Dr. Backlund's First Amendment Rights.").[29] That said, the AG and the Individual Plaintiffs make a compelling case that the choice either to operate one's private business in a way inconsistent with one's religious beliefs, or forego 3% of gross profits is not the sort of "gross financial burden" that violates free exercise. *First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Board*, 129 Wn.2d 238, 249, 916 P.2d 374 (1996) (historic landmark designation would reduce value of church property by half). Without the implication of a substantial burden in *Backlund*, the AG and the Individual Plaintiffs would prevail on this point, and *Backlund* is not without its challenges in interpretation, given that First Amendment and Article I, Section 11 are analyzed in the same manner therein.

Even assuming a substantial burden, the AG and the Individual Plaintiffs are correct that the

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assumed without deciding that the corporation could exercise first amendment rights. *Elane Photography*, 309 P.3d at 73.

[29] The Court in *Backlund* applies both State and Federal Constitutional protections of free exercise in the same manner, noting in a footnote that the parties did not argue persuasively for different applications, hence the reference to the First Amendment. *See Backlund*, 106 Wn.2d at 639, FN 3. Here, the parties have persuasively argued for different applications, starting with *City of Woodinville*, 166 Wn.2d at 642 (Article I, Section 11 provides "broader protection than the first amendment to the federal constitution").

compelling interest test is met. Compelling interests are "those government objectives based upon the necessities of national or community life such as threats to public health, peace, and welfare." *Balzer*, 91 Wn.App. at 56 (*citing Munns v. Martin*, 131 Wn.2d 192, 200 (1997)). The Defendants' claim that "combatting discrimination" is too broad an interest to be compelling. The Defendants are incorrect. The State's compelling interest in combatting discrimination in public accommodations is well settled. *Rotary*, 481 U.S. at 549 (finding this to be "compelling interest of the highest order.") (internal quotation and citation omitted). The Supreme Court stated over thirty years ago:

> acts of invidious discrimination in the distribution of publicly available goods, services and other advantages causes unique evils that government has a compelling interest to prevent.

Roberts v. U.S. Jaycees, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed.2d 462 (1984). The Court found that public accommodation laws protect a state's citizens from "a number of serious social and person harms," and characterized the injuries flowing therefrom as "stigmatizing." *Roberts*, 468 U.S. at 625; *see also Heckler v. Mathews*, 465 U.S. 728, 739-40, 104 S. Ct. 1387, 79 L. Ed.2d 646 (1984)(discussing stigmatizing injury as casting disfavored group as "innately inferior.") The language is consistent with that of *Rotary* and *Burwell*, describing the goal of public accommodation laws seeking to eradicate discrimination as "plainly serv[ing] compelling interests of the highest order." *Roberts*, 468 U.S. at

628. The WLAD, which gives rise to its own claim, and the *per se* CPA claims here at issue, meets this test as well:

> [t]his court has held that the purpose of the WLAD – 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 Fraternal Order of Eagles, 148 Wn.2d 224, 246, 59 P.3d 655 (2002).

All of the above cases, save *Burwell*, precede both the 2006 amendment to the WLAD adding sexual orientation as a protected class and Referendum Measure 74 in 2012 approving same-sex marriage. That said, the Court concludes there is no compelling legal argument for a different result for the Legislature's decision to include the protected class of sexual orientation. The Supreme Court struck down a state's attempt to remove protections from discrimination based on sexual orientation as violating equal protection almost 20 years ago. *Romer v. Evans*, 517 U.S. 620, 629, 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996) ("Amendment 2 bars homosexuals from securing protections against the injuries that these public accommodations laws address."). *Elane Photography*, 309 P.3d at 62. The case reached this result under a cognate New Mexico anti-discrimination law, which, as indicated above, is not meaningfully different that the WLAD.

The purpose statement of the WLAD invokes the police power of the state when it declares the law's

purpose is to "protect the public welfare, health and peace of the people of this state," and further declares that discrimination, including discrimination based on sexual orientation "threatens not only the rights and proper privileges of its inhabitants, but menaces the institutions and foundations of a free democratic state." RCW 49.60.010. Free exercise expressly excludes "practices inconsistent with the peace and safety of the state." Wash. Const. Article 1, Section 11. In light of these legislative findings, "there is no realistic or sensible less restrictive means" to end discrimination in public accommodations than prohibiting the discrimination itself, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints."[30] *Balzer*, 91 Wn.App. at 65, 60-61 (*citing Smith*, 93 Wn.2d at 338).

The Defendants claim that the WLAD is not narrowly tailored because the State could achieve its goals in other ways. Defendants propose an approach to the issue of discrimination, where business would be allowed to deny goods and services on the basis of the sexual orientation, and such businesses would simply refer that person to a non-discriminating business. This rule would, of course, defeat the purpose of combatting discrimination, and would allow discrimination in public accommodations based

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[30] The parties do not agree on the scope of the problem of discrimination historically suffered by individuals as the result of sexual orientation. But as *Blazer* makes clear, this is an issue for the Legislative Branch.

on all protected classes, including race, and thereby defeat the rule of *Heart of Atlanta Motel*, which applied the Civil Rights Act of 1964 to public accommodations under the Commerce Clause. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed.2d 258 (1964). Because the Court is not to determine the reasonableness of religious belief under *Backlund*, under Defendants' argument the "Curse of Canaan" would stand as equal justification[31] for racial discrimination as does Stutzman's adherence to the Resolutions of the SBC as a basis for refusing service to Ingersoll and Freed. The Defendants during argument asked the Court not to simply accept the "slippery slope" argument. But Defendants' own expert admits that their proposal allows for religiously based racial discrimination in public accommodations. Even without this admission, there is no slope, much less a slippery one, where "race" and "sexual orientation" are in the same sentence of the statue, separated by only by three terms: "creed, color, national origin…". RCW 49.60.215. As the Court in *Elane Photography* observed:

> [s]uch an exemption would not be limited to religious objections or to sexual orientation discrimination; it would allow any business in a creative or expressive field to refuse

[31] The Court intends no disrespect and does not mean to imply either that Stutzman possesses any racial animus, or that she has conducted herself in any way inconsistently with Resolutions of the SBC's direction to condemn "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" toward gay men or women.

> service on any protected basis, including race, national origin, religion, sex, or disability.

Elane Photography, 309 P.3d at 72. The WLAD is narrowly tailored to achieve its goals.

b. Free Speech

The Washington State Constitution provides as follows:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. Article 1, Section 5. While the Federal and State Free Speech rights may be different in their scope, the party wishing to argue for greater protection under Article 1, Section 5 needs to make that case. *Bradburn v. North Central Regional Library District*, 168 Wn.2d 789 (2010). While it may be true that greater protection is available under the Washington State Constitution in some instance, "no greater protection is afforded to obscenity, speech in non-public forums, commercial speech, and false or defamatory statements." *Bradburn*, 168 Wn.2d at 800. Defendants have brought forward no argument as to why the result here should not be the same as that under the First Amendment, and thus the Court makes the same ruling.

The AG and the Individual Plaintiffs are correct: no Court has ever held that religiously motivated conduct, expressive or otherwise, trumps state

discrimination law in public accommodations. The Defendants have provided no legal authority[32] why it should. The Defendants' affirmative defense fails as a matter of law.

4. Violation of Equal Protection By Selective Enforcement of CPA And WLAD Upon Defendants' Conduct

In the AG's action only, the Defendants assert an affirmative defense as follows:

> 6.8 Selective Enforcement in Violation of the Fourteenth Amendment to the United States Constitution.

Defendants' Answer (13-2-00871-5) (*AG Action*), pg. 6, para. 6.8. In a criminal context, a claim of selective prosecution "asks a court to exercise judicial power over a 'special province' of the executive." *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed.2d 6787 (1996) (*quoting Heckler v.*

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[32] All of the parties have cited to various administrative decisions addressing similar fact patterns, including the AG and Individual Plaintiffs' after-argument submission on February 12, 2015, of *In Re Klein (d/b/a Sweetcakes)*, OR Bureau of Labor and Industries, Case Nos. 44-14 and 45-14 (Interim Order – Respondents' Refiled Motion for Summary Judgment and Agency's Cross Motion for Summary Judgment, January 29, 2015 (available at http:/www.oregon.gov/boli/SiteAccess/pages/press/BOLI%20Sweet%20Cakes%20In). Rather than listing all such decisions cited by the parties, the Court would simply observe that those administrative agencies passing upon the merits of the claims ruled that violations of the applicable anti-discrimination laws had occurred and did not violate the rights of the business owner.

Chaney, 470 U.S. 821, 832, 105 S. Ct. 1649, 84 L. Ed.2d 714 (1985)). The AG, by citing to this authority, asserts [the] same is true here, where the AG is authorized to act in the name of the people in a civil context to prevent conduct. RCW 19.86.080(1) (AG authority to act under the CPA). Defendants do not assert otherwise in their response. A strong presumption of regularity supports the AG's actions and "in the absence of clear evidence to the contrary, courts presume that [the AG has] properly discharged [his or her] official duties." *Armstrong*, 517 U.S. at 464 (further quotation omitted).

Such a due process violation requires a defendant to show "discriminatory effect and discriminatory purpose." *State v. Terrovonia*, 64 Wn.App. 417, 423, 824 P.2d 537 (1992) (defendant did not show prima facie evidence of unconstitutional selective or vindictive prosecution in for unlawful possession of marijuana by a prisoner). Specifically, for selective prosecution, a defendant must show "(1) disparate treatment, *i.e.*, failure to prosecute those similarly situated, and (2) improper motivation of the prosecution." *Terrovonia*, 64 Wn.App. at 422 (*quoting Wayte v. United States*, 470 U.S. 598, 602-03, 105 S. Ct. 1524, 84 L. Ed.2d 547 (1985) (emphasis in original)). Improper motive means "selection deliberately based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id*. (*quoting State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)). The Defendants simply cannot meet this demanding standard. The first burden they face is that, at the time of the filing of this action, the fact pattern was novel: same-sex marriage had only been the law, and thus part of the "bundle of rights" that

related to sexual orientation, for approximately 4 months as of March 1, 2014. It is by definition difficult to make a selective prosecution argument when you allege that you are the "test case" for the application of new law. Someone is always first and "selectivity" in itself is not a constitutional violation: it is part of the AG's discretion to choose when to act. *See, e.g.*, *Terrovonia*, 64 Wn.App. at 422 (*quoting Oyler v. B*oles, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed.2d 446 (1962)). As to improper motive for selection, it would defeat the very purpose of statutes aimed at combatting discrimination if the motivation behind alleged discriminatory act supported a selective prosecution claim. Everyone against whom the AG institutes an action is "selected" in some sense, but here no legally improper motive has been shown.

Defendants assert throughout their briefing that they are only here because a then newly-elected Attorney General saw an opportunity to make an example out of Stutzman and Arlene's Flowers by pursuing this action. This is a political question, not a question of fact material to the issue of selective prosecution. Therefore, the Court finds that the Defendants' affirmative defense fails as a matter of law, and that the AG is entitled to summary judgment.

5. Application of Defense of Justification To Claims Under CPA And WLAD As Applied To Defendants' Conduct

In both actions, Defendants assert an affirmative defense titled "Justification." The content is, however, quite different between them. In the Answer to the AG's action, the affirmative defense is listed as follow:

> 6.9 Justification.

Defendants' Answer (13-2-00871-5) (*AG Action*), pg. 6, para. 6.9. In the Individual Plaintiff's action, additional context is provided:

> 33. Justification: As applied violation of Article I Section 11 and Article 1, Section 5 of the Washington State Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 33. As the AG correctly observes with respect to the proffered affirmative defense in its action, the defense of justification is a general term limited to criminal prosecutions, containing within it the three justification defenses of self-defense, duress, and necessity. *See e.g.*, *State v. Turner*, 167 Wn.App. 871, 881, 275 P.2d 356 (2012) (self-defense); *see also*, *State v. Healy*, 157 Wn.App. 502, 513, 237 P.3d 360 (2010) (duress); *State v. Gallegos*, 73 Wn.App. 644, 650, 871 P.2d 621 (1994) (necessity). In response, Defendants do not provide any authority that the defense of necessity has any application in a civil context. Given the Defendants' affirmative defense in the individual action, where Defendants are

represented by the same counsel, it appears that, by justification, Defendants mean that their actions are justified by the listed sections of the Washington State Constitution. Therefore, the Court finds that the Defendants' affirmative defenses in both actions fail as a matter of law, and that the AG and Individual Plaintiffs are entitled to summary judgment because either: 1) Justification [sic] is not an available defense in a civil action; or 2) as applied to Defendant's conduct, this these actions do not violate either Article I, Sections 11 or 5 of the Washington State Constitution, as indicated above.

6. <u>Four Remaining Non-Constitutional Defenses In Individual WLAD And CPA Actions</u>

Many of the affirmative defenses pled by Defendants were raised in both actions, using substantially similar language. These actions having been consolidated for pre-trial motion practice, both Individual Plaintiffs and the AG are entitled to the benefit of rulings. While not specifically addressed by the parties, both parties in the Individual WLAD and CPA claims appeared to assume the remainder of the Defendants' affirmative defenses are resolved by the Court's rulings in these and prior summary judgment motions by the parties. For a total of four of these affirmative defenses, it was not absolutely clear to the Court as to whether this is the case. (*Defendants' Answer* (13-2-00953-3), pg. 6, paras. 34-37 (listing affirmative defenses of Failure to Mitigate Damages, Estoppel, Waiver and Ratification, and Lack of standing in regard to Curt Freed). Therefore, the Court called for additional briefing from Defendants

and the Individual Plaintiffs. Both parties have responded.

The Individual Plaintiffs in their briefing agree that neither party addressed either of the four remaining affirmative defense in motion practice to date. They argue, by analogy to Federal Civil Rule 56, and case law interpreting it, that by moving for summary judgment on liability, affirmative defenses not specifically asserted by the Defendants are thereby abandoned. Thus, as to the three affirmative defenses not relating to a determination of damages ("Failure to Mitigate Damages") the Individual Plaintiffs assert that they are entitled to summary judgment. *United States v. Mottolo*, 26 F.3d 261, 263 (1st Cir. 1994) (*citing United Mine Workers of America 1974 Pension v. Pittson Co.*, 984 F. 2d 469, 478 (D.C. Cir. 1993)); *Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076 (D. Del. 1990), *affirmed by*, 932 F.2d 959 (3rd Cir. 1991). Both parties agree that the affirmative defense of "Failure to Mitigate Damages," is not before the Court, because the case has not yet reached the damages phase. The Court agrees as well, and will not address it. While the Individual Plaintiffs make a compelling analogy to the federal rule, the Court will nonetheless address the remaining three affirmative defenses on the merits.

a. Estoppel

The affirmative defense includes additional explanation:

> 35. Estoppel: Plaintiff's [sic] actions and omissions negate the relief requested.

(*Defendants' Answer* (13-2-00953-3), pg. 6, para. 35). Defendants cite to an unpublished case, which this Court may not consider. *City of Cheney v. Bogle*, 144 Wn.App. 1022 (2008) (*unpublished*). The Individual Plaintiffs correctly list the elements of equitable estoppel: (1) an admission, statement, or act inconsistent with the claims afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *Dobrosky v. Farmers Insurance Company of Washington*, 84 Wn.App. 245, 256, 928 P.2d 1127 (1996). Defendants' argument, without supporting authority, seems to be that because Stutzman was often asked to design arrangements for Ingersoll, Ingersoll had an obligation to commit to asking for only "sticks and twigs" at the outset of the request for goods and services and communicate that specifically up front, to prevent Stutzman from discriminating against him. The Court believes that in this fact pattern, the Individual Plaintiffs' understanding of collateral estoppel, that it would address the consequences of an action taken by Ingersoll or Freed after the refusal by Stutzman, is the more reasonable interpretation. The Court finds this affirmative defense fails as a matter of law, and grants summary judgment in favor of the Individual Plaintiffs.

b. Waiver and Ratification

The affirmative defense is pled as it is in the caption above:

36. Waiver and Ratification.

(*Defendants' Answer* (13-2-00953-3), pg. 6, para. 36). The Defendants state they "no longer pursue this defense." Because it is in fact abandoned, the Court grants summary judgment in favor of the Individual Plaintiffs.

c. Lack Of Standing In Regard To Plaintiff Curt Freed

The affirmative defense is again pled as it is in the caption above:

> 37. Lack of Standing in regard to Plaintiff Curt Freed.

(*Defendants' Answer* (13-2-00953-3), pg. 6, para. 37). Defendants confirm that their arguments here are those they made above: 1) that the case is the result of a misunderstanding, and thus the refusal by Stutzman should be discarded in favor of what she might have done had she not immediately refused to provide services for Ingersoll and Freed's wedding, and 2) that Ingersoll and Freed are not married, and thus the case is moot. For the reasons listed above in the Court's discussion of Defendants' Motion for Summary Judgment Based On Plaintiffs' Lack Of Standing, the Court finds this affirmative defense fails as a matter of law, and grants summary judgment in favor of the Individual Plaintiffs.

V. CONCLUSION

On the evening of November 5, 2012, there was no conflict between the WLAD or the CPA and the tenets of Barronelle Stutzman's Southern Baptist tradition. The following evening, after the passage of Referendum 74, confirming the enactment of same-sex marriage, there would eventually be a direct and insoluble conflict between Stutzman's religiously motived conduct and the laws of the State of Washington. Stutzman cannot comply with both the law and her faith if she continues to provide flowers for weddings as part of her duly-licensed business, Arlene's Flowers. While the percentage of her business at issue is small, approximately three percent, the AG and the Individual Plaintiffs do not gainsay the fact of her religious convictions in relation to these activities. The Defendants argue that these causes of action on behalf of the Individual Plaintiffs and the AG are novel and improper abridgements of their right to free exercise of religion.

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. The Washington Legislature properly invoked the police power of the State in drafting the WLAD, a violation of which is a *per se* violation of CPA in trade or commerce. Article I, Section 11 of the Washington

State Constitution expressly states that religiously motivated conduct is limited by the police power of the state. In so doing, the Legislature drafted a law that does not violate either the United States Constitution or the Washington State Constitution. Ingersoll and Freed and the AG are entitled to rely upon these laws passed by the Legislature of the State of Washington, and confirmed through the vote of its citizens, to bring their actions against the Defendants.

The Individual Plaintiffs and the AG have standing to bring their actions based on the past actions of the Defendants and the potential for future violations. Defendants remaining affirmative defenses fail as a matter of law, and their admitted conduct establishes their liability under the WLAD and CPA as a matter of law. The Individual Plaintiffs and the AG are therefore entitled to summary judgment on their claims to the extent they have requested.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants' Motion For Summary Judgment Based On Plaintiff's Lack Of Standing is **DENIED.**

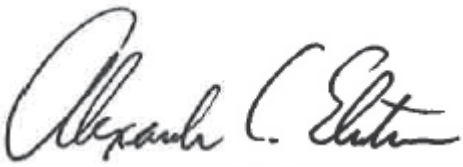
2. Plaintiff State Of Washington's Motion For Partial Summary Judgment On Liability And Constitutional Defenses is **GRANTED.**

3. Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment is **GRANTED.**

4. Summary Judgment in the remaining Non-Constitutional Defenses in the Individual WLAD and CPA actions are G**RANTED IN FAVOR OF PLAINTIFFS INGERSOLL AND FREED**, with the exception of the Affirmative Defense of Failure to Mitigate Damages, upon which **RULING IS DEFERRED.**

IT IS SO ORDERED.

DATED this 18th day of February, 2015.



ALEXANDER C. EKSTROM
Benton County Superior Court Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, Plaintiff, vs. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 (Consolidated with 13-2-00953-3 MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF STATE OF WASHINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' NON-CONSTITUTIONAL DEFENSES, DENYING DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF STATE OF WASHINGTON, AND DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS AGAINST BARRONELLE STUTZMAN IN HER PERSONAL CAPACITY
ROBERT INGERSOLL and CURT FREED, Plaintiffs, vs. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	

A motion hearing occurred in the above-captioned matter on December 5, 2014, in Kennewick, Washington. The Plaintiff, State of Washington, by and through the Attorney General, was represented through argument[1] by Todd Bowers, Senior Counsel and Kimberlee Gunning, Assistant Attorney General. The Plaintiffs Robert Ingersoll and Curt Freed were present, and were represented through argument by Jake Ewart, of Hillis Clark Martin & Peterson, P.S. The Defendants, Arlene's Flowers, Inc., d/b/a/ Arlene's Flowers and Gifts, and Barronelle Stutzman, were present, represented by Alicia Berry, Liebler, Connor, Berry & St. Hilaire, PS, through argument of David Austin Robert Nimocks and Kristen Waggoner, of Alliance Defending Freedom, appearing *pro hac vice*.

Before the Court were three motions: 1) Plaintiff's (State of Washington's) Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses; 2) Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington; and 3) Defendants' Motion For Partial Summary Judgment on Plaintiff's Claims Against Barronelle Stutzman In Her Personal Capacity. At the motions hearing, the Court heard argument from all parties and took the motions under advisement. After further consideration, the Court now grants, denies, and both denies in part and grants in part these motions, respectively.

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[1] Additional counsel assisted in preparation of the briefing and declarations for both the Plaintiffs and Defendants.

I. INTRODUCTION

A. Plaintiff's Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses

In Benton County Cause Number 13-2-00871-5, the Attorney General (hereinafter AG), on behalf of the Plaintiff State of Washington, has moved for partial summary judgment, arguing that six of the Defendants' non-constitutional affirmative defenses in their Answer[2] fail as a matter of law, and must therefore be dismissed. Those affirmative defenses are as follows: 1) this Court has no subject matter jurisdiction; 2) the AG has no standing to bring this action on behalf of the State; 3) failure to state a claim upon which relief can be granted; 4) the State has failed to exhaust administrative remedies available before the Human Rights Commission (hereinafter HRC); 5) the bringing of this case frustrates the purpose of the Washington Law Against Discrimination (hereinafter WLAD); and 6) the HRC is a necessary party to this case that the State failed to join. Specifically, the AG alleges that these defenses fail because they are contradicted by the express language, structure and clear intent of the

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[2] The AG's Complaint in Benton County Cause Number 13-2-00871-5 was filed on April 9, 2013. The Defendants' Answer, containing the affirmative defenses reference above, was filed on May 16, 2013. A Complaint by the individual plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed on April 18, 2013, to which the Defendants' answered on May 20, 2013. These matters were previously consolidated for consideration of these motions.

WLAD and the Consumer Protection Act (hereinafter CPA). The Defendants respond and allege that these affirmative defenses are supported by the AG's practice of deferring to the HRC. The Defendants also assert that there is clear legislative intent that the HRC handle claims of discrimination in the first instance. For the reasons set out below, the Court concludes that the legislature intended to allow the AG independent unfettered authority to bring this action and therefore grants the AG's motion.[3]

B. Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington

Also in Benton County Cause Number 13-2-00871-5, Defendants moved for summary judgment alleging that, for the same reasons listed in their non-constitutional defenses, the AG's Complaint must be dismissed. For the same reasons that the Court grants the AG's motion above, the Court denies the Defendants' motion.[4]

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[3] In reaching this conclusion, the Court reviewed and considered the Plaintiff's Motion For Partial Summary Judgment On Defendant's Non-Constitutional Defenses, filed October 25, 2013, the Defendant's Response To The State's Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses, filed November 12, 2013 (along with the Declaration of JD Bristol in support of the motion, filed the same day), as well as Plaintiff's Reply, filed December 1, 2014.

[4] In reaching this conclusion, the Court reviewed and considered the Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington, filed October 25, 2013 (along with the Declaration of JD Bristol in support of

C. Defendants' Motion For Partial Summary Judgment On Plaintiff's Claims Against Barronelle Stutzman In Her Personal Capacity

In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3 Defendants moved for partial summary judgment, asking this Court to dismiss both the AG and the Individual Plaintiffs' claims against Barronelle Stutzman in her personal capacity, as a corporate officer. Further, the Defendants, in Benton County Cause Number 13-2-00953-3, ask the Court to rule that the Individual Plaintiffs' Second Case of Action, "aiding and abetting" a violation of the WLAD, fails as a matter of law. As to the first issue, both the AG and Individual Plaintiffs respond that the plain language of both the CPA and WLAD provide for both individual and corporate liability, and that there is no need to "pierce the corporate veil" to find individual liability for Barronelle Stutzman in either matter. The Individual Plaintiffs concede that one cannot aid and abet one's own actions, and that this cause of action should be dismissed. For the reasons set out below, the Court concludes[5] that the Defendants' reliance on theories

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the motion, filed the same day), the State's Response To Defendants' First Motion For Summary Judgment, filed November 12, 2013 (along with the Declaration of Todd Bowers in support of the motion, filed the same day), as well as the Defendants' Reply In Support of Defendants' First Motion For Summary Judgment Against Plaintiff, State of Washington, filed December 1, 2014.

[5] In reaching this conclusion, the Court reviewed and considered the Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In

of corporate officer liability in these matters is not well founded, and that the clear language of the CPA and WLAD supports both individual and corporate liability in the first instance. The Court concludes that the Defendants are correct that accomplice liability is unavailable on these facts as a matter of law, and therefore accepts the Individual Plaintiffs' concession that the Second Cause of Action in Benton County Cause Number 13-2-00953-3 must be dismissed. The Court therefore denies in part and grants in part the Defendants' motion.

I. FACTUAL BACKGROUND

Defendant Barronelle Stutzman is the president, owner and operator of Defendant Arlene's Flowers, Inc. d/b/a Arlene's Flowers and Gifts. This closely-held Washington for-profit corporation has Stutzman and her husband as the sole corporate officers. From its retail store in Richland, Washington, it advertises and sells flowers and other goods to the public. The

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Her Personal Capacity, filed October 25, 2013 (along with the Declaration of Barronelle Stutzman and attachments thereto, as well as the Declaration of Alicia Berry and attachments thereto), Ingersoll and Freed's Opposition To Defendant's Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In Her Personal Capacity, filed November 12, 2013, the State's Response To Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman in Her Personal Capacity, filed November 12, 2013, Defendant's Joint Reply Supporting Their Motion For Partial Summary Judgment On Plaintiff's Claims Against Barronelle Stutzman In Her Personal Capacity, filed December 1, 2014, as well as Defendant's Supplemental Brief Regarding State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 82 Wn.2d 265 (1973), filed December 18, 2014.

company sells flowers for events including, among others, weddings. The company, originally incorporated in 1989, was previously owned and operated by Stutzman's mother, from whom she purchased the corporation almost 13 years ago. The corporation was and is licensed to do business in the State of Washington.

Stutzman has a firmly-held religious belief, based on her adherence to the principals of her Christian faith, that marriage can only be between a man and a woman. As a result, she believes that she cannot participate in a same-sex wedding. Stutzman draws a distinction between the provision of raw materials for such an event (or even flower arrangements that she received pre-made from wholesalers) and the provision of flower arrangements that she has herself arranged for the same event. Said more precisely, Stutzman does not believe that she can, consistent with tenants of her faith, use her professional skill to make an arrangement of flowers and other materials for use at a same-sex wedding. That which she believes she cannot do directly she also believes she cannot allow to occur on the premises of her company with her knowledge. Therefore she believes she cannot allow others in her employ to prepare such arrangements in her company's name. Stutzman believes that such participation would constitute a demonstration of approval for the wedding itself.

Plaintiff Robert Ingersoll is a gay man who was an established customer of Arlene's Flowers. During the approximately nine years leading up to the present action, Stutzman, on behalf of Arlene's Flowers, designed and created flower arrangements

for Ingersoll. Stutzman prepared these arrangements knowing both that Ingersoll was gay and that the arrangements were for Ingersoll's same-sex partner, Curt Freed. On November 6, 2012, the voters confirmed, through Referendum 74, the Legislature's earlier enactment of same-sex marriage. *See* Revised Code of Washington (hereinafter RCW) 26.04.010(1) (*as amended by* Laws of Washington 2012, Ch. 3, § 1(1)); *see also*, Referendum Measure 74, approved Nov. 6, 2012. Shortly thereafter, Ingersoll and Freed were engaged to be married.

On February 28, 2013, Ingersoll went to Arlene's Flowers to inquire about having Stutzman do the flowers for his and Freed's wedding. Stutzman was not present, and an employee who spoke with Ingersoll communicated the request to Stutzman. After speaking with her husband, Stutzman decided that she could not create arrangements for Ingersoll and Freed's wedding without violating her beliefs. On March 1, 2013, Ingersoll returned to Alrene's Flowers, where Stutzman informed Ingersoll that because of her beliefs, she could not do the flowers for his wedding. Ingersoll left Arlene's Flowers shortly thereafter. This interaction effectively severed the relationship between the parties and ultimately gave rise to the present actions.[6]

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[6] The preceding is only a brief statement of the agreed facts surrounding the interactions between Stutzman and Ingersoll in March of 2013. A more detailed statement of these facts, necessary to resolve the remaining motions of the parties heard on December 19, 2014, will accompany that future Memorandum Decision and Order.

After efforts toward a negotiated resolution between the AG and Defendants proved fruitless in March and April of 2013, the AG commenced its action in Benton County Cause Number 13-2-00871-5 by the filing of a Complaint on April 9, 2013. Therein, the AG alleged a violation of the CPA, both under the Act itself, and pursuant to the WLAD, a violation of which is a *per se* violation of the CPA. Defendants' Answer, containing the affirmative defenses that are the subject of two of these pending motions, was filed on May 16, 2013.

A Complaint by the Individual Plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed nine days later, on April 18, 2013. The Individual Plaintiffs alleged three causes of action: 1) Violation of the WLAD; 2) Aiding and abetting a violation of the WLAD; and 3) Violation of the CPA. Defendants answered on May 20, 2013. The cases were consolidated for consideration of these motions by the previously assigned judicial officer.

II. LEGAL BACKGROUND

A. The Consumer Protection Act (CPA)

The CPA provides:

> [u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.010. The CPA, "on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (italics in original).

In enacting the CPA, the Legislature sought "to protect the public and foster fair and honest competition." RCW 19.86.920. Consistent with its purpose, the Legislature has directed that the CPA "shall be liberally construed that its beneficial purposes may be served." *Id*. This statement from the Legislature "is a command that the coverage of [the CPA's] provision in fact be liberally construed and that its exceptions be narrowly confined." *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). The statute's purpose statement concludes as follows:

> *[i]t is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices* which are reasonable in relation to the development and preservation of business or *which are not injurious to the public interest, nor be construed to authorize those acts or practices which* unreasonably restrain trade *or are unreasonable per se*.

RCW 19.86.920 (italics added).

Actions for alleged violations of the CPA may be commenced by an individual or individuals. RCW 19.86.093. Individual plaintiffs must establish the following elements to prove their case: "(1) an unfair

or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to business or property, and (5) causation." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (further citation omitted). While undefined in the CPA, "[w]hether a particular act or practice is 'unfair or deceptive' is a question of law," to be determined by the Court. *Panag*, 166 Wn.2d at 47; *see also*, *State v. Schwab*, 103 Wn.2d 542, 546, 693 P.2d 108 (1985). That said, certain acts or practices have been declared by the Legislature to be *per se* violations of the CPA, and "private litigants are empowered to utilize the remedies provided them by the act." *Schwab*, 103 Wn.2d at 546-7.

Actions alleging violations of the CPA may also be brought by the AG. RCW 19.86.080(1). The scope of the AG's authority to act under the statute is broad:

> [t]he attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, *against any person* to restrain and *prevent the doing of any act* herein prohibited or declared to be unlawful…

Id. (italics added). Unlike an individual plaintiff, the AG must establish only three elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also*, *State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011). In bringing actions under the CPA, the AG's role is different than that of the private litigants:

> [t]he Attorney General's responsibility in bringing cases of this kind is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress or private individuals. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.

Seaboard Surety Co. v. Ralph Williams' NW Chrysler Plymouth (*hereinafter Ralph Williams' (I)*, 81 Wn.2d 740, 746, 504 P.2d 1139 (1973). The Legislature's declaration of *per se* violations of the CPA "authorize[s]" the AG to bring actions under the CPA for these acts or practices the Legislature declares as per se unfair or deceptive. *Schwab*, 103 Wn.2d at 546-7.[7]

B. The Washington Law Against Discrimination (WLAD)

The WLAD provides:

> (1) *[t]he right to be free from discrimination because of* race, creed, color, national origin, sex, honorably discharged veteran or military status, *sexual orientation…is recognized as and declared to be a civil*

[7] The Defendant objects that *Schwab* is dicta as to the interplay of the CPA and WLAD, particularly on the issue of exhaustion. As indicated below, the Court analyzes the exhaustion defense under a different case.

> *right.* This right shall include, but not be limited to:
>
> …
>
> (b) *The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation,* assemblage, or amusement…

RCW 49.60.030(1)(b) (italics added). The purpose statement for the law states:

> [the WLAD] 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, in the 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…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 foundations of a free democratic state….

RCW 49.60.010. As with the CPA, the Legislature has directed this Court that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW

49.60.020. The statute specifically prohibits discrimination as follows:

> (1) *[i]t shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination…or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, staying, or lodging in any place of public resort, accommodation,* assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, *regardless of race, creed, color, national origin, sexual orientation…*

RCW 49.60.215(1) (italics added).

The WLAD also created the Washington State Human Rights Commission (HRC), which is empowered, among other functions, to investigate and pursue violations of the WLAD. *See* RCW 49.60.010 & .050 (creating the HRC); *see also*, RCW 49.60.120 (powers and duties of HRC). "Any person" who claims a violation of the WLAD may file, either in person or through an attorney, a complaint with the commission. *See* RCW 49.60.230(1) (stating who may file a complaint); *see also*, RCW 49.60.040(19) (definition of "person"). The HRC may also issue a complaint whenever it has reason to believe any person is violating the WLAD. RCW 49.60.230(2).

A person need not file a complaint with the HRC before filing a separate action. *Galbraith v. TAPCO Credit Union*, 88 Wn.App. 939, 948 n. 6, 946 P.2d 1242 (1997) ("The parties do not contend and we see nothing in the statue that requires exhaustion of administrative remedies with the Human Rights Commission (HRC) prerequisite to filing a lawsuit under the statute."). Further, a person who files a complaint with the HRC does not thereby lose their right to file a separate action. *See* RCW 49.60.020 ("Nor shall anything herein contained be construed to deny the right of any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights."); *see also*, RCW 49.60.030(2) (providing right to seek injunction, actual damages, attorneys' fees, and "any other appropriate remedy" authorized by WLAD). In fact, the statute and the rules promulgated by the HRC thereunder contemplate a person or the AG pursuing a civil remedy and initiating or maintaining proceedings before the HRC. The HRC's rule regarding concurrent remedies, promulgated under the authority given to it by the Legislature, clearly contemplates a stay of proceedings when any action is filed that litigates the claim. *See* RCW 49.60.120(3) (HRC authority to promulgate rules); *and see*, Washington Administrative Code (hereinafter WAC) 162-08-062. The rule provides:

> A complaint of an unfair practice other than in real estate transactions will be held in abeyance during the pendency of a case in federal or state court litigating the same claim, whether under the law of discrimination or a similar law, unless the

> executive director of the commissioners direct that the complaint continue to be processed….

WAC 162-08-062(2) (Abeyance – General Rule). The rule differentiates between the deference given to cases filed in federal or state court, where the default position is that HRC proceedings will be stayed, and other administrative proceedings, where they will not. *Id*. It does not distinguish between private actions and cases instituted by the AG.

C. Violation Of The Washington Law Against Discrimination (WLAD) As A *Per Se* Violation of the Consumer protection Act (CPA)

The WLAD explicitly provides that a violation of the WLAD is a *per se* violation of the CPA:

> …any unfair practice prohibited by this chapter which is 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). Therefore, in addition to an individual's WLAD right of action,[8] both the AG and

[8] The AG has disclaimed a right of action under the WLAD (including a right to file a complaint with the HRC in the first

private individuals are authorized by the Legislature's designation of a WLAD violation as *per se* violations of the CPA to file a CPA action. *Schwab*, 103 Wn2d at 546-7 (listing "discriminatory practices" under the WLAD (RCW 49.60.030(3)) as example of violations of other statutes that constitute *per se* violations of the CPA).

III. ANALYSIS

A. Plaintiff's (State of Washington's) Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses

In Benton County Cause Number 13-2-00871-5, the AG has moved for partial summary judgment, arguing that six of the Defendants' non-constitutional affirmative defenses in their Answer fail as a matter of law, and must therefore be dismissed. Either party may move for summary judgment upon their assertion, supported by record, that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Superior Court Civil Rule (hereinafter CR) 56(a-c). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving

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instance). The AG has consistently asserted the CPA as its source of authority to bring this action. The Defendants, at argument, did not commit to the position that the AG has such a right, rather arguing that the answer to that question is not necessary for the Court to rule their favor.

party." W*ard v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn.App. 157, 161, 872 P.2d 69 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See State Farm Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984); *see also*, *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) ("A material fact is one upon which the outcome of the litigation depends."). The Court concludes that this matter is appropriate for summary judgment, as only questions of law remain.

A court's "'fundamental' objective when interpreting a statute is 'to discern and implement the intent of the legislature.'" *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012) (further citation omitted). When interpreting a statute, courts "look first to the statute's plain meaning." *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 494, 256 P.3d 321 (2011). "Where the plain language of a statute is unambiguous and legislative intent is apparent, [the court] will not construe the statute otherwise." *Lowy v. PeaceHealth*, 174 Wn.2d 769, 778-79, 280 P.3d 1078 (2012). Plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provisions in question." *Lowy*, 174 Wn.2d at 778 (further citation omitted). It is "fundamental that in construing any statute [the Court] avoid[s] absurd results." *Id*.

Courts are to "give effect to each word in a statute and will not adopt an interpretation that renders words useless, superfluous, or ineffectual." *BD Roofing, Inc. v. State of Wash. Dept. of L & I*, 139 Wn.App. 98, 108, 161 P. 3d 189 (2007) (further citation omitted). As indicated above, both the CPA and the WLAD are to be construed liberally. *See* RCW 19.86.920 (CPA "shall be liberally construed that its beneficial purposes may be served."); *see also*, RCW 49.60.020 ("[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."). "Ultimately, in resolving a question of statutory construction, [the] court will adopt the interpretation which best advances the legislative purpose." *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990); *see also*, *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994) (Court's expansive interpretation of word "inhabitant" in WLAD upheld because it "comport[ed] with the purpose underlying the statute, to deter discrimination.").

1. <u>Subject Matter Jurisdiction Of The Court To Hear The Case</u>

The Defendants in their answer, assert their first affirmative defense as follows:

> 6.1 Lack of Subject Matter Jurisdiction: The Superior Court does not have a statutory grant of original jurisdiction to hear complaints filed under RCW 49.60, with specific limited exceptions that do not apply to this case. Washington's law against discrimination under RCW 49.60.215 allows

> only (a) a private right of action in Superior court, or (b) an administrative action brought by the Washington Human Rights Commission.

Defendants' Answer (13-2-00871-5), pg. 5, para. 6.1.

"Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power." *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). Subject matter jurisdiction "is the authority of the court to hear and determine the class of actions to which the case belongs." *Buehl*, 87 Wn.2d at 655. The Washington Constitution grants this Court broad authority to hear all cases in equity and law for which jurisdiction had not been vested exclusively in some other court. Wash. Const. art IV, §6; *see also*, *Ullery v. Fulleton*, 162 Wn.App. 596, 603-4, 256 P.3d 406 (2011) (contrasting jurisdiction of state superior courts with federal courts). As the Defendants correctly indicate in their affirmative defense, the WLAD allows only a private right of action in this Court, or an administrative action (brought by a person or the HRC s*ua sponte*), which can ultimately come to this Court. *See* RCW 49.60.020 (individual right of action); *see also, e.g.*, RCW 49.60 (right of appeal from administrative law judge's order as part of HRC procedure). The Defendants argue that this case was brought under the WLAD, the AG has no right to bring it, and thus this Court has no power to hear it.

The AG responds that the Defendants are mistaken as to the statute under which their case was pled, pointing to the first paragraph of the AG's Complaint, which reads:

> 1.1 This Complaint is filed and these proceedings are instituted under the provisions of the Unfair Business Practices-Consumer Protection Act, 19.86.

AG's Complaint (13-2-00871-5), pg. 1, para. 1.1. While it is true that violation of the WLAD is a means of proving some of the necessary elements of a CPA claim, and thus must be pled, the Defendants have provided no authority that a CPA claim is somehow converted into another action when a *per se* violation of another statute is pled as part of the CPA claim.

To hold as the Defendants suggest would frustrate the purpose of both the CPA and the WLAD: it would completely deny the AG, the sole government agency entitled to enforce the CPA, the ability to vindicate the public's interest in ending discrimination declared by the Legislature to be a *per se* unfair practice when committed "in the course of trade or commerce." RCW 49.60.030(3). Therefore, the express language, structure and clear intent of both the CPA and WLAD, leads to the conclusion that this is and remains a CPA action. RCW 19.86.920 (Purpose statement and instruction that the CPA "shall be liberally construed that its beneficial purposes may be served."); *see also*, RCW 49.60.010 (purpose statement); *and see*, RCW 49.60.020 ("[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.").

Because this case is brought under the CPA, the AG has the authority to bring the action, and thus the Court has subject matter jurisdiction to hear the case. *See Ralph Williams' (I)*, 81 Wn.2d at 744 (confirming AG's authority under RCW 19.86.080 and 19.86.140 to bring CPA action).

Existing case law supports this result. In *Tacoma-Pierce County MLS v. State*, several boards of realtors argued that the AG's CPA complaint violated the doctrine of exhaustion of remedies and the doctrine of primary jurisdiction. *Tacoma-Pierce County MLS v. State*, 95 Wn.2d 280, 622 P.2d 1190 (1980). The defendant's argued that, because the unfair practices alleged were subject to regulation by the Real Estate Commission and the Department of Licensing, those administrative bodies must first have the opportunity to render decisions before the AG could act. *Tacoma-Pierce Co. MLS*, 95 Wn.2d at 284. The Court there disposed of the exhaustion argument, and began as follows:

> [w]e disagree. This is an action under RCW 19.86 and involves violations of the Consumer Protection Act.

Id. at 284. While the case involved a claim of failure to exhaust and did not involve a *per se* violation of another statute, the rational is equally applicable: an action plead under RCW 19.86 is a CPA action, no matter its underlying subject matter. Furthermore, the AG has pled this case in the alternative, both as a per se violation of the WLAD and as a generic violation of the CPA. *See AG's Complaint* (13-2-00871-5), pg. 4, para. 5.8. Thus, even if Court were

persuaded by the Defendants' argument as to the *per se* claim, the generic CPA claim would survive. The Defendants' affirmative defense as to the *per se* violation of the CPA fails as a matter of law.[9]

2. Standing Of The AG To Bring The Case

The Defendants' next affirmative defense reads:

> 6.2 Lack of Standing: Standing under RCW 19.86 cannot be used by the State to apply to an alleged violation of RCW 49.60, without undermining the intent of the legislature's grant of enforcement power to the Washington State Human Rights Commission. While adjudication of a violation under RCW 49.60 becomes a *per se* violation of RCW 19.86 once proved, it is improper for the State to prosecute a violation of RCW 49.60 claiming standing under RCW 19.86, without doing an "end run" around the enforcement provision of

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[9] The AG argues in the alternative that, even if this were a WLAD claim, the Court would have subject-matter jurisdiction, citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 98-99, 864 P.2d 937 (1990). This solves one problem while creating another, because the AG disclaims a right to file a complaint before the HRC. The next question would then be how the AG would have the right to bring its own WLAD claim on these facts. *See, e.g.*, RCW 49.60.230(1) (stating who may file a complaint), RCW 49.60.020 (reservation of civil and criminal rights of a person), *and see* RCW 49.60.040(19) (definition of "person"). As indicated above, the Court concludes this is not a WLAD claim, but rather a *per se* CPA claim.

> RCW 49.60. Moreover, Defendants allege that the Washington Attorney General's Office does not have police power with respect to either RCW 49.60, or RCW 19.86. Therefore, the Washington Attorney General's Office has no authority to act on behalf of the State in any civil capacity absent a complaint having been filed with the Attorney General's Office, or some other State agency. Upon information and belief, no complaint was ever filed in this case, with any agency of the State of Washington, including the Attorney General's Office. For these reasons, Plaintiff lacks standing to bring this action.

Defendants' Answer, pgs. 5-6, para. 6.2. The AG asserts that the Defendants have mislabeled the defense as one of standing, and that the Defendants are in fact arguing 1) that the AG's action undermines the enforcement provision of the HRC, and 2) the AG cannot bring this action under the CPA without the filing of a consumer complaint. Before addressing these two arguments, it is clear the AG has standing to bring CPA actions, either as generic action or *per se* action alleging a violation of the WLAD. *See City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985) (basic test for standing "whether the interest sought to be protected by the complainant is arguably within the zone of interested to be protected or regulated by the statute"); *see also*, *Ralph Williams (I)*, 81 Wn.2d at 744 (confirming AG's authority under RCW 19.86.080 and 19.86.140 to bring CPA action); *and see* RCW 49.60.030(3) (violation of WLAD in trade or commerce is per se violation of CPA).

As to the first argument, that the AG's action here undermines the enforcement provisions of the HRC, the AG properly points out the Legislature drafted the WLAD to have multiple avenues to address discrimination and is to be liberally construed. *See* RCW 49.60.010, .020, *and* 030(3). As indicated above, an individual may see redress through the commission, an action under the WLAD, or a CPA[10] action alleging a *per se* violation of the CPA due to a violation of the WLAD. This CPA action by the AG, based on a violation of the WLAD, which has as its purpose the elimination of discrimination in trade or commerce, is consistent with and furthers the intent of both statutes.

The AG points out that both the elements of a CPA action, and the potential remedies, are different from those available under a WLAD action and a HRC enforcement action. *Compare* RCW 19.86.080(1), *with both*, RCW 49.60.030(3), *and*, RCW 49.60.250(3). The AG is correct. The Court further concludes that if RCW 49.60.020 (confirming the absolute right of an individual to see criminal or civil remedies in lieu of resort to the HRC) does not undermine the enforcement provisions of the HRC, it is difficult to see how the AG's action here undermines the HRC either.

As to the portion of the affirmative defense alleging that the AG lacks standing or authority to file its CPA action in the absence of a consumer

[10] While the AG also filed a generic CPA action, the Individual Plaintiffs appear to have relied on the *per se* violation of the WLAD in their CPA action.

complaint, because it lacks police power under the statues in the first instance, both assertions fail as a matter of law. First, both statutes make clear that they are an exercise of police power. *See* RCW 49.60.010 (WLAD is an "exercise of the police power of the state), *see also*, RCW 49.60.030(3) (violation of WLAD in trade or commerce is per se violation of CPA), *and see* RCW 19.86.090 (unfair or deceptive acts or practices declared unlawful). Second, there is no language within the CPA conditioning the AG's ability to prosecute upon the presence or absence of a consumer complaint. To hold as Defendants suggest, particularly in the absence of any such language in the statute, would be to construe the statute against its purpose without any basis. *Burnside*, 123 Wn.2d at 99 (purpose of WLAD is "to deter discrimination."). The Defendants' affirmative defense fails as a matter of law.

3. Failure To State A Claim Upon Which Relief May Be Granted

The Defendants next assert as follows:

> 6.3 Failure to State a Claim Upon which Relief can be Granted: For the reasons articulated in paragraphs 6.1 and 6.2 above, Plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed under Civil Rule 12(b)(6).

Defendants' Answer, pg. 6, para. 6.3. Defendants accurately cite the rule. CR 12(b)(6). That said, the AG correctly points out that this affirmative defense is, by its express terms, derivative of the first two

affirmative defenses. Because the Court concludes the first two affirmative defenses fail as a matter of law, this affirmative defense must fail as well.

4. Exhaustion Of Remedies By AG

The Defendant's fourth affirmative defense alleges:

> 6.4 Failure to Exhaust (or even initiate) Administrative Remedies.

Defendants' Answer, pg. 6, para. 6.4. As indicated above, this is an action under the CPA, not the WLAD. *Tacoma-Pierce Co. MLS*, 95 Wn.2d at 284. For an alleged violation of the CPA, the Court need not address exhaustion, because alleged violations of the CPA are matters for the courts, not administrative bodies. *Id*. (declining to address the elements of exhaustion because "[v]iolations of the [CPA] are not cognizable by either the Department of Licensing or the Real Estate Commission, but rather by the courts").

The Defendants' construction of the case is based on the assumption that the AG's CPA action is a WLAD action, which *Tacoma-Pierce Co. MLS* flatly rejects. Defendants contend that by pleading the CPA by way of a *per se* violation of the WLAD, there is a preliminary requirement to have fact finding done by the HRC before the AG can pursue an action in court. The Defendants reach this conclusion because the AG is not specifically mentioned in RCW 49.60.030(2) as a person with a retained right of a private action.

The answer to the Defendants' observation is that the Legislature only clarifies that a conciliatory remedy (here, resort to the HRC) does not limit other rights when it provides that conciliatory remedy in the first instance. The logical construction of the statute is that the AG is not mentioned because the remedy of the HRC as a complainant is not available to the AG in the first instance. This is the case because the AG has independent authority to bring this action under the CPA, not as a private action but rather on behalf of the public. *See Ralph Williams (I)*, 81 Wn.2d at 746. As with the discussion of standing above, to do as the Defendants suggest would be to construe the statutes against their purpose of deterring discrimination in trade or commerce, without any textual support. *Burnside*, 123 Wn.2d at 99 (purpose of WLAD is "to deter discrimination.").

Furthermore, it makes no sense to require such a step when, for both the AG and the Individual Plaintiffs, this Court is to determine as a matter of law, based on the facts before it, "[w]hether a particular act or practice is 'unfair or deceptive'". *Panag*, 166 Wn.2d at 47. Creating such a cumbersome, delay-inducing and ultimately irrelevant predicate fact-finding requirement for the HRC from statutory silence would again be contrary to the purpose statements and directions for the construction to be given to the CPA and the WLAD.

It bears repeating: Defendants' assertion that the Legislature expressed concern that the AG might subvert the HRC appears nowhere in either statute. *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("…a court must

not add words where the legislature has chosen not to include them."). The HRC's own rulemaking belies such a concern, deferring broadly to all matters filed in court addressing an issue before it. *See* WAC 162-08-062(2) (Abeyance – General Rule). Surely, even if the Legislature had failed to express such a concern, the HRC could and would have done so in their own rules. The Defendants' citations to other portions of the WLAD, such as RCW 49.60.350, in which the AG assists the HRC in its mission, do not compel the conclusion that the AG has a dependent or secondary role to the HRC. It simply confirms, given the purpose of the statute, that the AG has multiple roles to play. By the same token, Defendants' citation to the portion of the WLAD that grants authority to the HRC cannot be read to strip the AG of its power to pursue this *per se* violation: both in light of the delineation of those functions, powers and duties in RCW 49.60.120 and elsewhere in the WLAD, and again remaining consistent with the purpose and liberal construction to be given both statutes.

Even assuming, for the purposes of argument, that the elements of exhaustion should be addressed (perhaps because *Tacoma-Pierce Co. MLS* did not involve a *per se* CPA claim), the result is the same. The test for the application of the doctrine, requiring a party to exhaust administrative remedies before a court will intervene, is as follows:

> (1) "when a claim is cognizable in the first instance by an agency alone"; (2) when the agency's authority "'establishes clearly defined machinery for the submission, evaluation and resolution of complaints by

> aggrieved parties'"; and (3) when the "relief sought…can be obtained by resort to an exclusive or adequate administrative remedy".

Tacoma-Pierce Co. MLS, 95 Wn.2d at 284 (further citation omitted). Here, the first part of the test is not satisfied, as the AG's CPA[11] claim is not cognizable in any agency at all, much less the HRC in the first instance or alone[12]. Because this is the case, the second part of the test is not satisfied either. As to the third part of the test, as the AG points out, civil penalties are not available under the WLAD, thus the third part of the test is not satisfied either. *See* RCW 49.60.250(5) (remedies available upon Administrative Law Judge finding of violation of WLAD). Failure to satisfy any part of the test prohibits application of the doctrine of exhaustion. The primary case relied upon by the Defendants in their argument is

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[11] The AG argues in the alternative that if this matter is cognizable under the WLAD, there is no requirement for exhaustion under that statute, either, citing to *Cloer*. *Cloer v. United Food & Commercial Workers Int'l Union*, C05-1526JLR, 2007 WL 601426, at *3 (W.D. Wash., Feb. 22, 2007). As the Defendants rightly point out, even assuming that this case is properly considered at all by the Court, it deals only with exhaustion of individual plaintiffs. Further, it is a Federal District Court ruling, and would have no precedential value upon other Federal District Courts on this issue. By analogy, it would be as if the AG cited another Superior Court's Memorandum Order to this Court. As indicated earlier, the Court concludes this is a CPA action.

[12] Even WLAD claims are not "cognizable in the first instance by [the HRC] alone" due to the individual right of action.

distinguishable in that it discusses administrative remedies available through the City of Lakewood in the context of a dispute regarding taxes paid by a corporation, not an action under the CPA or WLAD. *Cost Management Services, Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013).

The Defendants' attempt to invoke the doctrine of "primary jurisdiction," is similarly unavailing. First, the Defendants did not plead it in their affirmative defenses. Second, as will be discussed in the Defendants' First Motion below, they fail to meet this test. See *Tacoma-Pierce Co. MLS*, 95 Wn.2d at 285 (discussing three-part test); *and see, e.g.*, *Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn.App. 174, 202, 293 P.3d 413 (2013) ("no reason for lower court to apply the primary jurisdiction doctrine and defer to the [HRC]" in individual WLAD action).

Finally, the Defendants produced correspondence that purports to be an admission by the AG that it lacks the power to institute this action. Many of these statements are clearly taken out of context (such as when speakers or writers were discussing the WLAD not the CPA). One item was a letter by a non-lawyer member of the AG's Office, which was modified from the approved form without permission. These items are not material facts. This is because "agencies do not have the power to amend unambiguous statutory language." *Caritas Services, Inc. v. Department of Social and Health Services*, 123 Wn.2d 391, 415, 869 P.2d 28 (1994). Said another way, the AG himself could not defeat the existence of a legislatively

granted power by denying its existence publicly. This affirmative defense fails as a matter of law.

5. AG's Frustration Of Purpose Of HRC By Bringing The Case

The Defendants' fifth affirmative defense states:

> 6.5 Frustration of the Purpose of the enforcement provisions of RCW 49.60.

Defendants' Answer, pg. 6, para. 6.5. As addressed in discussion of the Defendants' second affirmative defense above, given the purpose statements of the CPA and WLAD, it is difficult to see how the AG's action here undermines the HRC, when an individual's election to "bypasses" the HRC is made part of the law itself. Statutes designed to combat a legislatively declared harm are furthered, not frustrated in their purpose, by allowing more avenues for more parties to address and combat that harm. The affirmative defense fails as a matter of law.

6. Failure To Join HRC As An Indispensable Party

The final non-constitutional affirmative defense addressed in this motion is the last one listed by Defendants:

> 6.10 Failure to Join Indispensable Party: The only grant of original jurisdiction to the Superior court for violation of RCW 49.60, although inapplicable here, articulates that a claim may be brought in Superior Court by the Washington Human Rights Commission

> *via* the State Attorney General as counsel. Therefore, it seems appropriate that any action brought by the State Attorney General to enforce the provision of RCW 49.60 should be brought on behalf of the Washington Human Right Commission.

Defendants' Answer, pg. 7, para. 6.10 (italics in original). CR 19 requires that:

> **(a) Persons to Be Joined if Feasible**. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a part in the action if (1) in his absence complete relief cannot be accorded among those already parties….

CR 19(a). Again, because the Court finds that this is an action brought under the CPA in which the HRC plays no role, the HRC is not an indispensable party under the rule. The presence or absence of the HRC in no way limits this Court's ability to provide relief pursuant to the statute. *See* RCW 19.86.080 (discussing available relief upon finding of violation of the statute). The rule further provides that a party is indispensable when their absence prevents them from protecting their interest in the subject matter, or creates a risk of multiple or inconsistent obligations as a result of proceeding without them. CR 19(a). Here, the HRC remains free to initiate or pursue an action. Further, the HRC has developed its own broad rule reflecting a policy of deference to the filing of a claim such as this by suspending HRC proceedings. *See* WAC 162-08-062(2) (Abeyance – General Rule)

(HRC proceedings "will be held in abeyance during the pendency of a case in federal or state court litigating the same claim, whether under the law of discrimination or a similar law…"). Again, any arguments as to the danger of inconsistent decisions between the AG and the HRC are belied by the HRC's rule and the fact that this "danger" was clearly embraced by the Legislature as to the Individual Plaintiffs. This final affirmative defense fails as a matter of law.

B. Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington

Also in Benton County Cause Number 13-2-00871-5, the Defendants have moved for summary judgment alleging that, for the same reasons listed in two of their non-constitutional defenses, the AG's Complaint must be dismissed. Again, either party may move for summary judgment. CR 56(a). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn.App. at 161 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See State Farm Ins. Co. v. Emerson*, 102 Wn.2d at 249 ("A material fact is one upon which the outcome of the litigation depends."). The Court concludes that this matter is appropriate for summary judgment. To the extent that there are disputes regarding the effect of

the AG's actions and written documents upon its authority to bring this action, they are not material factual disputes in light of existing case law, and only questions of law remain.

This Court must interpret the relevant statutes "to discern and implement the intent of the legislature." *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d at 432. When interpreting a statute, courts "look first to the statute's plain meaning." *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 494, 256 P.3d 321. "Where the plain language of a statute is unambiguous and legislative intent is apparent, [the court] will not construe the statute otherwise." *Lowy v. PeaceHealth*, 174 Wn.2d at 778-79. The Legislature has directed that both the CPA and the WLAD are to be construed liberally. *See* RCW 19.86.920. (the CPA "shall be liberally construed that its beneficial purposes may be served."); *see also*, RCW 49.60.020 ("[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."). This Court is to "adopt the interpretation which best advances the legislative purpose." *Bennett*, 113 Wn.2d at 928. Here, as is the case in the motion above, rather than addressing all six of the affirmative defenses in its answer to the AG's complaint, the Defendants address two of the six, and raise a third.

1. <u>Standing Of The AG To Bring The Case</u>

The Defendants assert that the AG has, for over 30 years, "refused to address discrimination complaints," and has instead deferred to the HRC.

The Defendants further assert that this deference is required by the WLAD. As to the assertion that the AG has never filed a CPA action premised on a *per se* violation of the WLAD, the AG concedes the point. However, as the AG correctly points out, the fact that this is the first such action filed by the AG is not a bar to the present action. Whether the argument is that the failure to exercise a power results in it being lost, or that that failure leads those who may be in violation of the law to believe the law will not be enforced, the results is the same: the power remains. In *Longview Fibre*, that company made just such an argument, saying this long history of operating scrubbers with holes "lulled" them into believing that they were "satisfying [their] legal obligation." *Longview Fibre Co. v. Department of Ecology*, 89 Wn.App. 627, 636, 949 P.2d 851 (1998). The Court then stated:

> [b]ut the holes that DOE had discovered earlier were substantially smaller than those at issue here, and Longview Fibre had promptly repaired them. *Further, an administrative agency's acquiescence at an earlier time does not estop it from enforcing the law at a later date.*

Longview Fibre Co., 89 Wn.App. at 636-37 (italics added); *see also*, *Good v. Associated Students Of University Of Washington*, 86 Wn.2d 94, 765-66, 542 P.2d 762 (1975) ("Failure to exercise a power which is statutorily vested in a body…does not mean that the power does not exist."). Were this not the rule the acts (or non-action) of one AG could defeat the intent of the Legislature to grant of authority to that AG as well as

to his or her successor. The rationale is the same as not allowing a legislative granted power to be destroyed by the statements of the holder of that power. *Caritas Services, Inc.*, 123 Wn.2d at 415. Further, as the AG observes, this enforcement authority delegated to it by the Legislature is given great deference in when and where it is exercised. *See, e.g.*, *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) (discussing prosecutorial discretion). Said another way, the fact that this is the first such CPA action, when the AG has declined to take action on other similar complaints since sexual orientation discrimination was added to the WLAD in 2006[13] has no legal significance: the AG gets to pick when and if to file based on the AG's determination of the public interest and the AG's assessment of the strength of each case.

The Defendants cite to four AG opinions from prior AGs, ranging from 1975 to 2002, asserting that they demonstrate the AG's deference to the HRC's role in defining and determining what constitutes discrimination under the WLAD. When read in context, none of the opinions support such a

[13] While the failure of past AGs to file this type of action are not legally significant, it is worthy of note that the current AG assumed office on January 16, 2013. While sexual orientation has been part of the WLAD since 2006, same-sex marriage was approved on November 2, 2012, so this particular cause of action was only factually available for approximately five months before these charges were filed. In fact, the Defendants employ the recent change in the state of the law in their argument regarding personal liability for Stutzman, below.

conclusion.[14] But assuming for the purposes of argument that they did, this would still not raise an issue of material fact, because the holder of a legislative grant of power cannot destroy it through his or her own statements. *Caritas Services, Inc.*, 123 Wn.2d at 415.

The Defendants also assert that the AG is required to defer to the HRC in a *per se* CPA action where discrimination is alleged. The Defendants cite to RCW 49.60.120(4), for the proposition that the Legislature has "established the WHRC to review and pass upon a discrimination claim on behalf of the State as an 'unfair act or practice' as defined in the WLAD." RCW 49.60.120(4) (stating among HRC powers "[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter."). As indicated above, the Defendants read the HRC's separate conciliatory role as defeating the AG's independent enforcement role, and in this the Defendants are mistaken. The AG has independent authority to bring an action under the CPA based on a *per se* violation of the WLAD, consistent with the required liberal constructions of both statutes to achieve their purpose of deterring discrimination in trade or commerce. RCW 19.86.080(1) gives the AG authority to file the CPA action, while RCW

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[14] Further, as the AG notes, the language in one of the cases cited therein, *Loveland* v. *Leslie*, 21 Wn.App. 84, 88, 583 P.2d 664 (1978) doesn't stand for the proposition that the HRC's "reconciliatory efforts" are jurisdictional, preventing the AG from acting. Rather, it holds that the HRC itself needs to follow its own rules requiring good faith efforts at reconciliation and those rules are jurisdictional as to the HRC's own decisions.

49.60.030(3) declares discrimination in trade or commerce a per se violation of the CPA. As the AG points out, had the Legislature wanted the WLAD to limit the AG's authority in what it had announced was "a matter of state concern," surely it could and would have done so in RCW 49.60.030(3). Clearly it did not.

The cases cited by the Defendants do not hold otherwise. *Hegwine v. Longview Fibre Co.*, is limited in pointing out the degree of deference that is given by this Court to regulations (WACs) created by the HRC. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007). There deference is given only when the HRC's interpretations do not conflict with the Legislature's intent in enacting the WLAD. *Hegwine*, 162 Wn.2d at 349 ("Moreover, so long as the Commission's interpretations do not conflict with the legislative intent underlying the WLAD, this court will often give 'great weight' to those interpretations."). The case says nothing about restricting the AG. The WLAD grants general jurisdiction to the HRC, but does not grant it exclusive jurisdiction, with powers, but not the sole power to combat discrimination. *See* RCW 49.60.010. The Legislature's scope of powers granted to the HRC are consistent with that of an administrative body charged with, among other powers, investigation, mandatory efforts toward conciliation, administrative fact finding and administrative remedies. *See* RCW 49.60.050 *et. seq*. Nowhere therein is there any indication express or implied, that the HRC gets to order the AG to do anything, particularly when it acts under its CPA authority. By way of example, the Defendants cite to RCW 49.60.340(1) and (2), as an example of how the

AG's role is to validate the HRC's action. Therein, an aggrieved individual in a real estate transaction, where the HRC has found "reasonable cause" for discrimination may institute a civil action by providing notice to the HRC. The Defendants make much of the fact that, upon election by the aggrieved person, the AG "shall" commence a civil action on that person's behalf. *See* RCW 49.60.340(2). The Defendants fail to recite that the HRC also "shall" act upon notice by the aggrieved person, and authorize the action within 30 days. *See* RCW 49.60.340(2). No timeframe is given for the AG to act. *Id*. These provisions simply stand for the proposition that when an individual has gone through the HRC's process in a real estate matter, and has a finding in their favor, that person can require both the HRC and the AG to institute an action in court.

The HRC has no independent authority to file a case in court. It is dependent upon the AG to get it there, and it only gets to go to court where the Legislature had deemed it necessary. Nothing in this structure of the WLAD implies that the HRC controls the AGs actions when the AG brings a CPA case with an allegation of discrimination. The Defendants make the AG's point when they observe the "[n]othing about this conciliatory administrative process, which the Legislature entrusted to the WHRC, is even remotely similar to the general prosecutorial function that the Legislature assigned to the Attorney General under the CPA." For these reasons, and those relating to the purpose and construction of both statutes indicated above, the Defendants' affirmative defense fails as a matter of law.

2. Exhaustion Of Remedies By AG

As indicated above, this is an action under the CPA, not the WLAD, and thus the doctrine of exhaustion of remedies is inapplicable. *Tacoma-Pierce Co. MLS*, 95 Wn.2d at 284. The Defendants next attempt to invoke the doctrine of "primary jurisdiction." There are two barriers to applying this doctrine in this case.

First, the Defendants did not plead primary jurisdiction in their affirmative defenses. *See Defendants' Answer (13-2-00871-5)*, pgs. 5-7, paras. 6.1-6.10. Second, they fail to meet this three-part test. To apply the doctrine the court must find:

> (1) The administrative agency has the authority to resolve the issues that would be referred to it by the court. In the case of antitrust actions, the statutory authority of the agency in some [w]ay must limit the applicability of the antitrust laws;
>
> (2) The agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and
>
> (3) The claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with the regulatory scheme.

Tacoma-Pierce Co. MLS, 95 Wn.2d at 285 (citations omitted). Again, as with the discussion of exhaustion, the HRC has no authority to resolve a CPA claim and

only the AG is empowered to act. For the same reason, the second and third parts of the test are not satisfied either. Finally, even if this were a WLAD action, primary jurisdiction would be unavailable. *See, e.g.*, *Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn.App. 174, 202, 293 P.3d 413 (2013) ("no reason for lower court to apply the primary jurisdiction doctrine and defer to the [HRC]" in individual WLAD action).

It makes no sense to have the AG's exercise of police power dependent upon the HRC's distinctly different conciliation process. At argument, Defendants did not commit to whether the AG had independent power to access this HRC fact-finding process and did not describe how the AG would get approval from the HRC to institute an action. Their argument that the existence of the HRC completely vindicates the State's interest in this area is belied by the purpose and construction of both the CPA and the WLAD.

C. Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In Her Personal Capacity

Where there are no disputed facts and only issues of law remain to be determined, summary judgment is appropriate. *See Emerson*, 102 Wn.2d at 480; *see also*, *Clements*, 121 Wn.2d at 249. In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3, claims are made against Defendant Barronelle Stutzman in her personal capacity. In Benton County Cause Number 13-2-00953-3,

Individual Plaintiffs' Second Cause of Action, alleges "aiding and abetting" a violation of the WLAD. As to both claims addressed in this motion, the parties agree that summary judgment is appropriate. The parties agree that Defendant Barronelle Stutzman is the president, owner and operator of Defendant Arlene's Flowers, Inc. d/b/a Arlene's Flowers and Gifts. The parties also agree that Ms. Stutzman and her husband are the sole corporate officers and that the company was and is licensed to do business in the State of Washington. Further, the parties agree that Stutzman has maintained the corporate form. Finally, the parties also agree that, on March 1, 2013, it was Stutzman who informed Ingersoll that because of her beliefs, she could not do the flowers for his wedding. There are no material factual disputes and only questions of law remain.

The duty of this Court remains the same: "to discern and implement the intent of the legislature.'" *Estate of Bunch*, 174 Wn.2d at 432. The legislature has directed that both the CPA and the WLAD are to be construed liberally to fulfill their purposes. *See* RCW 19.86.920; *see also*, RCW 49.60.020.

1. <u>Personal Liability of Defendant Barronelle Suzan</u>

The Defendants observe that Washington law provides broad protection for corporate officers in their personal capacity, honoring the corporate form and prohibiting suits against corporate officers absent exceptional circumstances, such as when a corporate officer knowingly engages in fraud, misrepresentation, or theft. Because there is no such

claim on behalf of the AG or the Individual Plaintiffs, Defendants argue that Stutzman cannot be found personally liable as a corporate officer of Arlene's Flowers as a matter of law. Therefore, Defendants' argue that, while the claim against Arlene's Flowers survives, the claim against Stutzman herself must be dismissed.

The rule regarding respect for the corporate form is well-settled:

> [w]hen the shareholders of a corporation, who are also the corporation's officers and directors, conscientiously keep the affairs of the corporation separate from their personal affairs, and no fraud or manifest injustice is perpetrated upon third-persons who deal with the corporation, the corporation's separate entity should be respected.

Grayson v. Nordic Construction Co., 92 Wn.2d 548, 552-53 (1979). Further, as the Court in *Grayson* observed, "a corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person." *Grayson*, 92 Wn.2d at 552. The corporate form will be disregarded, and the court will "pierce the corporate veil," in several instances: when the corporate form is disregarded, such that it can be said that the corporation ceases to exist (the "alter ego" theory), or the above mentioned manifest injustice/fraud exception. *Id*. at 552-53. The Defendants argue that, because there is no "fraud, misrepresentation, or some form of manipulation of the corporation," the corporate form should be respected. *Meisel v. M&N*

Modern Hydraulic Press Co., 97 Wn.2d 403, 410 (1982). Defendants argue that, because the AG and the Individual Plaintiffs cannot show that Stutzman knowingly violated the law (in part because same-sex marriage was only approved by Measure 74 on Nov. 6, 2012, less than four months before these events) personal liability is improper.

Both the AG and the Individual Plaintiffs respond that this argument misses the point: "piercing the corporate veil" is unnecessary, because the relevant statutes impose liability based on Stutzman's participation in the conduct. They both observe that the Defendants' own case, *Grayson*, makes this point:

> [a]lthough the trial court improperly pierced Nordic's corporate veil on the alter ego theory, we nonetheless find that personal liability was properly imposed on Bergstrom under the rule enunciated in *State v. Ralph Williams' North West Chrysler Plymouth Inc. [Ralph Williams' III*], 87 Wash.2d 298, 553 P.2d 423 (1976). If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, was well as the corporation, is liable for the penalties. *State v. Ralph Williams' North West Chrysler Plymouth Inc.*, supra; *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wash.2d 745, 489 P.2d 923 (1971). In *Ralph Williams*, this court considered a deceptive practice in violation of the Consumer Protection Act to be a type of wrongful conduct which justified imposing

> personal liability on a participating corporate officer.

Grayson, 92 Wn.2d at 553-4. Both in *Ralph Williams' (III)* and in *Grayson*, piercing the corporate veil was unnecessary to find individual liability. This is the case because of the structure of the CPA, which by definition imposes liability upon the corporation and the individual as alleged in these actions. The WLAD is also similarly broad in scope.

The CPA includes both individuals and corporations within its reach. *See* RCW 19.86.080 (AG may bring action "against any person"); *see also*, RCW 19.86.010(1) ("'Person' shall include, where applicable, natural persons, corporations…."). The scope of liability in the WLAD is also broad. *See* RCW 49.60.040(19) (defining "person" to include "*one or more individuals…corporations…it includes any owner, lessee, proprietor, manager, agent or employee…*") (italics added); *see also*, RCW49.60.215(1) ("It shall be an unfair practice for *any person or the person's agent or employee* to commit an act which directly or indirectly results in any distinction, restriction, or discrimination…" (italics added). The liberal construction to be given these terms to eliminate all forms of discrimination is driven home by case law: as where the term "employer" was broadly construed to include "both the individual supervisor who discriminates and the employer for whom he or she works." *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 354-57, 20 P.3d 921 (2001) (holding individual supervisor liable under WLAD).

Further, both Plaintiffs respond that knowing or intentional discrimination is not necessary for liability under either statute. Plaintiffs are correct. *See Wine v. Theodoratus*, 19 Wn.App.700, 706, 577 P2d 612 (1978) (CPA "does not require a finding of an intent to deceive or defraud," and "good faith on the part of the [violator] is immaterial"); *see also Lewis v. Doll*, 53 Wn.App. 203, 210, 765 P.2d 1341 (1989) ("Nor is the fact that [defendant] did not intend a discriminatory effect relevant.") (WLAD cause of action). Finally, as admitted by Stutzman, she not only participated in the conduct alleged, her own personal actions (in defining corporate policy and in her interaction with Ingersoll) constitute the sum total of the conduct complained of by Plaintiffs. The Defendants' motion for partial summary judgment is denied in part as to Plaintiffs' claims against Barronelle Stutzman in her personal capacity.

2. Aiding and Abetting Liability of Defendant Barronelle Stutzman

As to Benton County Cause Number 13-2-00953-3, Defendants contest the validity of the Individual Plaintiffs' Second Cause of Action, which alleges "aiding and abetting" an act in violation of the WLAD. As Defendants observe, the only act alleged therein is the refusal[15] to sell flowers to the Individual Plaintiffs by Stutzman:

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[15] The Defendants characterize this as "declining" to provide services. While each party is free to choose its own descriptors, legally this is a distinction without a difference: the focus is on the actual conduct of the parties.

> 27. Because she refused to sell flowers to Mr. Ingersoll and Mr. Freed for their wedding, defendant Barronelle Stutzman aided Arlene's Flowers in violating the Washington Law Against Discrimination by discriminating against the Plaintiffs on the basis of their sexual orientation.

Individual Plaintiffs Complaint, pg. 5, para. 27. Defendants respond that RCW the references in 49.60.220:

> to "aid, abet, encourage, or incite" and to "prevent any other person from complying" show that the statue applies only where the actor is attempting to or has involved a third person in conduct that would violate the WLAD.

Jenkins v. Palmer, 116 Wn.App. 671, 675-76, 66 P.3d 1119 (2003). The WLAD's aiding and abetting language does not apply to an individual "acting alone." *Jenkins*, 116 Wn.App. at 676. The Individual Plaintiffs concede the point, as they must. The Defendants' motion for partial summary judgment is granted in part as to the Individual Plaintiffs' Second Cause of Action.

IV. CONCLUSION

The Defendants' non-constitutional affirmative defenses, and their motion to dismiss the claims against Barronelle Stutzman in her personal capacity fail because they ask for less: less liability on behalf of Stutzman and Arlene's Flowers. The Legislature,

through its purpose statements and directions for construction of the WLAD and the CPA clearly demands more: more avenues to address claims of discrimination in trade or commerce through allowing both individuals and the AG to institute the present actions, and more liability through a broad definitions extending liability to both corporations and individuals. Because the Defendants' affirmative defenses and motions to limit personal liability run contrary to the express intention of the Legislature as well as the Legislature's direction of how these statutes are to be constructed, they must fail as a matter of law.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's (State of Washington's) Motion For Partial Summary Judgment On Defendants' Non-Constitutional Defenses is **GRANTED.**

2. Defendants' First Motion For Summary Judgment Against Plaintiff State of Washington is **DENIED.**

3. Defendant's Motion For Partial Summary Judgment On Plaintiffs' Claims Against Barronelle Stutzman In Her Personal Capacity is **DENIED IN PART** and **GRANTED IN PART.**

IT IS SO ORDERED.

DATED this 7th day of January, 2015.

ALEXANDER C. EKSTROM
Benton County Superior Court Judge

U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Excerpts of RCW 49.60.030
Freedom from discrimination—
Declaration of Civil Rights

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

. . . .

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement[.]

Excerpts of RCW 49.60.040
Definitions

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

. . . .

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or

schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

Excerpts of RCW 49.60.215
Unfair practices of places of public resort, accommodation, assemblage, amusement— Trained dog guides and service animals

(1) It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice.

(2) This section does not apply to food establishments, as defined in RCW 49.60.218, with respect to the use of a trained dog guide or service animal by a person with a disability. Food establishments are subject to RCW 49.60.218 with respect to trained dog guides and service animals.

Excerpts from Brief of Appellants filed in Washington Supreme Court, Case No. 91615-2, on November 13, 2018

* * * * *

I. INTRODUCTION

Appellant Barronelle Stutzman, owner of Appellant Arlene's Flowers, Inc. (Arlene's), is a Christian artist who imagines and creates floral designs. Mrs. Stutzman serves everyone, but she cannot personally participate in, or create art that celebrates, sacred events that violate her religious beliefs.[1] Her faith teaches her that marriage is a divine relationship between a man and a woman—symbolic of God's relationship with his people—and that all wedding ceremonies are religious events. Due to those beliefs, Mrs. Stutzman cannot personally participate in same-sex weddings or create custom floral arrangements that celebrate those events.

Mrs. Stutzman had a nearly decade-long relationship with Respondent Robert Ingersoll. During that time, she designed dozens of anniversary, Valentine's Day, and other arrangements for Mr. Ingersoll and his partner, Respondent Curt Freed. Only once did she decline a request from them—when Mr. Ingersoll asked her to "do" the flowers for his same-sex wedding. For that exercise of her faith, the State has prosecuted her in her personal capacity under the Washington Law Against Discrimination (WLAD) and the Consumer Protection Act (CPA). She

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[1] Unless otherwise indicated, references to Mrs. Stutzman include Arlene's.

now faces financial devastation under a judgment demanding that she pay the individual Respondents' attorney fees.

What the State has done to Mrs. Stutzman violates the First Amendment in three ways. First, disregarding her free-exercise rights, the Attorney General has targeted her because of, and exhibited hostility toward, her religious beliefs about marriage. He devised an admittedly unprecedented use of the CPA to punish Mrs. Stutzman, while refusing to pursue a Seattle coffee-shop owner who viciously berated and expelled Christian customers because of their religious beliefs. This unequal treatment, combined with the Attorney General's dismissive and derisive comments about Mrs. Stutzman's faith, leaves no doubt that he has targeted her because of his animus toward her religious beliefs.

Second, the Superior Court's ruling infringes Mrs. Stutzman's free-exercise rights by compelling her to physically attend and participate in same-sex wedding ceremonies, which she regards as religious events. As part of the full wedding support she provides, Mrs. Stutzman decorates the venue with her floral art, attends the ceremony, ensures the flowers are beautiful during the event, and participates in wedding rituals. Forcing her to attend and personally participate in a same-sex wedding in these ways contravenes the core of what religious freedom protects.

Third, the State violates Mrs. Stutzman's free-speech rights by punishing her for declining to create custom floral art celebrating same-sex weddings. Mrs. Stutzman's wedding arrangements, much like

paintings or sculptures, are artistic expression shielded by the First Amendment. Through those custom creations, she expresses celebration for weddings and marriage. But the State can no more force Mrs. Stutzman to express such celebratory messages through her art than to speak them with her lips.

The First Amendment's free-exercise and free-speech guarantees unite in a common purpose—to ensure "freedom of conscience" for all. *Lee v. Weisman*, 505 U.S. 577, 591, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). Yet the State has no regard for Mrs. Stutzman's conscience, demanding that she violate it by pouring her heart into creating art that conflicts with her faith and by physically participating in inherently religious ceremonies. The State, in other words, has been "neither tolerant nor respectful of [Mrs. Stutzman's] religious beliefs." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731, 201 L. Ed. 2d 35 (2018).

But there is a better resolution to this case—one that prohibits businesses from refusing to serve customers simply because of who they are, but that protects the conscience rights of people like Mrs. Stutzman who respectfully object to creating custom art for, or personally participating in, ceremonies that violate their religious beliefs. This path is the only one that preserves First Amendment freedoms and protects people with politically unpopular beliefs about important topics like marriage. The Superior Court's judgment should be reversed.

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IV. STATEMENT OF THE CASE

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H. Enjoining Mrs. Stutzman's Policy on Same-Sex Marriage and Full Wedding Support

* * * * *

The State then requested a broad injunction requiring, among other things, that "[a]ll goods, merchandise and services offered or sold to opposite sex couples shall be offered or sold on the same terms to same-sex couples, including but not limited to goods, merchandise and services for weddings and commitment ceremonies." CP 2401. Mrs. Stutzman objected that this sweeping language apparently covers her "full wedding support services" and thus mandates that she "physically appear at" and participate in same-sex wedding ceremonies. CP 2395.

The Superior Court nonetheless included that language in its injunction, thereby compelling Mrs. Stutzman to personally attend and participate in same-sex wedding ceremonies if she continues her wedding business. CP 2419-20.

* * * * *

V. ARGUMENT

A. Targeting Mrs. Stutzman because of the State's hostility toward her religious beliefs and requiring her to physically attend and participate in same-sex weddings violate her free exercise of religion.

The State violates Mrs. Stutzman's free-exercise rights in two ways.[3] First, the Attorney General has targeted her because of, and shown hostility toward, her religious beliefs about marriage—beliefs that the U.S. Supreme Court has described as "decent and honorable" and held "in good faith by reasonable and sincere people." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2602, 192 L. Ed. 2d 609 (2015). Second, the Superior Court's order requires Mrs. Stutzman to physically attend and participate in wedding ceremonies—events she considers sacred—that violate her faith.

* * * * *

[3] Arlene's free-exercise rights are synonymous with Mrs. Stutzman's. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768, 189 L. Ed. 2d 675 (2014) ("[P]rotecting the free-exercise rights of [closely held] corporations . . . protects the religious liberty of the humans who own and control those companies."); *Masterpiece*, 138 S. Ct. at 1732 (ruling in favor of a free-exercise claim brought by a small business and its owner).

2. Requiring Mrs. Stutzman to physically attend and personally participate in same-sex weddings violates her free exercise of religion.

The Superior Court's injunction requires Mrs. Stutzman either to personally attend and participate in same-sex weddings or to exit the wedding industry and abandon work with deep religious significance to her. Forcing her to make that choice violates the Free Exercise Clause. *Masterpiece* itself identified personal attendance at a wedding as a factor impacting a free-exercise claim like Mrs. Stutzman's. 138 S. Ct. at 1723. It did so for good reason: no U.S. Supreme Court authority suggests that the State may require attendance at and participation in sacred ceremonies.

Marriage and weddings, in the eyes of many, have deep "spiritual significance," *Turner v. Safley*, 482 U.S. 78, 96, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to the point of being "sacred," *Obergefell*, 135 S. Ct. at 2594. Mrs. Stutzman is among the many people of faith who believe that marriage and weddings are innately religious. CP 539, 606-07. Regardless of whether her customers have overtly religious weddings presided over by clergy, like the individual Respondents did, CP 1488, 1803-04, she views all weddings as religious in nature, CP 606-07. The religious significance that she ascribes to marriage is the reason why her wedding work is so meaningful to her and why she cannot defy her faith by celebrating same-sex unions.

Mrs. Stutzman is an active participant in her clients' weddings. She meets with the couple to learn

their vision for the wedding and to develop design ideas—a process that personally invests her in, and connects her to, "the wedding ceremony itself." CP 540, 654, 1577-79. Next, she creates with her own hands the custom floral designs that celebrate the wedding. CP 540-41. Then she and a driver deliver the flowers in an Arlene's van. CP 541. Once there, she provides full wedding support by decorating the venue, attending the ceremony, ensuring that "all flowers are beautiful," and "participat[ing] in rituals," including standing for the processional, clapping for the couple, and joining in the officiant's prayer. *Id.*

Mrs. Stutzman's full wedding support is squarely at issue in this case, as demonstrated by four facts. First, Mrs. Stutzman understood that Mr. Ingersoll was seeking—like her longtime customers often do—full wedding support at the ceremony, and that is what she intended to decline. CP 542, 544. Second, the State challenged Mrs. Stutzman's same-sex-marriage policy, which precludes her from providing full wedding support for those events. CP 370-71, 546-47. Third, the Superior Court explicitly held that *any* wedding "service" Mrs. Stutzman "provide[s] for a fee"—such as her full wedding support—"must be offered" for same-sex weddings. CP 2630-31 n.19. Fourth, the injunction's expansive language encompasses Mrs. Stutzman's full wedding support, thereby requiring her to personally attend and participate in same-sex wedding ceremonies as she does for other weddings. CP 2419-20.

But the First Amendment prohibits government action that "force[s] . . . a person to go to" a religious event "against [her] will," *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15, 67 S. Ct. 504, 91

L. Ed. 711 (1947), or that "in effect require[s] participation in a religious exercise," *Lee*, 505 U.S. at 594. Both the Free Exercise and Establishment Clauses promise this basic liberty. *See id.* (discussing Establishment Clause); *Masterpiece*, 138 S. Ct. at 1727 (compelling clergy to perform same-sex wedding ceremony would deny their "right to the free exercise of religion"). When the State violates this fundamental guarantee, it "disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee*, 505 U.S. at 592.

Compelling attendance at and participation in religious events is so odious that the U.S. Supreme Court has adopted broad standards to ensure that it will not happen. Litigants need not show an "official decree" demanding their presence at the event. *Id.* at 595. The First Amendment forbids the State from "requir[ing] one of its citizens to forfeit his or her rights and benefits"—even "intangible benefits"—as the price of declining to attend a ceremony with religious meaning. *Id.* at 595-96; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022, 198 L. Ed. 2d 551 (2017) (First Amendment protects against "indirect coercion or penalties on the free exercise of religion").

The State demands that Mrs. Stutzman give up her wedding business as the cost of adhering to her faith. But her wedding work is crucially important to her. CP 539. From a religious perspective, it holds deep spiritual significance and meaning. *Id.* And from a business perspective, it generates vital customer referrals and marketing. *Id.* The State cannot force

her to abandon that faith-inspired work to protect her conscience. That is an unconstitutional demand.

Nor do First Amendment violations require formal participation in an official religious exercise, like reciting a prayer or bowing before a statue. Just as "the act of standing or [respectfully] remaining silent [is] an expression of participation in [a graduation] prayer," *Lee*, 505 U.S. at 593, Mrs. Stutzman's acts of standing when the officiant offers a prayer, clapping for the couple, and rising during the wedding party's processional constitute participation. But that is not all she does. She also participates by personally investing in the ceremony through design consultations, hand-crafting arrangements, and adorning the event with art that celebrates the couple's union. Taken together, these acts easily qualify as participation in a wedding ceremony of the kind that the government cannot compel.

History confirms that the First Amendment outlaws compelled participation in ceremonies with religious significance. Objection to such government coercion was "well known to the framers of the Bill of Rights." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). In England, when many colonists fled, the law compelled attendance at religious services.[10] But the Framers repudiated that practice, and the U.S. Supreme Court's precedents stand firm against it.

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[10] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2144 (2003).

E.g., *Lee*, 505 U.S. at 587; *Masterpiece*, 138 S. Ct. at 1727.

As discussed above, Mrs. Stutzman's only alternative is to abandon her wedding art. But like compelled participation in religious ceremonies, forcing individuals to choose between their profession and adherence to their conscience is a historic means of religious persecution that the Framers rejected. They lived under British laws that excluded Catholics and others who did not take communion in the Church of England from holding civil, military, academic, or municipal office.[11] So "abhorrent" did the Framers consider this practice, *Torcaso v. Watkins*, 367 U.S. 488, 491, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961), that they adopted the Religious Test Clause, *see* U.S. Const. art. VI, cl. 3.

Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), does not bar Mrs. Stutzman's free-exercise claim, for at least three reasons. First, practices clearly at odds with our Nation's history and traditions are not subject to *Smith*'s neutrality and general-applicability rule. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171, 190, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) ("The contention that *Smith* forecloses recognition of" well-established historical precepts "rooted in the Religion Clauses has no merit"); *Trinity Lutheran*, 137 S. Ct. at 2021 n.2 (refuting the notion "that any application of a valid and neutral law of general applicability is necessarily constitutional

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[11] Br. of Christian Legal Soc'y et al. as Amici Curiae in Supp. of Pet'rs at 32-33, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4005662.

under the Free Exercise Clause"); *Masterpiece*, 138 S. Ct. at 1727 (noting that clergy cannot "be compelled to perform [a same-sex wedding] ceremony without denial of his or her right to the free exercise of religion").[12] That includes state action requiring attendance at and participation in a sacred event. Because the State demands that here, *Smith*'s rule does not govern.

Nor does *Smith*'s rule control when governments "impose special disabilities on the basis of religious views." *Smith*, 494 U.S. at 877; *accord Trinity Lutheran*, 137 S. Ct. at 2021. The State uniquely disadvantages religious wedding professionals who believe that marriage is an opposite-sex union and who are unable to participate in sacred events contradicting that belief. Unlike others, they are unwelcome in, and categorically driven from, the custom-wedding-art industry. As a result, *Smith* doesn't apply.

* * * * *

C. Forcing Mrs. Stutzman to create custom floral arrangements celebrating a same-sex wedding and to personally participate in that event does not satisfy strict scrutiny.

Strict scrutiny requires the State to show that forcing Mrs. Stutzman to create custom wedding arrangements celebrating same-sex weddings and to

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[12] *Cf. Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014) ("[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.") (quotation marks omitted).

personally participate in those ceremonies "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quotation marks omitted). Governments that have applied public-accommodation laws to infringe First Amendment liberties have repeatedly been unable to satisfy heightened forms of constitutional scrutiny. *See*, *e.g.*, *Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 659. Here, the State—which must justify a sweeping injunction that mandates physical attendance at and participation in sacred events—fares no better in this case.

* * * * *

Excerpts from Petition for a Writ of Certiorari filed by Arlene's Flowers, Inc. and Barronelle Stutzman in United States Supreme Court, Case No. 17-108, on July 14, 2017

* * * * *

STATEMENT OF THE CASE

II. Factual Background

* * * * *

Barronelle also regularly provides full wedding support to large weddings and long-time clients, which involves attending and facilitating the ceremony and reception, ensuring the flowers remain pristine throughout, and assisting with clean-up and removal thereafter. App.316-18a; 351-356a. That service is what Barronelle believed Robert would expect. App.319-20a. Barronelle determined that she could not attend and participate in a same-sex wedding ceremony without seriously violating her religious beliefs. App.319-21a.

* * * * *

III. The Washington Supreme Court's Ruling Expands a Circuit Conflict Regarding the Scope of the Free Exercise Clause.

* * * * *

A Free Exercise Clause that does not preclude the state from compelling Barronelle to attend, facilitate, and create art celebrating a religious wedding ceremony that her faith teaches is wrong "based on decent and honorable religious … premises" is not

worth the paper it is written on. *Obergefell*, 135 S. Ct. at 2602. In short, if *Smith* allows the state to order Barronelle "to go to" and facilitate a sacred same-sex wedding service conducted by an ordained minister "against her will," it should be overruled. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947); App.423a.

* * * * *

Excerpts from Brief of Appellants filed in Washington Supreme Court, Case No. 91615-2, on October 16, 2015

* * * * *

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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3. Whether applying state law to force a florist to create artistic expression for and to participate in a marriage that directly contradicts her sincerely held religious beliefs violates her right to the *free exercise of religion* under the Washington and United States Constitutions?

* * * * *

E. Mrs. Stutzman Referred Long-Time Customer Mr. Ingersoll To Nearby Florists For His Same-Sex Wedding.

Arlene's Flowers provides a range of wedding related services. CP 539-43 & 653-59. Not only do these services include floral design and delivery, but also full wedding support before, during, and after the wedding ceremony and reception. At the wedding venue, the floral designers ensure all flowers appear beautiful, perform touch-ups and changes, attend the ceremony, and clean-up afterwards. They also offer help the bridal party throughout the day. CP541-542; 656-657.

* * * * *

C. The Superior Court Violated Mrs. Stutzman's State And Federal Constitutional Rights To The Free Exercise Of Religion By Forcing Her To Create Floral Designs That Are Contrary To Her Religious Beliefs.

The state and federal constitutions protect the free exercise of religion.[23] This protection does not vary with the outcome of elections, *Barnette*, 319 U.S. at 638, and serves the vital purpose of ensuring the widest possible toleration of conflicting views. *United States v. Ballard*, 322 U.S. 78, 87 (1944). Here, neither the lower court nor Mr. Ingersoll or Mr. Freed questioned the sincerity of Mrs. Stutzman's religious beliefs. CP 1764, 2134, 2355. Rather, the only question is whether the government violates the free exercise of religion by requiring Mrs. Stutzman not only to design wedding arrangements in violation of her religious beliefs, but also provide services that include her presence at, and direct support of, a ceremony completely at odds with those beliefs.[24]

* * * * *

Third, requiring Mrs. Stutzman to attend same-sex marriage ceremonies, which is a part of the services she offers, would impermissibly force her to participate in a religious ceremony she views as

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[23] *See* Wash. Const., art. I, § 11; U.S. Const. amend. I.

[24] Arlene's Flower's free exercise rights are synonymous with Mrs. Stutzman's. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2768 (2014) ("protecting the free-exercise rights of [closely-held] corporations … protects the religious liberty of the humans who own and control those companies.").

theologically incorrect and spiritually harmful. CP 606-09. Mrs. Stutzman's view is that "wedding ceremonies [are] religious events where worship takes place." CP 539. At overtly religious weddings, like Mr. Ingersoll's and Mr. Freed's, where a minister officiates and the parties exchange rings, this factor becomes equally apparent. CP 1776, 1799, 1803-04.

Significantly, Mrs. Stutzman has an established practice of providing superior customer service, which includes actively facilitating and participating in a variety of ways at the ceremony and reception. CP 542. As one of Mrs. Stutzman's customer's explained, Mrs. Stutzman goes "above and beyond by talking to the guests, helping them feel comfortable, and even calming nervous parents." CP 657. The superior court's orders commanding Mrs. Stutzman to provide all of these "services … on the same terms to same-sex couples," CP 2420, and to participate in their marriages to the same degree—severely burdens her free exercise of religion.[27]

* * * * *

[27] If this case cannot be resolved on non-constitutional grounds, then the Court is obligated to address issues arising under the state constitution before addressing issues arising under the federal constitution. *See State v. Johnson*, 128 Wn. 2d 431, 443 & n.45, 909 P.2d 293 (1996). If the Court determines that the WLAD is ambiguous, then the constitutional analysis can serve as an interpretive aid. *See Davis v. Cox*, 183 Wn. 2d 269, 280, 351 P.3d 862 (2015).

No. 91615-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

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

Appellants.

ROBERT INGERSOLL and CURT FREED,

Respondents,

v.

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

Appellants.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION

This appeal concerns a fundamental question: May the State compel a person to use her artistic skills to celebrate a same-sex wedding when she has long-served the requesting customer and doing so would violate her religious belief that marriage is between a man and a woman?

Appellant Barronelle Stutzman, a 70-year-old grandmother, owns and operates Arlene's Flowers, Inc. ("Arlene's"), in Richland, Washington.[1]

[1] Barronelle Stutzman and Arlene's Flowers are at times referenced collectively as "Barronelle" because the lower court's ruling did not legally distinguish between the two.

Barronelle has regularly employed gay, lesbian, and bisexual employees and serves all members of the public. For nearly a decade, she has enjoyed creating artistic floral arrangements for Respondent Robert Ingersoll, including arrangements for Robert's partner, Curt Freed, for birthdays, anniversaries, and Valentine's Days. Barronelle considered Robert a friend.

A few months after Washington began recognizing same-sex marriage, Robert asked Barronelle about floral design work for his wedding. This was Barronelle's first same-sex marriage request. Barronelle could not fulfill Robert's request because her faith teaches that God created marriage between one man and one woman, and that she cannot participate in or use her artistic abilities to celebrate wedding ceremonies that conflict with her religious beliefs. Given their longstanding business relationship and friendship, Barronelle felt she had to personally tell Robert why she could not participate in this particular event. She also referred him to three other floral shops.

When the Attorney General learned of Barronelle's actions, he sued Arlene's and Barronelle under the Consumer Protection Act ("CPA") and WLAD. Robert and his partner, now spouse, Curt Freed later filed an additional suit under the CPA and WLAD, which this Court consolidated with the State's action for purposes of appeal.

Dismissing statutory, free exercise, free speech, and free association defenses, the Superior Court ruled for the State and private plaintiffs on summary

judgment. RA 259.[2] It then issued a final judgment for the State and private plaintiffs ordering Arlene's and Barronelle (1) to pay an as yet undetermined amount of damages, attorneys' fees, and costs to the private plaintiffs once all appeals are exhausted, (2) to pay $1,000 in fines and $1.00 in attorneys' fees and costs to the State, and (3) to create artistic floral arrangements for same-sex ceremonies and provide full wedding support if she continues to create and provide support for weddings between one man and one woman, and enjoining her from referring such requests to florists who have no objection. *See* Notices of Appeal (judgments attached thereto).

Direct review is warranted because the Superior Court's ruling has broad import, misconstrues the WLAD, and impairs the exercise of state and federal constitutional rights. The Court held that the State may force Barronelle to choose between engaging in compelled expression celebrating an event that violates her religious faith or foregoing the wedding design work she has loved for forty years. The Court also found that she faces personal liability for her decision. Such rulings present "fundamental and urgent issue[s] of broad public import which require[] prompt and ultimate determination" by this Court. RAP 4.2(a)(4).

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[2] The Superior Court's opinion and other key parts of the lower court record are reproduced in a separate and contemporaneously filed Record Appendix ("RA"). In addition, the full text of the statutes and constitutional provisions cited in this Statement of Grounds for Direct Review are reproduced in the Appendix to this brief.

II. NATURE OF THE CASE AND DECISION

Barronelle began working in Arlene's Flowers, originally owned by her mother, nearly 40 years ago. Since then, Barronelle has honed her artistic creativity and skill as a florist, purchasing the business from her mother in 1996. Robert was one of Barronelle's favorite clients because he commissioned unique and challenging pieces and they got along well together. When he was in the shop, Barronelle chatted with Robert about Curt. In March 2013, Robert came into the ship [sic] to talk with Barronelle about floral arrangements for his same-sex wedding ceremony.

When Barronelle designs arrangements for weddings, she invests significant creative thought and time and often provides full-wedding support for long-time customers, including set-up at the ceremony and assisting the wedding party at the event. She did not wish to offend Robert and would gladly provide fresh cut flowers, floral supplies, and pre-made arrangements for any event. But fulfilling Robert's request would have required Barronelle to violate her religious beliefs, which teach that God ordained marriage between a man and a woman and prevent her from using her artistic talents to celebrate any marriage defined differently.

Barronelle understood Robert wanted her to use her artistic talents and imagination to create custom arrangements and provide wedding support.[3] Robert

[3] The discussion was preliminary, so that the parties did not discuss the specific details for the arrangements. However, the

had already come into the store and told an employee he wanted to speak with Barronelle about his wedding. RA 11. When he returned, Barronelle met him in a corner of the store. After he brought up the wedding, Barronelle took his hand, and gently and respectfully told him that she could not "do his wedding" because of her relationship with Christ. RA 13. They continued to chat about his wedding plans. She referred him to other shops that she knew would provide beautiful work, one of which ended up arranging flowers for the wedding. Robert and Barronelle hugged and he left.

The Attorney General and later the private plaintiffs filed suit, alleging that Arlene's and Barronelle committed discrimination based on sexual orientation in a place of public accommodation in violation of RCW 49.60.030 and 49.60.215 and RCW 19.86.

The Superior Court granted summary judgment for the State and private plaintiffs, concluding that Barronelle's decision not to use her artistic ability to celebrate Robert's marriage ceremony constituted sexual orientation discrimination under the WLAD. RA 228-30. Although it recognized that Barronelle is in the business of providing "artistic expression," RA 238, the Court rejected any distinction between her

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Superior Court found no legal distinction between forcing Barronelle to provide full wedding support (custom design work and physical presence and personal assistance at the ceremony) and selling raw, unarranged product. RA 207-08; *see also* RA 11. The Court held it could order her to provide full wedding support. RA 230-31 n.19.

objection to being compelled to create expression related to a particular event and discrimination based on a person's sexual orientation, RA 230-31 n.19. The court ruled that even if such a distinction were valid, Barronelle nonetheless caused an "indirect discriminatory result" that violated the WLAD and CPA. RA 234.

The Superior Court observed an "insoluble" conflict between Barronelle's "religiously motivated conduct" and state public accommodations law. RA 238. But it rejected her state free exercise defense, holding that the substantial burden the State is imposing on her religious exercise satisfies strict scrutiny. It also rejected Barronelle's federal free exercise defense, holding the WLAD and CPA neutral and generally applicable, despite existing exemptions, and denying her hybrid rights defense, RA 244.

The Superior Court rejected Barronelle's free speech defense as well, ruling that there can never be a "free speech exception (be it creative, artistic, or otherwise) to . . . public accommodation[]" laws, regardless of whether they require the "expression of a message with which the speaker disagrees." RA 239. The Superior Court's rejection of the free association defense was equally categorical. RA 243.

III. ISSUES PRESENTED FOR REVIEW

1. Whether gladly providing custom floral designs for a client for nearly a decade and only referring the client for one event, a same-sex wedding, because of one's religious beliefs constitutes

sexual orientation discrimination in violation of the WLAD and CPA?

2. Whether the application of state public accommodation laws in this case violates Appellants' right to the free exercise of religion under article 1, section 11 of the Washington State Constitution and the First Amendment to the United States Constitution?

3. Whether the application of state public accommodation laws in this case violates Appellants' right to freedom of speech under article 1, section 5 of the Washington State Constitution and the First Amendment to the United States Constitution?

4. Whether the application of state public accommodation laws in this case violates Appellants' right to freedom of association under the First Amendment to the United States Constitution and article 1, section 5 of the Washington State Constitution?

5. Whether Barronelle should be subject to personal liability under the WLAD and CPA?

IV. GROUNDS FOR DIRECT REVIEW

This case implicates several issues of first impression following the State's recent recognition of same-sex marriage, including the proper interpretation and application of the State's public accommodation laws and Barronelle's constitutional rights to the free exercise of religion, free speech, and free association. These fundamental issues warrant

prompt and ultimate determination by this Court. *See* RAP 4.2(a)(4).

A. This Court Should Determine Whether Barronelle's Religious Objection To Creating Artistic Floral Design Work And Providing Full-Wedding Support For A Long-Standing Customer's Marriage Ceremony That Violates Her Religious Beliefs Constitutes Sexual Orientation Discrimination.

The WLAD prohibits discrimination in places of public accommodation based on sexual orientation, RCW 49.60.215(1), and deems violations of the WLAD to be *per se* violations of the CPA, RCW 49.60.030(3). *See also* RCW 49.60.030(1)(b) (banning "discrimination … because of . . . sexual orientation"). But this Court has never determined that prohibition's scope. *See* RCW 49.60.020 (providing WLAD "shall not be construed to endorse any specific belief, . . . or orientation").

Barronelle regularly serves gay and lesbian clients, and will continue to do so. She gladly served Robert for nearly a decade. Her only objection is to using her artistic abilities to create artistic custom arrangements celebrating a particular event, *i.e.*, a marriage ceremony that her religion teaches is contrary to God's plan and spiritually harmful to her. This religious objection extends to any marriage that is not between a man and a woman, not just those involving two persons of the same sex.

Nevertheless, the Superior Court, primarily relying on an opinion by the New Mexico Supreme Court, *see Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), ruled that religious objections to expressing a celebratory message about, and participating in, same-sex marriages constitutes sexual orientation discrimination, despite Barronelle having served gay and lesbian customers for years. RA 229-30, 234. And it did so despite the WLAD's clear language stating that it "shall not be construed to endorse any specific belief, practice, behavior, or orientation," RCW 49.60.020, and without taking into account that RCW 49.60.030(1) also establishes Barronelle's right to be free of religious discrimination, which is equally implicated here, as a broad "civil right" to be protected in more than just the statutorily enumerated contexts. *See Kumar v. Gate Gourmet Inc.*, 180 Wn. 2d 481, 489 (2014) ("creed" in the WLAD has long been equated with "religion"). Such important matters of state law, with evident impact on constitutional freedoms, should be determined by this Court.

B. This Court Should Determine Whether Barronelle's State And Federal Free Exercise Rights Are Violated By The Application Of The WLAD And CPA To Compel Her To Create Custom Floral Work Celebrating Marriages That Are Not Between One Man and One Woman.

Under the Washington Constitution, religious freedom is a "paramount right" with a scope "more expansive than [that] conferred by the Federal Constitution." *First Covenant Church of Seattle v.*

City of Seattle, 120 Wn.2d 203, 224 (1992) (quotation omitted). Article 1, section 11 "focuses both on belief and on conduct" and makes clear that courts' "most important duty" is to safeguard "religious liberty, and to see [it is] not narrowed or restricted because of some supposed emergent situation." *Id.* at 225 (quotation and alteration omitted).

Thus, Art. I, § 11 subjects all laws to strict scrutiny if they substantially burden a sincerely held religious belief. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn. 2d 633, 642 (2009). There is no dispute that Barronelle's objection to creating custom floral designs celebrating marriages that do not include one man and one woman is based on a sincerely held religious belief. RA 246. And the Superior Court rightly assumed that the WLAD imposes a substantial burden on Appellants' exercise of religion.[4] RA 247. Indeed, it is clearly a substantial burden to coerce Barronelle—under threat of personal and professional liability for fines and ruinous attorneys' fees awards—to use her heart, mind, and artistic abilities to design and create artistic expression—or otherwise participate in a wedding ceremony—when that event violates her sincerely held religious beliefs.

The Superior Court also rejected Barronelle's First Amendment free exercise defense because it regarded the WLAD and CPA as neutral and

[4] This burden is not limited to the wedding revenue itself. Weddings generate lifetime referrals. Moreover, the Court's order forces Barronelle to forego all weddings, the pinnacle of a florist's work, or surrender her religious beliefs. RA 6-10.

generally applicable laws and her hybrid rights claim as lacking a viable free speech or free association foundation. RA 244. But existing religious and secular exemptions to the WLAD and CPA for others, *see, e.g.*, RCW 26.04.010, 49.60.040, & 49.60.222, raise significant questions as to their neutrality and generally applicability. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993) (noting the "differential treatment of two religions" may be "an independent constitutional violation"); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (providing secular exemptions "while refusing religious exemptions . . . trigger[s] heightened scrutiny"). And significant free speech and free association case law substantiates her hybrid rights claim. *See infra* pp. 11-15.

Direct review is warranted to determine if applying the State's public accommodation laws to force Barronelle to create and design floral arrangements and provide full-wedding support for marriages that conflict with her religious beliefs violates her free exercise rights. The Superior Court wrongly concluded that the State had a compelling interest to force her to violate her sincerely held religious beliefs in this way. RA 248-50. But it failed to "look beyond broadly formulated interests" in promoting non-discrimination and "scrutinize the asserted harm of granting specific exemptions to particular religious claimants."[5] *Burwell v. Hobby*

[5] Between 2006 and 2013, only seventy complaints of sexual-orientation discrimination by a public accommodation were made to the Washington Human Rights Commission, none

Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) (quotation and alterations omitted). Nor did the Superior Court consider whether other means of furthering this goal exist "without imposing a substantial burden on [Appellants'] exercise of religion." *Id.* at 2780. Both questions are worthy of this Court's prompt resolution.

C. This Court Should Determine Whether Barronelle's State And Federal Free Speech Rights Are Violated By Applying The WLAD And CPA To Coerce Her Artistic Expression.

The Superior Court recognized that Barronelle engages in "artistic expression." RA 238. Nonetheless, it held that no potential free "speech exception (be it creative, artistic, or otherwise)" exists to state public accommodation laws even if they "require[] communication or expression of a message with which the speaker disagrees." RA 239. Not only does this categorical ruling address a question of broad public import, it conflicts with longstanding compelled-speech precedent.

As this Court has explained, "[f]ree speech is a fundamental right on its own as well as a keystone right enabling us to preserve all other rights." *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 536 (1997). "Freedom of speech includes the freedom not to speak or to have one's [resources] used to advocate ideas one opposes." *State v. Wash. Educ. Ass'n*, 156

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of which were substantiated. RA 138-165. Accommodating Barronelle's sincerely-held religious beliefs thus poses no threat to the State's interests.

Wn.2d 543, 557 (2006), *overruled on other grounds by Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

Free speech protections for artistic expression are "particularly strong" when the state compels expression, "for then the law's . . . reluctance to force private citizens to act augments its constitutionally based concern for the integrity of the artist." *Redgrave v. Bos. Symphony Orchestra, Inc.*, 855 F.2d 888, 905 (1st Cir. 1988) (internal citation omitted). Barronelle provided expert testimony confirming that her work is artistic expression. *See* RA 122-130. Yet the Superior Court found the artistic nature of her speech to be irrelevant here.

The Superior Court also disregarded controlling precedent applying the compelled speech doctrine in the public-accommodations context. Describing the application of public accommodation laws to expressive activities as "peculiar," the U.S. Supreme Court has explained that such laws may not "be used to produce thoughts and statements acceptable to some groups" because the freedom of speech "has no more certain antithesis." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572, 579 (1995).

Free speech protections bar the government from attempting to "produce speakers free of . . . biases, whose expressive conduct [are] at least neutral toward . . . particular [protected] classes." *Id.* at 579; *see Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 115 (1997) (Washington Constitution "more protective" of free speech than the First Amendment). Yet the Superior Court treated the

State's effort to produce speakers who are not only "neutral" toward non-traditional marriages, but supportive, as binding. This Court should resolve the conflict between Barronelle's free speech rights and the Superior Court's injunction requiring her to express a message about non-traditional marriages with which she disagrees.

D. This Court Should Determine Whether Barronelle's Freedom of Expressive Association Is Violated By Applying the WLAD and CPA To Force Her To Associate With Unwanted Views.

Implicit in the right of free speech is "a corresponding right to associate with others in pursuit of . . . political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quotations omitted). This freedom of expressive association protects individuals' right to join together "to express those views, and only those views, that [they] intend[] to express." *Id.* at 648. Consequently, it "presupposes a freedom not to associate" with those advocating different opinions or viewpoints. *Id.*

The freedom of expressive association applies when government commands an individual or group to associate with another who would "affect[] in a significant way [its] ability to advocate public or private viewpoints." *Id.* It "is crucial in preventing the majority from imposing its views on [individuals] or groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. The Superior Court ruled that free association did not apply here because

Barronelle's views in favor of traditional marriage are "[i]nvidious private discrimination." RA 243.

But constitutional protection has always been extended "to speech and conduct that society at large views as . . . politically incorrect." *State v. Williams*, 144 Wn.2d 197, 209 (2001). That some may deem associating only with couples celebrating marriages between a man and woman "invidious" is not a reason to force Barronelle to associate with those communicating other views. *See Dale*, 530 U.S. at 660.

The U.S. Supreme Court has ruled that public accommodations laws must give way when their enforcement would "materially interfere with the ideas" that an individual seeks to express. *Dale*, 530 U.S. at 657. Resolving the conflict between this binding caselaw and the Superior Court's ruling is worthy of this Court's direct review.

E. The Personal Liability Question Merits Direct Review.

The Superior Court imposed personal liability on Barronelle for actions she took as a corporate owner and officer despite the fact that the parties agreed she "maintained the corporate form," RA 196, and no evidence of fraud, misrepresentation, or intentional misconduct exists. *See Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552-53 (1979) (holding that when the "affairs of the corporation [are] separate . . . and no fraud or manifest injustice [exists,] the corporation's separate entity should be respected"). And *Brown v. Scott Paper Worldwide Co*, 143 Wn.2d 349, 361 (2001) does not require personal liability because this case

has nothing to do with employment discrimination and employer liability. This unprecedented ruling of broad public import warrants prompt review.

V. Conclusion

For these reasons, Arlene's Flowers and Barronelle Stutzman respectfully request that this Court grant direct review.

Respectfully submitted this the 1st day of June, 2015.

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Excerpts from Defendants' Objections to Plaintiffs' Proposed Judgment filed in State of Washington, Benton County Superior Court, Case No. 13-2-00871-5, on March 23, 2015

* * * * *

Defendants object to the following terms and language in Plaintiffs' proposed judgments:

* * * * *

- "…are permanently enjoined and restrained from directly or indirectly violating the Washington Law Against Discrimination, RCW ch. 49.60, and the Consumer Protection Act, RCW ch. 19.86, by discriminating against any person because of their sexual orientation. The terms of this permanent injunction include but are not limited to a prohibition against any disparate treatment in the offering or sale of goods, merchandise, or services to any person because of their sexual orientation, including but not limited to the offering or sale of goods, merchandise, or services to same-sex couples. All goods, merchandise, and services offered or sold by Defendants shall be offered and sold on the same terms to all customers without regard to sexual orientation. All goods, merchandise, and services offered and sold to opposite sex couples shall be offered and sold on the same terms to same-sex couples."

* * * * *

- The proposed language also fails to give Defendants fair notice. Defendants offer a wide range of goods and services to the public. Without more specificity about what goods and services Defendants must provide to same-sex couples, Defendants will not know what services they must provide to customers. For example, Defendants offer their full wedding support services for a fee, and these services include attending a wedding service and assisting the bride and groom at the service and reception. If the Court intends to include these services in its injunction, it should so specify. The Court should also clarify if the order would require Defendants to physically appear at a same-sex wedding ceremony and assist same-sex couples at the ceremony to wed because requiring these activities strikes at the heart of the free exercise of religion and compelled speech.

* * * * *

STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	NO. 13-2-00871-5 ANSWER, AFFIRMATIVE DEFENSES, AND THIRD-PARTY COMPLAINT
ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Third-Party Plaintiffs	

v.

ROBERT W. FERGUSON, in his official capacity as ATTORNEY GENERAL for the STATE OF WASHINGTON,

Third-Party Defendant.

Defendants, Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts, ("Arlene's Flowers") and Barronelle Stutzman hereby answer the State's complaint filed herein and assert Affirmative Defenses and as follows:

ANSWER

1.1 Paragraph 1.1 of Plaintiff's Complaint is DENIED.

1.2 Paragraph 1.2 of Plaintiff's Complaint is DENIED.

1.3 Paragraph 1.3 of Plaintiff's Complaint is DENIED as it relates to Defendant Barronelle Stutzman, individually. Defendants ADMIT that the facts stated in Plaintiff's Complaint took place in Benton County, Washington. All other inferences related to Paragraph 1.3 of Plaintiff's Complaint are DENIED.

1.4 Paragraph 1.4 of Plaintiff's Complaint is ADMITTED.

2.1 Paragraph 2.1 of Plaintiff's Complaint is ADMITTED.

2.2 Paragraph 2.2 of Plaintiff's Complaint is ADMITTED.

2.3 Paragraph 2.3 of Plaintiff's Complaint is not a statement of fact and, therefore, requires no response.

3.1 Paragraph 3.1 of Plaintiff's Complaint is DENIED as it relates to Barronelle Stutzman, individually. Otherwise, Paragraph 3.1 of Plaintiff's Complaint is ADMITTED.

3.2 Paragraph 3.2 of Plaintiff's Complaint is DENIED as it relates to Barronelle Stutzman, individually. Otherwise, Paragraph 3.2 of Plaintiff's Complaint is ADMITTED.

3.3 Paragraph 3.3 of Plaintiff's Complaint is DENIED as it relates to Barronelle Stutzman, individually. Otherwise, Paragraph 3.3 of Plaintiff's Complaint is ADMITTED.

4.1 Paragraph 4.1 of Plaintiff's Complaint is DENIED. Robert Ingersoll did not intend to simply purchase flowers. Robert Ingersoll intended to hire Arlene's Flowers to design and create floral arrangements to decorate and beautify his upcoming wedding.

4.2 Paragraph 4.2 of Plaintiff's Complaint is DENIED as it relates to Barronelle Stutzman, individually. Otherwise, Paragraph 4.2 of Plaintiff's Complaint is ADMITTED.

4.3 Paragraph 4.3 of Plaintiff's Complaint is DENIED. Robert Ingersoll did not state that he intended to simply purchase flowers. Robert Ingersoll intended to hire Arlene's Flowers to design and create floral arrangements to decorate and beautify his upcoming wedding.

4.4 Paragraph 4.4 of Plaintiff's Complaint is DENIED. Ms. Stutzman did not refuse to sell Mr. Ingersoll flowers. Ms. Stutzman informed Robert Ingersoll that her religious convictions precluded her from designing and creating floral arrangements to decorate a same-sex wedding.

4.5 Paragraph 4.5 of Plaintiff's Complaint is ADMITTED.

4.6 Paragraph 4.6 of Plaintiff's Complaint is DENIED to the extent that it alleges either Defendant refused to sell Mr. Ingersoll flowers. *See* answer to Plaintiff's Complaint at Paragraph 4.1. Otherwise, Paragraph 4.6 of Plaintiff's Complaint is ADMITTED.

5.1 Defendants admit and deny paragraphs 1.1 through 4.6 of Plaintiff's Complaint as indicated above.

5.2 Paragraph 5.2 of Plaintiff's Complaint is DENIED as it relates to Barronelle Stutzman,

individually. Otherwise, Paragraph 5.2 of Plaintiff's Complaint is ADMITTED.

5.3 Paragraph 5.3 of Plaintiff's Complaint is DENIED as it relates to Barronelle Stutzman, individually. Otherwise, Paragraph 5.3 of Plaintiff's Complaint is ADMITTED.

5.4 Paragraph 5.4 of Plaintiff's Complaint is DENIED to the extent that it alleges either Defendant refused to sell Mr. Ingersoll flowers. Paragraph 5.4 of Plaintiff's Complaint is also DENIED to the extent that the allegation relates to Barronelle Stutzman, individually. It is ADMITTED that Arlene's Flowers declined to design and create floral arrangements to decorate and beautify Mr. Ingersoll's upcoming wedding.

5.5 Paragraph 5.5 of Plaintiff's Complaint is DENIED. It is ADMITTED only that Arlene's Flowers declined to design and create floral arrangements to decorate and beautify a same-sex wedding, on the basis of the sincerely held religious convictions of the owners of Arlene's Flowers, concerning the meaning and significance of the institution of marriage.

5.6 Paragraph 5.6 of Plaintiff's Complaint is DENIED.

5.7 To the extent that Paragraph 5.7 of Plaintiff's Complaint calls for a legal conclusion, the allegation is neither admitted or denied. The statutes referenced in Paragraph 5.7 of Plaintiff's Complaint speak for themselves. Otherwise, Paragraph 5.7 of Plaintiff's Complaint is DENIED.

5.8 To the extent that Paragraph 5.8 of Plaintiff's Complaint calls for a legal conclusion, the allegation is neither admitted or denied. The statutes referenced in Paragraph 5.8 of Plaintiff's Complaint speak for themselves. Otherwise, Paragraph 5.8 of Plaintiff's Complaint is DENIED.

AFFIRMATIVE DEFENSES

6.1 Lack of Subject Matter Jurisdiction: The Superior Court does not have a statutory grant of original jurisdiction to hear complaints filed under RCW 49.60, with specific limited exceptions that do not apply in this case. Washington's law against discrimination under RCW 49.60.215 allows only (a) a private right of action in Superior Court, or (b) an administrative action brought by the Washington Human Rights Commission.

6.2 Lack of Standing: Standing under RCW 19.86 cannot be used by the State to apply to an alleged violation of RCW 49.60, without undermining the intent of the legislature's grant of enforcement power to the Washington Human Rights Commission. While adjudication of a violation under RCW 49.60 becomes a *per se* violation of RCW 19.86 once proved, it is improper for the State to prosecute a violation of RCW 49.60 claiming standing under RCW 19.86, without doing an "end run" around the enforcement provisions of RCW 49.60. Moreover, Defendants allege that the Washington Attorney General's Office does not have police power with respect to either RCW 49.60, or RCW 19.86. Therefore, the Washington Attorney General's Office has no authority to act on behalf of the State in any civil capacity absent a

complaint having been filed with the Attorney General's Office, or some other State agency. Upon information and belief, no complaint was ever filed in this case, with any agency of the State of Washington, including the Attorney General's Office. For these reasons, Plaintiff lacks standing to bring this action.

6.3 Failure to State a Claim Upon which Relief can be Granted: For the reasons articulated in paragraphs 6.1 and 6.2, above, Plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed under Civil Rule 12(b)(6).

6.4 Failure to Exhaust (or even initiate) Administrative Remedies.

6.5 Frustration of the Purpose of the enforcement provisions of RCW 49.60.

6.6 As applied preemption under the First Amendment to the United States Constitution.

6.7 As applied violation of Article I Section 11 of the Washington State Constitution.

6.8 Selective Enforcement in Violation of the Fourteenth Amendment to the United States Constitution.

6.9 Justification.

6.10 Failure to Join Indispensable Party: The only grant of original jurisdiction to the Superior Court for violation of RCW 49.60, although inapplicable here, articulates that a claim may be brought in Superior Court by the Washington Human

Rights Commission *via* the State Attorney General as counsel Therefore, it seems appropriate that any action brought by the State Attorney General to enforce the provisions of RCW 49.60 should be brought on behalf of the Washington Human Rights Commission.

THIRD-PARTY COMPLAINT

COME NOW Defendants and Third-Party Plaintiffs, and allege the following as claims against Third-Party Defendant, Robert W. Ferguson, in his official capacity as Attorney General for the State of Washington:

I. INTRODUCTION

Arlene's Flowers and its owner Barronelle Stutzman have long enjoyed warm relationships with the company's gay and lesbian patrons and employees, including the customer at issue in this case, Robert Ingersoll. Arlene's Flowers has never refused to sell flowers to someone simply because of sexual orientation. But because of Barronelle Stutzman's Christian faith, she cannot as a matter of conscience participate in or facilitate a same-sex wedding by using her creative skills to personally craft floral arrangements to decorate the wedding. The Attorney General's attempt to use state law to compel her and Arlene's Flowers to do so violates the state and federal constitutions.

II. PARTIES

7.1 Arlene's Flowers is a Washington corporation in good standing and licensed to do business in the State of Washington.

7.2 Barronelle Stutzman has been a floral designer in the Tri-Cities for 35 years. Ms. Stutzman was trained in floral design and artistry by respected designers, and she is recognized in her community for her skill in creating unique and expressive floral arrangements. She has owned Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts, for 16 years.

7.3 Robert W. Ferguson is the Washington State Attorney General. Attorney General Ferguson claims authority to pursue an action against individuals and businesses, including Arlene's Flowers and Barronelle Stutzman, for alleged violations of the WLAD, *via* the CPA. Attorney General Ferguson has made it clear in public statements that he will pursue litigation against all individuals and businesses that cannot, as a matter of conscience, facilitate, promote, or participate in same-sex weddings.

III. JURISDICTION AND VENUE

8.1 The Superior Court has jurisdiction under RCW 7.24.010 to issue declaratory relief.

8.2 The Superior Court has jurisdiction under RCW 7.40.010 to issue restraining orders and injunctions.

8.3 The Superior Court has concurrent jurisdiction to adjudicate violations of 42 U.S.C. § 1983.

8.4 Venue is appropriate in the Benton County Superior Court under RCW 4.12.020.

IV. STATEMENT OF FACTS

9.1 Barronelle Stutzman has been designing and creating floral arrangements for 35 years.

9.2 After initially working as a delivery person for a local flower shop, Barronelle realized that she had the artistic talent to become a floral designer. She trained under experienced floral designers to develop her natural skill. She also attended training programs and trade shows to further develop her creative skills in floral design and artistry.

9.3 With years of experience and natural artistic skills, Barronelle finds the greatest joy in her job by personally crafting unique floral designs that express her own creativity and style.

9.4 Barronelle has owned and operated Arlene's Flowers for 16 years. In that time, she has gained a reputation for being skilled in personally crafting distinct and expressive floral arrangements.

9.5 Some of the floral arrangements Barronelle creates for weddings include the bridal and attendant bouquets, pew markers, table centerpieces, topiaries, floral and foliage garlands, and corsages and boutonnieres.

9.6 Barronelle's floral arrangements for weddings are creative and unique expressions, personally designed specifically to celebrate each wedding.

9.7 Before designing floral arrangements for a wedding, Barronelle meets with the client for detailed discussions about the types of designs the couple is looking for. Together they review sample arrangements and talk about the particular details of the wedding and its venue. Barronelle then takes the information from the client to determine a plan for custom-designed floral arrangements for the wedding.

9.8 In her capacity as the owner and primary floral designer for Arlene's Flowers, Barronelle has been creating floral arrangements for Robert Ingersoll for nearly nine years. Barronelle enjoys the warm and cordial relationship that she has developed with Mr. Ingersoll. She also enjoys creating the challenging and unique floral arrangements Mr. Ingersoll requests.

9.10 Arlene's Flowers has sold Robert Ingersoll a variety of flowers and arrangements for a variety of occasions and sentiments throughout the past nine-years. Such occasions include, but are not limited to, birthdays, anniversaries, mother's day, Valentine's day, and private parties.

9.11 Barronelle has known that Robert Ingersoll identifies himself as gay throughout most of their nine year relationship. That fact never made

any difference in the way Mr. Ingersoll was treated as a customer.

9.12 Arlene's Flowers routinely designs floral arrangements for other gay and lesbian clientele. Arlene's Flowers has also had openly gay employees.

9.13 Washington only recently adopted a bill to alter the state's definition of marriage to include same-sex couples, in 2012. In her 35 years of personally crafting floral designs and arrangements for weddings, this is the first time that Barronelle has been asked to craft floral designs and arrangements for a same-sex wedding.

9.14 Approximately one week before March 1, 2013, an employee of Arlene's Flowers told Barronelle that Robert Ingersoll had come by the store to announce that he had become engaged. He also told the employee at the store that he intended for Arlene's Flowers to create the floral arrangements for his wedding, and that he would come back the next week to discuss the matter with Barronelle.

9.15 When Barronelle was given the message by her employee, she was distraught because she knew that this posed an insurmountable burden for her religious convictions. Barronelle voted against the passage of the same-sex marriage bill (R-74) in Washington. She spent time praying and discussing with her husband about how to kindly explain to Mr. Ingersoll that her convictions would not allow her to be involved in decorating a same-sex wedding.

9.16 In accord with her understanding of traditional Christian and Biblical values, Barronelle believes that marriage has religious significance apart from any civil significance, and that its religious significance is inherent in the institution of marriage. Barronelle believes, as the Bible teaches, that marriage is defined by God as a union of man and woman.

9.17 Barronelle knew that creating floral arrangements for Mr. Ingersoll's wedding would be contrary to her sincerely held religious convictions. She believed that doing so would compel her to express a message with her creativity that violates God's commands. She also believed that her creation of the floral arrangements would be perceived as an endorsement and celebration of same-sex marriage.

9.18 On or about March I, 2013, Robert Ingersoll came back to Arlene's Flowers as promised to ask Barronelle if she would create the designs and floral arrangements for his wedding. Emotional about her convictions and her decision to decline, Barronelle touched Robert's hand and kindly told him that she could not create the floral arrangements for his wedding because of her Christian faith. Robert Ingersoll noted that he was disappointed, but he said that he understood.

9.19 Before leaving, Mr. Ingersoll asked Barronelle for referrals to other florists, which Barronelle gladly gave. She gave him names of other local florists that he could use. After chatting for awhile, Barronelle and Mr. Ingersoll hugged each other, and he left the store.

9.20 Robert Ingersoll has received several offers from other florists to create the arrangements for his upcoming wedding.

9.21 A few weeks after Robert Ingersoll left Arlene's Flowers, Barronelle received a letter from the Attorney General's office, threatening legal sanctions for alleged violation of the WLAD and CPA.

9.22 The Attorney General originally learned about the situation between Arlene's Flowers and Robert Ingersoll, from social media, including Facebook.

9.23 Prior to the Attorney General's initial demand as stated in paragraph 9.21, above, neither Robert Ingersoll, nor his partner Curt Freed had ever filed a complaint with the Attorney General's office, or otherwise requested that the Attorney General intervene.

9.24 Upon information and belief, this case is the first time the Attorney General's office has attempted to use the CPA to pursue a purported violation of WLAD, absent action initiated by the Washington Human Rights Commission. The state agency established by law to enforce the WLAD is the Washington Human Rights Commission.

9.25 The Attorney General has filed suit against Arlene's Flowers and Barronelle and has indicated that he intends to continue to pursue what he believes to be violations of WLAD via the CPA.

9.26 Barronelle is being sued, and she fears future suits by the Attorney General, for following her conscience in her work, which has resulted in a chilling effect in the exercise of her constitutional rights and a chill in the exercise of constitutional rights by other small business owners in Washington.

9.27 If this Court fails to issue declaratory and injunctive relief, the Attorney General's action in this case will inevitably result in a chilling effect for the exercise of constitutional rights by other, similarly situated businesses in Washington.

V. CAUSES OF ACTION

10.1 The claims stated below arise under the Washington Constitution, the First and Fourteenth Amendments to the United States Constitution, the federal Civil Rights Act (42 U.S.C. § 1983), RCW 7.24, and RCW 7.40.

10.2 The Attorney General pursues actions under the color of state law. This lawsuit and his threat to pursue legal action against future exercises of conscience and expression has chilled the exercise of Barronelle's constitutional rights to act according to her conscience and religious belief and has similarly chilled the exercise of constitutional rights by other individuals and businesses in Washington.

10.3 The Attorney General, in his official capacity, is a person for purposes of 42 U.S.C. § 1983 in this suit for prospective injunctive and declaratory relief.

10.4 The Attorney General sued Barronelle and Arlene's Flowers for the purpose of sending a message to other similarly-situated business owners who have religious and conscience reasons for not participating in or facilitating a same-sex wedding.

10.5 The Attorney General is constitutionally precluded from compelling Barronelle to use her artistic skill to personally craft expressive floral arrangements for a same-sex wedding when it violates her religious beliefs and her conscience to do so, particularly when there are many other florists willing, ready, and able to create floral arrangements for same-sex weddings.

First Claim: Violation of Article 1, Section 11 of the State Constitution

11.1 The Washington State Constitution, in Article 1, Section 11, absolutely protects "freedom of conscience in all matters of religious sentiment, belief, and worship" and guarantees that "no one shall be molested or disturbed in person or property on account of religion."

11.2 The state constitution has broader protections for conscience and religious exercise than the federal constitution. A law that has a direct or indirect burden on the free exercise of religion must be justified by a compelling government interest. The state must also show that the means used to achieve the compelling interest are both necessary and the least restrictive available.

11.3 Barronelle has a sincere religious belief, which is shared with many other citizens of Washington State, that marriage is uniquely defined by God as a union of a man and a woman and that it would be a serious violation of God's precepts and her conscience to use her creative skill to personally decorate and thereby personally express a message in support of a wedding between two persons of the same sex.

11.4 The Attorney General's actions and public statements in this case are a use state power to coercively ban an important practice of religion by Barronelle and her business, Arlene's Flowers.

11.5 The state's effort here, via the Attorney General, to coerce participation in and facilitation of a same-sex wedding in violation of Barronelle's sincerely held religious convictions is subject to strict scrutiny by the Court. The Attorney General's actions and public statements use state power to coercively ban an important practice of religion by Barronelle and Arlene's Flowers.

11.6 The state has no compelling interest in forcing Barronelle to violate her conscience and act contrary to her faith by crafting personalized floral arrangements in support of a same-sex wedding.

11.7 In addition to the fact that the state has no compelling interest in this context, the means that the state has chosen to pursue its interest is not necessary or the least restrictive available to achieve the desired end.

11.8 The Attorney General's actions violate the rights of Barronelle and Arlene's Flowers under Article I, Section 11 of the Washington State Constitution.

Second Claim: Violation of the Free Exercise Clause of the First Amendment to the United States Constitution

12.1 Arlene's Flowers and Barronelle Stutzman have sincerely held religious beliefs that marriage is a union between a man and a woman, and that to participate in, decorate, or facilitate a same-sex wedding is a violation of her conscience and a violation of her religious belief and right to freely exercise her religious beliefs. The Attorney General's actions substantially burden the free exercise of religion by Barronelle and Arlene's Flowers.

12.2 The state's CPA and WLAD are not neutral or generally applicable because, among other things, they have exceptions that undermine the purposes of those Acts, and they are therefore subject to strict scrutiny.

12.3 Because the rights implicated in this case involve the free exercise of religion as well as free speech and free association, this case presents a hybrid claim that also requires application of strict scrutiny.

12.4 The state is selectively enforcing the CPA to enforce the WLAD against religious belief and practice, in violation of the First and Fourteenth

Amendments to the US Constitution, which also subjects the law's application to strict scrutiny.

12.5 The state does not have a compelling interest in forcing Barronelle and/or Arlene's Flowers to participate in, or to decorate a same-sex wedding.

12.6 In addition to the fact that the state has no compelling interest in this context, the means that the state has chosen to pursue its interest is not necessary or the least restrictive available to achieve the desired end.

12.7 The Attorney General's actions violate the rights of Barronelle and Arlene's Flowers under the Free Exercise Clause of the First Amendment to the United States Constitution.

Third Claim: Free Speech and Free Association Under the State and Federal Constitutions

13.1 Barronelle's creation of wedding floral arrangements and design artistry is expression.

13.2 The First Amendment to the federal constitution and Article I, Section 5 of the state constitution protect the right to speak, as well as the right not to speak.

13.3 The First Amendment and Article 1, Section 5 protect citizens from being compelled to speak or endorse messages with which they disagree.

13.4 The First Amendment and Article I, Section 5 also protect citizens from being compelled to

associate with activities and social, political, and ideological messages with which they disagree.

13.5 Requiring Arlene's Flowers and Barronelle to participate in or facilitate a same-sex wedding is subject to strict scrutiny under the First Amendment to the United States Constitution and Article 1, Section 5 of the Washington Constitution.

13.6 The state does not have a compelling interest in requiring Barronelle and Arlene's Flowers to use their artistic talent and expressive skills to promote a message with which they disagree, or to endorse a message with which they do not want to associate.

13.7 The Attorney General's actions violate the rights of Barronelle and Arlene's Flowers as guaranteed by the free speech and free association protections under the state and federal constitutions.

PRAYER FOR RELIEF

Arlene's Flowers and Barronelle Stutzman respectfully request that the Court:

14.1 Dismiss Plaintiffs Complaint in its entirety, and each cause of action therein, with prejudice.

14.2 Declare that it is unlawful for the Attorney General to compel Third-Party Plaintiffs and those similarly situated to participate in, or otherwise facilitate same-sex weddings, on the basis of conscience and/or freedom of speech.

14.3 Enjoin the Attorney General from compelling Third-Party Plaintiffs to create floral arrangements for a same-sex wedding.

14.4 Award reasonable attorneys' fees and litigation costs to Third-Party Plaintiffs, as allowed by statute, court rule, or in equity, as applicable.

14.5 Award such other relief that the Court deems just and equitable.

RESPECTFULLY SUBMITTED this 14th day of May, 2013.

GOURLEY | BRISTOL | HEMBREE

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STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	NO. 13-2-00953-3 ANSWER AND AFFIRMATIVE DEFENSES

Defendants, Arlene's Inc., d/b/a Arlene's Flowers and Gifts, ("Arlene's Flowers") and Barronelle Stutzman hereby answer Plaintiffs' complaint and assert Affirmative Defenses and as follows:

PARTIES

1. Defendants were aware that Robert Ingersoll identified as gay and that he was in a relationship. As for the remainder of the corresponding paragraph, Defendants lack information and knowledge sufficient to form a belief as to the truth of the allegations, and therefore deny.

2. Defendants admit the allegations in the corresponding paragraph.

3. Defendants admit the allegations in the corresponding paragraph.

JURISDICTION AND VENUE

4. Defendants admit that the events underlying the lawsuit occurred at the Arlene's Flowers store in Richland, Washington. Defendants deny the remaining allegations in the corresponding paragraph.

5. Defendants admit the allegation in corresponding paragraph.

6. Defendants admit the allegation in the corresponding paragraph.

7. Defendants admit allegation in the corresponding paragraph.

FACTS

8. Defendants lack information and knowledge sufficient to form a belief as to the truth of the allegations in the corresponding paragraph, and therefore deny.

9. Defendants lack information and knowledge sufficient to form a belief as to the truth of the allegations in the corresponding paragraph, and therefore deny.

10. Defendants lack information and knowledge sufficient to form a belief as to the truth of the allegations in the corresponding paragraph, and therefore deny.

11. Defendants admit that Mr. Ingersoll has been a customer of Arlene's Flowers for many years. Defendants lack information and knowledge sufficient to form a belief as to the truth of the remaining allegations in the corresponding paragraph, and therefore deny.

12. Defendants admit that Arlene's Flowers sold Robert Ingersoll flowers for a variety of occasions, including those listed in the corresponding paragraph. Defendants lack information and knowledge sufficient to form a belief as to the truth of the allegations concerning the amount of money spent, and whether Mr. Freed also purchased flowers at Arlene's, and therefore deny those allegations.

13. Defendants admit that Robert Ingersoll became engaged. Defendants lack information and

knowledge sufficient to form a belief as to the truth of the remaining allegations in the corresponding paragraph, and therefore deny.

14. Defendants deny that Plaintiffs simply planned to buy flowers. Defendants admit that Mr. Ingersoll asked Arlene's Flowers to create floral arrangements for his wedding, and that Arlene's Flowers advertises and sells flowers for a variety of occasions, including weddings. Defendants admit that Arlene's Flowers advertises on the Internet and maintains a web page. The phrase "large portion of the general public" is too vague for Defendants to admit or deny and Defendants therefore deny. Defendants admit the remainder of the allegations in the corresponding paragraph.

15. Defendants admit that Mr. Ingersoll went to Arlene's Flowers on March 1, 2013, where he asked Barronelle Stutzman if Arlene's Flowers would create the floral arrangements for his wedding. Ms. Stutzman knew that Mr. Ingersoll identified himself as gay and that he was in a relationship. Defendants lack information and knowledge sufficient to form a belief as to the truth of the remaining allegations in the corresponding paragraph, and therefore deny.

16. Defendants deny the allegations in the corresponding paragraph.

17. Defendants deny the allegation of the corresponding paragraph in that Arlene's Flowers does not generally just sell flowers for weddings, absent designing and creating the floral

arrangements for weddings. Defendants deny any other interpretation of the corresponding paragraph.

18. Defendants lack information and knowledge sufficient to form a belief as to the truth of the allegations in the corresponding paragraph, and therefore deny.

FIRST CAUSE OF ACTION

19. To the extent that the corresponding paragraph calls for a legal conclusion, the allegation is neither admitted nor denied. The statute referenced speaks for itself. Otherwise, Defendants deny the allegations in the corresponding paragraph.

20. To the extent that the corresponding paragraph calls for a legal conclusion, the allegation is neither admitted nor denied. The statutes referenced speak for themselves. Otherwise, Defendants deny the allegations in the corresponding paragraph.

21. The phrase "providing all the supplies necessary for wedding floral arrangements" is too vague for Defendants to admit or deny. Otherwise, Defendants admit the allegation in the corresponding paragraph.

22. The allegation in the corresponding paragraph calls for a legal conclusion, which is neither admitted nor denied. Washington's law against discrimination speaks for itself. All other interpretations of the corresponding paragraph are denied.

23. The allegation in the corresponding paragraph calls for a legal conclusion, which is neither admitted nor denied. Washington's law against discrimination speaks for itself. All other interpretations of the corresponding paragraph are denied.

24. Defendants deny the allegations in the corresponding paragraph.

25. To the extent that the corresponding paragraph calls for a legal conclusion, the allegation is neither admitted nor denied. Otherwise, Defendants deny the allegations in the corresponding paragraph.

26. Defendants deny the allegations in the corresponding paragraph.

SECOND CAUSE OF ACTION

27. Defendants deny the allegations in the corresponding paragraph.

28. Defendants deny the allegations in the corresponding paragraph.

THIRD CAUSE OF ACTION

29. To the extent that the corresponding paragraph calls for a legal conclusion, the allegation is neither admitted nor denied. The statutes referenced speak for themselves. Otherwise, Defendants deny the allegations in the corresponding paragraph.

30. Defendants deny the allegations in the corresponding paragraph.

AFFIRMATIVE DEFENSES

31. Failure to State a Claim Upon which Relief can be Granted: Plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed under Civil Rule 12(b)(6).

32. Preemption: As applied violation of the Free Speech, Free Exercise, and Free Association provisions of the First Amendment to the United States Constitution.

33. Justification: As applied violation of Article I Section 11 and Article 1, Section 5 of the Washington State Constitution.

34. Failure to Mitigate Damages.

35. Estoppel: Plaintiff's actions and omission negate the relief requested.

36. Waiver and Ratification.

37. Lack of Standing in regard to Plaintiff Curt Freed.

38. Frustration of Purpose in regard to application of Washington Law Against Discrimination and Consumer Protection Act.

39. Prior pending action. Washington law against discrimination is designed to be enforced by state agency or, alternatively, provide a private right

of action. The intent of the statute is frustrated by allowing more than one set of statutory penalties to apply to a single alleged statutory violation. The intent of the statute at issue is to exact penalties as stated within the statute, and not as a compound penalty and compound remedy for multiple parties.

40. Lack of Causation and Damages: Defendant's alleged actions and omissions did not result in Plaintiff's alleged damages, if any. Plaintiffs have not suffered any damages.

41. No Statutory Violation: Defendants' alleged acts and omissions did not violate any statute. Defendants did not discriminate in the provision of goods or services on the basis of any customer's sexual orientation. Rather, Defendant Arlene's Flowers declined to provide goods and services for a particular type of event, based on a religious objection to participation in the event, and the subject matter thereof.

PRAYER FOR RELIEF

42. Defendants request that Plaintiffs' Complaint be dismissed in its entirety, with prejudice.

43. Defendants request an award of reasonable attorney fees and litigation costs as allowed by statute, court rule, or in equity, as appropriate.

44. Defendants request any other and further relief the court deems just and equitable.

RESPECTFULLY SUBMITTED this 17th day of May, 2013.

JD Bristol, WSBA no. 29820
jdb@snocolaw.com
Dale Schowengerdt, *pro hac vice*
Alliance Defending Freedom
15100 N. 90th Street
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(480) 444-0020
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Attorneys for Defendants
and Third-Party Plaintiffs

STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	NO. 13-2-00871-5 COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF UNDER THE CONSUMER PROTECTION ACT

The Plaintiff, State of Washington, by and through its attorneys Robert W. Ferguson, Attorney General, and Sarah A. Shifley, Assistant Attorney General, brings this action against the Defendants named below. The State alleges the following on information and belief:

I. JURISDICTION AND VENUE

1.1 This Complaint is filed and these proceedings are instituted under the provisions of the Unfair Business Practices—Consumer Protection Act, RCW 19.86.

1.2 The Attorney General is authorized to commence this action pursuant to RCW 19.86.080 and RCW 19.86.140.

1.3 The violations alleged in this Complaint were committed in whole or in part in Benton County, Washington, by the Defendants named herein.

1.4 Venue is proper m Benton County pursuant to RCW 4.12.020 and RCW 4.12.025.

II. DEFENDANTS

2.1 Defendant Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts ("Arlene's Flowers") is a Washington for-profit corporation engaged in the sale of goods and services, including flowers for weddings.

2.2 Defendant Barronelle Stutzman is the president, owner, and operator of Arlene's Flowers.

2.3 Defendants Arlene's Flowers and Barronelle Stutzman are collectively referred to as "Defendants."

III. NATURE OF TRADE AND COMMERCE

3.1 Defendants sell goods and services through a retail store located at 1177 Lee Blvd, Richland, WA 99352 and have been at all times relevant to this action in competition with others engaged in similar activities in the state of Washington.

3.2 The goods and services sold by the Defendants include flowers for weddings and various related goods and services, including: wedding consultation, on-sight decorating and decorations, and rental of Candelabras, Topiaries, Columns, Arches, etc.

3.3 Defendants advertise their goods and services, including flowers for weddings, to the general public through various media including: signage outside of their retail store, websites, and a Facebook page.

IV. FACTS

4.1 On Friday, March 1, 2013, during regular business hours, Robert Ingersoll entered Defendants' retail store with the intention of purchasing flowers for his upcoming wedding.

4.2 Mr. Ingersoll had previously purchased goods and services from Defendants.

4.3 Mr. Ingersoll informed Ms. Stutzman that he wanted to purchase flowers for his wedding.

4.4 In response, Ms. Stutzman stated to Mr. Ingersoll that she could not provide flowers for his

wedding "because of [her] relationship with Jesus Christ." Ms. Stutzman refused to sell flowers to Mr. Ingersoll.

4.5 At the time, Ms. Stutzman was aware that Mr. Ingersoll is gay and that his upcoming wedding for which he was seeking to purchase flowers would be to another man.

4.6 After Ms. Stutzman refused to sell him flowers, Mr. Ingersoll left the store. Mr. Ingersoll did not make any other purchases.

V. CAUSE OF ACTION

5.1 Plaintiff realleges paragraphs 1.1 through 4.6 and incorporates them herein as if set forth in full.

5.2 Defendants' retail business is a facility, open to the public, for the sale of goods and services. Defendants advertise their goods and services, including flowers for weddings, to the general public.

5.3 Defendants customarily sell flowers for weddings.

5.4 On March 1, 2013, Defendants refused to sell flowers to Mr. Ingersoll for his wedding.

5.5 The fact that Mr. Ingersoll, a gay man, was seeking to purchase flowers for his wedding to another man was a substantial factor in Defendants' refusal to sell him flowers.

5.6 Defendants discriminated against Mr. Ingersoll based on his sexual orientation by refusing to sell him flowers for his wedding.

5.7 Pursuant to RCW 49.60.030(3), violations of Washington's Law Against Discrimination are per se violations of the Consumer Protection Act, RCW 19.86. The conduct described herein constitutes discrimination on the basis of sexual orientation in a place of public accommodation in violation of RCW 49.60.215 and therefore constitutes a violation of the Consumer Protection Act, RCW 19.86.

5.8 Notwithstanding RCW 49.60.030(3), the conduct described herein constitutes an unfair practice in trade or commerce and an unfair method of competition that is contrary to the public interest and therefore violates RCW 19.86.020 of the Consumer Protection Act.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, State of Washington, prays for relief as follows:

6.1 That the Court adjudge and decree that Defendants have engaged in the conduct complained of herein.

6.2 That the Court adjudge and decree that the conduct complained of in paragraphs 4.1 through 5.8 constitutes an unfair or deceptive act or practice in trade or commerce in violation of the Consumer Protection Act, RCW 19.86.

6.3 That the Court issue a permanent injunction enjoining and restraining Defendants, and their representatives, successors, assigns, officers, agents, servants, employees, and all other persons acting or claiming to act for, on behalf of, or in active concert or participation with Defendants, from continuing or engaging in the unlawful conduct complained of herein.

6.4 That the Court assess penalties, pursuant to RCW 19.86.140, of two-thousand dollars ($2,000) per violation against Defendants for each and every violation of RCW 19.86.020 caused by the conduct complained of herein.

6.5 That the Court make such orders pursuant to RCW 19.86.080 to provide that plaintiff, State of Washington, have and recover from Defendants the costs of this action, including reasonable attorney's fees.

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6.6 For such other relief as the Court may deem just and proper.

DATED this 9th day of April, 2013.

ROBERT W. FERGUSON
Attorney General

WSBA # 32901
FOR

SARAH A. SHIFLEY, WSBA #39394
Assistant Attorney General
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF WASHINGTON
FOR BENTON COUNTY

ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS; and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00953-3 **COMPLAINT**

Washington law prohibits business owners operating places of public accommodation from discriminating against customers based on factors such as race, religion, sex, and sexual orientation. The law prohibits such discrimination because it "threatens not only the rights" of Washington residents, "but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. This is a case about protecting people in Washington from

unlawful discrimination on the basis of sexual orientation.

Plaintiffs Robert Ingersoll and Curt Freed, for their causes of action against Defendant, allege as follows:

I. PARTIES

1. Plaintiffs Robert Ingersoll and Curt Freed are gay men. They have been in a romantic relationship since 2004 and are engaged to marry each other. Plaintiffs reside together in Kennewick, Washington.

2. Defendant Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts ("Arlene's Flowers") is a for-profit Washington corporation that sells goods and services to the general public from its retail store at 1177 Lee Boulevard, Richland, Washington.

3. Defendant Barronelle Stutzman is the president, owner, and operator of Arlene's Flowers. On information and belief, Ms. Stutzman resides in Eltopia, Washington.

II. JURISDICTION AND VENUE

4. This action arises from Ms. Stutzman's refusal, as owner of Arlene's Flowers, to sell flowers to Plaintiffs on the basis of their sexual orientation. The incident occurred at the Arlene's Flowers store in Richland, Washington.

5. This Court has personal jurisdiction over all parties.

6. This Court has subject matter jurisdiction over all causes of action.

7. Benton County is the proper venue for this action.

III. FACTS

8. Mr. Freed was born and raised in the Tri-Cities. He has been on the faculty of Columbia Basin College since 1994 and is currently Vice President of Instruction.

9. Mr. Ingersoll was raised in Colorado and New Mexico. He moved to Washington in the late 1990s. Mr. Ingersoll currently works as the Operations Manager at Goodwill Industries in Richland, Washington.

10. Mr. Freed and Mr. Ingersoll met in September 2004. They hiked through the Yakima area for their first several dates, and they began to fall in love. The two men have been a couple ever since.

11. Mr. Freed has been a customer of Arlene's Flowers his entire adult life. Mr. Ingersoll also became a customer after he met Mr. Freed.

12. Mr. Freed and Mr. Ingersoll estimate that they have spent thousands of dollars at Arlene's Flowers. Among other purchases, they frequently bought flowers for each other for birthdays, anniversaries, and Valentine's Days. They have also purchased flowers for family members and friends, and recently for their housewarming party.

13. After sharing their lives with each other for eight years, Mr. Freed proposed to Mr. Ingersoll in December 2012 and they plan to marry in September 2013.

14. Mr. Freed and Mr. Ingersoll planned to buy flowers for their wedding from Arlene's Flowers, which regularly advertises and sells flowers for all occasions, including weddings. Arlene's Flowers advertises on the Internet and maintains a web page. Arlene's Flowers serves a large portion of the general public, delivering flowers and gifts to customers located in Richland, Kennewick, Pasco, Finley, Burbank, and Benton City. Arlene's Flowers also serves funeral homes, hospitals, churches, and nursing homes in the Tri-Cities.

15. Mr. Ingersoll went to Arlene's Flowers on March 1, 2013, where he spoke with Ms. Stutzman about placing an order for the event. Ms. Stutzman knew at that time that Mr. Ingersoll is gay and is in a long-term, romantic, and committed relationship with Mr. Freed.

16. Ms. Stutzman refused to sell flowers to Mr. Ingersoll and Mr. Freed for their wedding because they are a gay couple.

17. Arlene's Flowers has sold, and continues to sell, wedding flowers to heterosexual couples.

18. Mr. Freed and Mr. Ingersoll have not secured a florist for their wedding.

IV. FIRST CAUSE OF ACTION: UNLAWFUL DISCRIMINATION

19. The Washington Law Against Discrimination prohibits discrimination based on sexual orientation and preserves "[t]he right to be free from discrimination." RCW 49.60.030(1).

20. "The right to be free from discrimination" includes "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." *Id.*; *accord* RCW 49.60.215. The statute applies to any person or entity who offers "the sale of goods, merchandise, services, or personal property, or for the rendering of personal services…." RCW 49.60.040(2).

21. Arlene's Flowers sells goods, merchandise, services, and renders personal services – including providing all the supplies and services necessary for wedding floral arrangements.

22. Arlene's Flowers' commercial practices are subject to the Washington Law Against Discrimination.

23. Arlene's Flowers is a place of public accommodation under the Washington Law Against Discrimination.

24. On March 1, 2013, the Defendants refused to sell flowers to Mr. Ingersoll and Mr. Freed for their wedding solely on the basis of their sexual orientation.

25. The Defendants have deprived the plaintiffs of the "accommodations, advantages, facilities, or privileges of [a] place of public resort, accommodation, assemblage, or amusement," in violation of RCW 49.60.030(1)(b) and RCW 49.60.215.

26. Pursuant to RCW 49.60.030 and RCW 49.60.215, the Defendants' refusal to sell goods and services constitutes unlawful discrimination against the Plaintiffs on the basis of their sexual orientation.

V. SECOND CAUSE OF ACTION: AIDING A VIOLATION OF THE WASHINGTON LAW AGAINST DISCRIMINATION

27. Because she refused to sell flowers to Mr. Ingersoll and Mr. Freed for their wedding, defendant Barronelle Stutzman aided Arlene's Flowers in violating the Washington Law Against Discrimination by discriminating against the Plaintiffs on the basis of their sexual orientation.

28. Ms. Stutzman violated RCW 49.60.220 by so aiding Arlene's Flowers.

VI. THIRD CAUSE OF ACTION: VIOLATION OF THE CONSUMER PROTECTION ACT

29. Unfair acts or practices in the conduct of trade or commerce are unlawful violations of the Washington Consumer Protection Act. RCW 19.86.020. Violations of Washington's Law Against Discrimination are per se violations of the Consumer Protection Act. RCW 49.60.030(3)

30. The defendants' actions constitute an unfair act or practice in trade or commerce and an unfair method of competition that runs contrary to the public interest of Washington State. The defendants' actions injured the plaintiffs, and the defendants are therefore liable under the Washington Consumer Protection Act.

VII. PRAYER FOR RELIEF

THEREFORE, Plaintiffs demand:

1. That the Defendants and all other persons acting or claiming to act for, on behalf of, or in active concert or participation with the Defendants, be enjoined from engaging in the unlawful discriminatory conduct described above, which violates RCW ch. 49.60 and RCW ch. 19.86;

2. A judgment against the Defendants, jointly and severally, pursuant to RCW 49.60.030(2) and RCW 19.86.090, for damages in an amount to be proved at trial, including trebling as permitted by statute.

3. An award of reasonable attorneys' fees and costs that the plaintiffs incur in connection with this action; and

4. Such other relief as the Court deems just and proper.

DATED this 18th day of April, 2013.

HILLIS CLARK MARTIN &PETERSON P.S.

By 

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Consumer Protection Division
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March 28, 2013

VIA FEDERAL EXPRESS

Barronelle Stutzman
Arlene's Flowers, Inc.
1177 Lee Blvd.
Richland, WA 99352

Re: Violation of the Consumer Protection Act

Dear Ms. Stutzman:

I am an Assistant Attorney General in the Washington State Attorney General's Office. It has come to the attention of our Office that on or about March 1, 2013, you refused to sell floral arrangements to a same-sex couple for their wedding because of the couple's sexual orientation. Refusing to provide goods or services on the basis of a consumer's or consumers' sexual orientation is an unfair practice under Washington's Law Against Discrimination, RCW 49.60, and therefore violates the Washington Consumer

Protection Act, RCW 19.86. Our Office is charged with enforcing the Consumer Protection Act.

In an effort to resolve this matter and to avoid further action by our Office, up to and including the filing of a lawsuit, we would like to provide you the opportunity to agree that, in the future, you will not discriminate against consumers based on their sexual orientation. This means that as a seller of goods or services, you will not refuse to sell floral arrangements for same-sex weddings if you sell floral arrangements for opposite-sex weddings.

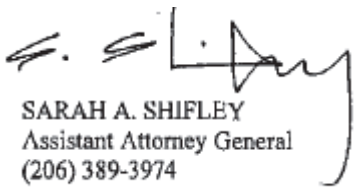
I have enclosed an Assurance of Discontinuance (AOD) reflecting such an agreement for your review. If you agree to enter into this AOD, you agree not to discriminate against consumers based on their sexual orientation in the future. Please note that the AOD is not an admission by you that you violated the law and it does not include monetary payments or attorneys' fees, both of which are provided for under the Consumer Protection Act. However, if you fail to abide by the terms of the AOD after signing it, you could be subject to potential legal action including injunctions, civil penalties of up to $2000 per violation, and attorneys' fees and costs.

It is our preference to resolve this matter in a fair, measured, and appropriate manner. We believe that the enclosed AOD does this. I would appreciate hearing from you no later than close of business, April 8, 2013, regarding your willingness to sign the AOD. I would also be happy to discuss this matter with you further, either in person or by telephone; if this is something you would like to do, please let me know

and I will find a convenient time that works for both of us. However, if you do not respond or if you are not willing to sign the AOD, we will be required to pursue more formal options to address this matter.

You, or your counsel, may reach me by email at sarah.shifley@atg.wa.gov, or by telephone at the number listed below. Thank you in advance for your prompt attention to this letter.

Sincerely,



SARAH A. SHIFLEY
Assistant Attorney General
(206) 389-3974

SAS:lra

Enclosure

STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

In the matter of: ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN Respondents.	NO. ASSURANCE OF DISCONTINUANCE

The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General, and Sarah A. Shifley, Assistant Attorney General, files this Assurance of Discontinuance pursuant to RCW 19.86.100.

I. INVESTIGATION

1.1 The Attorney General initiated an investigation into the business practices of Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts, and its president, owner, and operator, Barronelle Stutzman (collectively, "Respondents").

1.2 Respondents are engaged in the sale of goods or services in the state of Washington, including the sale of floral arrangements for weddings and other occasions, through a retail store located at 1177 Lee Blvd., Richland, WA 99352.

1.3 On or about March I, 2013, Respondents refused to sell floral arrangements to a same-sex couple for their wedding because of the couple's sexual orientation.

II. ASSURANCE OF DISCONTINUANCE

2.1 The Attorney General deems and the Respondents acknowledge that the following constitutes an unfair or deceptive act or practice in violation of the Consumer Protection Act, RCW 19.86:

> Discriminating against any person by directly or indirectly refusing to sell or provide any goods or services – including flowers, floral arrangements, or other floral services for a wedding – because of the person's sexual orientation in violation of Washington's Law Against Discrimination, RCW 49.60.

2.2 Respondents agree that they will not engage in the above-identified unfair or deceptive act or practice. Respondents further agree that they will not permit their agents, employees, or any other people acting on their behalf, to engage in the above-identified act or practice.

2.3 This Assurance of Discontinuance shall not be considered an admission of violation for any purposes. However, failure to comply with this Assurance of Discontinuance shall be *prima facie* evidence of a violation of RCW 19.86.020 and may result in imposition by the Court of injunctions and civil penalties of up to $2,000 per violation, attorneys'

fees and costs, and any other relief that the Court may order pursuant to RCW 19.86.

2.4 Nothing in this Assurance of Discontinuance shall be construed so as to limit or bar any other person or entity from pursuing available legal remedies against the Respondents.

DATED this ____ day of _____, 2013.

Approved for entry:

_____
JUDGE/COURT COMMISSIONER

Presented by:	Agreed to, Approved for Entry, Notice of Presentation Waived:
ROBERT W. FERGUSON Attorney General	
_____ SARAH A. SHIFLEY, WSBA #39394 Assistant Attorney General Attorneys for State of Washington	_____ BARRONELLE STUTZMAN Respondent
	_____ ARLENE'S FLOWERS, INC. By: _____ Respondent

SUPERIOR COURT OF WASHINGTON
COUNTY OF BENTON

STATE OF WASHINGTON, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 (Consolidated with 13-2-00953-3) DECLARATION OF BARRONELLE STUTZMAN IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON PERSONAL CAPACITY CLAIMS
ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS; and BARRONELLE STUTZMAN, Defendants.	

1. My name is Barronelle Stutzman, and I am one of the named Defendants in this case. I am also the President of Arlene's Flowers, Inc. (DBA Arlene's Flowers and Gifts), the other named Defendant in this case.

2. I am over the age of eighteen, competent to testify, and have personal knowledge of the information contained within this affidavit.

3. My mother, Dorothy ("Dotty") Ryan, incorporated Arlene's Flowers, Inc., in 1989. Attached as Exhibit A is a true and correct copy of the Certificate of Incorporation.

4. I bought Arlene's Flowers, Inc., from my mother in 2000. Attached as Exhibit B is a true and correct copy of the stock purchase agreement.

5. Arlene's Flowers, Inc., is a closely held company. I am the president of Arlene's Flowers, Inc., and my husband, Darold Stutzman, is the Secretary and Treasurer. Attached as Exhibit C are the Bylaws of Arelene's Flowers, Inc, as well as the corporate minutes for the previous year.

6. We have always strived to comply with Washington law in maintaining our corporate status, and we have a corporate attorney who has assisted us in ensuring that we followed state requirements and best practices.

7. As I have previously testified, Robert Ingersoll has been one of my customers for approximately nine years, during which time I

designed and created floral arrangements for him for many different occasions.

8. I have enjoyed a warm and friendly relationship with Robert, knowing that he identified as gay and was in a relationship with Curt Freed.

9. The fact that Robert identifies as gay and was in a same-sex relationship never lessened his dignity or worth in my eyes, or the respect I gave to him as a longtime customer and friend.

10. In March 2012, Robert came to my shop to see if I would design the flowers for his wedding to Curt.

11. I had designed and created flowers for Robert and Curt in the past, but I believe that doing the flowers for any same-sex wedding would give the impression that I endorsed same-sex marriage

12. My deeply held religious belief is that God defines marriage as a spiritual union between one man and one woman.

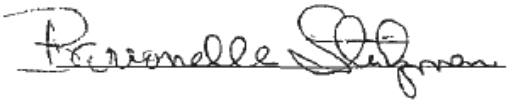
13. As a matter of faith, I cannot go against God's definition of marriage or assist others in doing so.

14. I believe that participation in same-sex ceremonies and using my artistic talent to design and create the floral arrangements that are an important component of weddings would go against God's definition of marriage.

15. Agreeing to do flowers for any marriage ceremony not between one man and one woman would violate my conscience and my deeply held religious beliefs. When I told Robert that I could not do his flowers, I never imagined that the state could consider that sexual orientation discrimination in violation of the law. As noted, I have always served gay and lesbian customers without any problem.

16. The reason I could not create floral arrangements for Robert's wedding ceremony to Curt freed was because of my biblical belief that marriage is a union of a man and a woman. I was declining participation in an event. I did not decline because of Robert and Curt's sexual orientation.

I declare under the penalty of perjury that the foregoing answers to Plaintiffs' discovery requests are true and correct to the best of my knowledge. Executed October 25, 2013.



Barronelle Stutzman

STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 (consolidated with 13-2-00953-3) DECLARATION OF BARRONELLE STUTZMAN
ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	

I, Barronelle Stutzman, declare the following under oath and penalty of perjury of the laws of the State of Washington.

I. BACKGROUND

1. My name is Barronelle Stutzman, and I am one of the named Plaintiffs in this case. I am also the sole owner and operator of Arlene's Flowers, Inc., the other named Plaintiff in this case.

2. I am over the age of eighteen, competent to testify, and have personal knowledge of the information contained within this declaration.

3. I am a Christian and I ascribe to the teaching on Biblical principles provided by the Southern Baptist tradition.

4. My faith is a part of every aspect of my life. I believe that God requires me to apply my faith in all that I do whether that is in my personal life or my business.

5. I have been involved in the floral industry for approximately 37 years and have been sharpening my floral design skills ever since I started in this industry.

6. In the mid-1970s, I began learning the art of floral design and creation at my mother's floral shop in Connell. I also began practicing the art of floral design and developed my own individual floral design style. I have continued to hone my skills ever since.

7. Early in my floral design career, my mom and several other floral design artists who worked for my mother trained me in the artistic and creative components of floral design and creation, for which I had a natural aptitude.

8. In 1982, I became the manager of Arlene's Flowers, which was owned by my mother. In 1989, my mom was diagnosed with Alzheimer's. So I purchased the business from my mom in 1996 and became the owner of Arlene's Flowers, where continue to design floral arrangements, Pictures of Arlene's Flowers' storefront and one of its vans are attached to this declaration as Exhibit 2.

II. FLORAL DESIGN

9. Floral design is an art of precision as well as creativity. Floral design requires the skills to take raw material – such as flowers, plants, containers, adornments ("baby's breath") and other elements – and then arrange them in an artistic fashion until the arrangement conveys the right message and mood for the customer or for the occasion. I try to use these artistic skills and my floral design business, which I view as gifts from God, to honor God.

10. As floral artists, we often incorporate and harmonize the meaning and symbolism of flowers, a particular color, or specific element or adornment in a floral arrangement to assign with conveying the intended message.

11. In addition to the experience and observation of my mother and of other floral design artists, I also took various classes to hone these skills.

12. I enjoy teaching the art of floral design and creation to others. Photographs of some floral arrangements that I have designed and arranged are attached at Exhibit 1. This exhibit contains pictures of just raw flowers (pages 1, 3-6, 10-11, 15-17) and also of arrangements I have created (the other pages).

13. Over the last 40 years, I have further developed my own design style and sharpened my skills to execute my designs.

14. All floral design artists have their own unique style. However, all of the designers at Arlene's Flowers use a style and form consistent with mine so that there is a consistent quality in the arrangements that we produce. This consistency is intentional. I supervise the design and creation of most floral arrangements, and view most of them before they leave the store.

15. Clients who want custom designed arrangements almost always give me discretion and allow me to exercise my artistic judgment to determine how to fit their needs and how to convey a mood and message through the requested arrangements.

A. Customer Relationships and Floral Design

16. My religious beliefs require that I love and respect my neighbor, which includes my customers and my employees regardless of race, religion, sex, or sexual orientation. According to my religious beliefs, I am no better than anyone else. I believe that I cannot judge anyone but everyone, including me, has sinned and needs the forgiveness God offers in his son, Jesus.

17. While working under my mother and other florists, I learned that it is important to develop close relationships with clients. It is part of our business goal to be our customers' "personal florist for life", not just a florist for one occasion. This goal is reflected in the written policies of Arlene's Flowers. A true and correct copy of one of Arlene's business policies is attached as Exhibit 12 to the declaration of Kristen Waggoner, Bates page 43.

18. I have developed close relationships with many of my customers, especially my regular customers, which I very much enjoy. We have some customers that we have served as long as 30 years. These regular customers have allowed us to serve them by creating flowers for and participating in their significant life events like Valentine's Day, Easter, Mother's Day, engagements, anniversaries, birthdays, weddings, baptisms, births, proms, work promotions, and relative's funerals. These customers also allow Arlene's to create arrangements to share in expressing simple, everyday thoughts like I love you.

I enjoy serving these costumers as well as the children and grandchildren of these customers.

19. Many of these customers are very different from each other and very different from me. I am proud to serve customers and develop relationships with customers of all different backgrounds and beliefs.

20. Indeed, I have loved and respected these customers and my employees regardless of their race, religion sex, or sexual orientation.

21. For example, I knew one of my former employees named David Mulkey was gay. And we always got along, frequently chitchatting at work about various topics. Just as I enjoy interacting with others to convey God's love, I enjoyed interacting with David in a loving and respectful way.

22. I design my arrangements so that they convey an expressive message, especially if it is for an event like a wedding ceremony. The close relationships I have with clients allow me to better design an arrangement and convey a message through flowers that meets their needs for the occasion.

B. Wedding Floral Design

23. Designing arrangements for weddings is one of the most rewarding aspects of my job because I enjoy celebrating the marriage with the couple. There is no greater delight than to see a bride cry with joy the first time she encounters the beauty of her wedding flowers. I also enjoy the great challenge of

designing arrangements for weddings, a process which requires a level of training, artistic skill, and experience not required by other arrangements and events. In addition, I view wedding ceremonies as religious events where worship takes place. So weddings carry religious significance for me.

24. In addition to the personal reward, I also receive referrals to my business from guests who see Arlene's work at weddings they attend. These wedding guests admire the style and design of floral arrangements Arlene's creates, ask who designed the arrangements, and are told Arlene's did. Many of these referred customers want the same type of beautiful and creative arrangements they saw at the wedding they attended.

25. It is also very satisfying to work on weddings because it gives me an opportunity to participate in marriage, which I believe God designed. My religious beliefs about marriage are an important component of my faith.

26. Few other projects require me to pour myself so completely into a project as wedding flower design and creation. I love using my artistic skill in floral design and creation to celebrate and commemorate important events in the lives of my customers.

27. It is also very rewarding to get to know an engaged couple, celebrate their marriage with them, and share my creations with them, their friends, and their family. Because designing and creating wedding arrangements requires such an intense personal investment, I feel very connected to the wedding

ceremony itself, especially since my creations adorn the ceremony and often define the style and colors of the wedding.

28. As long as the client is available and willing, I typically like to meet with my wedding clients several times. In those meetings, I spend a great deal of time (sometimes hours) getting to know the couple, their background, their aspirations, and their personal tastes. One of the great joys of my job is learning about the engaged couple and celebrating with them. My goal is to bring elements of their relationship and personalities into the floral designs for their wedding.

29. I have books with pictures of wedding designs in my consultation room, which I share with wedding customers as a conversation starter. It is very rare that a customer picks arrangements as they appear in the wedding books. And even if they select an arrangement from a picture, the arrangements never look exactly the same as I add my personal style and creativity as a floral artist.

30. In designing the plan for the wedding, I must consider what flowers are in season, the location of the wedding, the colors or other elements chosen by the couple, and the overall mood and feeling that will be expressed. I must do this with the personalities of the couple in mind, and within their budget.

31. After I learn about the couple and their ceremony, I begin designing the arrangements for the wedding ceremony and reception. This typically includes a wide variety of arrangements, including

boutonnieres and corsages, pew markers, altar arrangements, window and other adornments, table center pieces, and of course the bridal bouquet. Part of the challenge of weddings is designing the different arrangements, each requiring different elements, in a way that compliments to the overall floral design, the engaged couple's personality, the wedding location, and the mood desired for the wedding. Wedding arrangements typically contain multiple elements, like different flowers or accompanying adornments.

32. Almost every customer who requests wedding flowers from Arlene's wants me or one of the other Arlene's floral designers to custom arrange these flowers into an arrangement designed specifically for them and their wedding.

33. In addition to designing the arrangements, Arlene's will also deliver flowers to the wedding venue in Arlene's vans and offer to provide full wedding support. When offering to provide full wedding support, Arlene's floral designers offer to help before, during, and after the wedding ceremony to ensure that all flowers are beautiful throughout the ceremony and reception. Often this might require touching up an arrangements, changing out flowers if needed, attending the ceremony, and assisting with the clean-up and removal of floral arrangements afterwards.

34. When I attend wedding ceremonies for Arlene's, I also participate in rituals that occur at the wedding. For example, l have frequently stood for the bride, clapped in appreciation of the married couple,

and prayed along with the officiant as the officiant leads the wedding attendees.

35. Arlene's often provides its full wedding support for large weddings or for long-time customers that we have developed relationships with at the shop.

36. When providing full wedding support, my employees and I are at the disposal of the Bride and we want to help any way that we can. I have greeted guests as they arrived to the ceremony, helped with entertaining children as the wedding party prepared for the ceremony, styled hair for the wedding party, and even assisted with cleaning the wedding party's attire. Because my floral business depends on personal relationships and participation in customers' significant life events, I want my customers' weddings to run as smoothly as possible and for customers to enjoy their weddings as much as possible. When my customers enjoy their weddings, they enjoy what Arlene's provided for their weddings. So Arlene's floral designers do whatever it takes to make the entire ceremony an enjoyable and successful event.

37. When providing full wedding support, I also help the wedding party and encourage them as they prepare and meet their needs in any way that I can. For example, one bride confided in me that she was experiencing some doubts about getting married and I was able to counsel her and offer my advice, which included some of my personal beliefs about marriage. I was honored that she trusted me with her feelings,

and it made watching her take her vows even more special.

38. Because of the emotional investment required by most weddings, I enjoy forming a unique personal bond with my clients, and feel very connected to their wedding ceremony. That connection to the ceremony is heightened because of my religious beliefs about the importance of marriage, and the significance it has in Scripture. It is so significant, that the Bible compares marriage to the relationship between Jesus and His Church.

III. ROBERT INGERSOLL

39. Rob was my customer for over nine years. I had a particular fondness for him, and we developed a very warm friendship. We would often chat as he browsed the shop and placed orders. And as a natural outgrowth of my religious beliefs to love and respect my neighbors and customers, I loved and respected Rob. I genuinely like Rob and that has not changed.

40. Not only do I enjoy Rob personally, I also enjoy the way he challenges me to design and create arrangements that are unique and expressive. Rob would always ask for me when he came into the shop for various occasions. Rob and I would typically pick out a vase together, and then he would hand me the vase and tell me to "do my thing." He was particularly fond of unusual and creative arrangements. His requests for arrangements always challenged me to do my best work, utilizing the artistic skill that I've spent honing. I loved working with Rob. I learned Rob identified as gay because we would frequently talk

about his relationship to his partner, Curt Freed, when Rob came into the store. I tried to show interest in Rob's relationship to Curt, just as I try to show interest in the lives of my other customers. But my knowledge that Rob was gay made no difference in how I viewed him as a friend and a customer.

41. I have had several gay, lesbian, and bisexual employees and customers over the years, and that fact made no difference in how I viewed them as employees, customers, and friends.

42. Sometime in the last week of February 2012, I learned from one of my employees that Rob had come to the store and asked to see me to talk about wedding flowers for his upcoming wedding to Curt. I wasn't at the store at the time Rob came in.

43. Upon learning this information from my employee, I believed Rob wanted me to provide full wedding support for his wedding because he always requested complex and intricate work from me, we were friends, and he was a long time customer, the type of customer who typically asks Arlene's for full wedding support. As a result, I believed Rob was asking me to provide each of the following: to custom design his floral arrangements, to deliver these arrangements in Arlene's delivery vans to his wedding, to attend his wedding ceremony and participate in the rituals at this ceremony, to perform touch-ups to the flowers at the ceremony, to clean up after the ceremony, and to potentially provide other assistance at the ceremony like I often do, such as greeting guests, encouraging the bride and groom, helping organize other elements of the ceremony, and

working with the wedding party. Rob never told me anything to contradict my belief. For example, Rob never told me he wanted to purchase raw sticks and twigs for his wedding.

44. In all my years of working in the floral industry, I had never received a request to participate in a same-sex wedding ceremony. And to my knowledge, Rob's request was the first of its kind for Arlene's Flowers or for me.

45. I believe that God created two distinct genders, male and female, in His image and the Bible defines marriage as a union of one man and one woman as ordained by God. This is also the doctrine of my Southern Baptist faith.

46. My faith requires that I not participate in events that are dishonoring to God, including using my artistic talents and my business to participate in such events.

47. Participating in a same-sex wedding ceremony in the way Rob requested would violate my conscience, and I would be held accountable to the Lord for this.

48. I also believe that if I participated in a same-sex wedding ceremony in the way Rob requested, others would see my actions as an endorsement of the ceremony.

49. After consulting with my husband, I decided that I could not in good conscience participate

in Rob's wedding due to my religious beliefs about marriage.

50. This decision was not made because of Rob's sexual orientation, but based solely on my beliefs about marriage as a union between a man and a woman. For this reason, Arlene's and I will decline to participate in any wedding ceremony not between one man and one woman, regardless of the sexual orientation to those marrying. Likewise, Arlene's and I will participate in a wedding ceremony between one man and one woman, regardless of the sexual orientation of those marrying.

51. I struggled with what to say to Rob and how to explain that I would not be able to participate in Rob's wedding as I did not want to hurt my friend's feelings.

52. When Rob returned to the store to speak with me, we initially chitchatted a bit about various subjects. Rob then said he was getting married and he wanted me to create arrangements for his wedding. I tried to respond in the most sensitive way I knew how. I gently took his hand, looked him in the eye, and told him that I could not do his wedding because of my relationship with Jesus Christ. I also happily gave him the names of three other florists in town who might be able to participate in his ceremony. I hoped Rob would be able to find a florist who could do what I could not in good conscience do.

53. When I referred Rob to the other florists, I thought I was declining to have Arlene's provide its full wedding support for Rob's wedding.

54. Rob said he understood, and we went on to talk about his plans for the wedding. We hugged, and he left the store. Based on our conversation, it was my belief and hope that he would remain my friend and customer.

55. I understand from my attorneys and several court documents that Rob and Curt have indicated that they only wanted the raw materials such as twigs, branches, or vases to design their own arrangements. The request for raw materials was not something Rob and I discussed. If Rob had requested the raw materials, I would have gladly provided them.

56. After coming to the decision that I would not be able to participate in Rob's same-sex ceremony, I realized that other customers may ask Arlene's to participate in same-sex weddings like Rob did. So I determined that Arlene's policy going forward would be not to take same-sex weddings, meaning Arlene's would not provide full wedding support for same-sex wedding ceremonies and would refer such requests to other florists.

57. Rob's request is the only same-sex wedding request Arlene's received before this lawsuit began. And Rob's request is the only same-sex wedding request Arlene's declined before this lawsuit began. As a result, between the time of Rob's request and the initiation of this lawsuit, I did not have to decline a request to participate in a same-sex wedding ceremony different from Rob's request. So during that time and before, I did not have to confront the issue whether Arlene's would provide any services for

same-sex wedding ceremonies except a request for Arlene's full wedding support.

58. But Arlene's will sell flowers and create custom arrangements for homosexual and bisexual customers just as it always has. Arlene's will also sell flowers for same-sex wedding ceremonies as well. But neither I nor my employees under my direction will use our imagination and artistic skill to intimately participate in a same-sex wedding ceremony because of my religious beliefs.

59. After Rob's partner posted his thoughts concerning my decision on Facebook, our store began to receive many hate-filled phone calls, emails, and Facebook messages. Some of these messages contained explicit threats against our safety, including a threat to burn down the shop. I did not respond to any of these negative messages or engage in any way with those making threats. Because of these, we used the help of a private security firm to keep my employees and me safe. A few of those emails are attached as Exhibit 10 to the declaration of Kristen Waggoner.

60. Shortly after the news media publicized my decision to refer Rob to another florist because of my religious beliefs, the Attorney General's office sent me a letter, demanding that I agree to participate in same-sex ceremonies or face court action and penalties and sign an assurance stating the same. Because of my faith, I could not agree to the Attorney General's demands and did not sign the assurance.

61. I cannot participate in same-sex wedding ceremonies without violating my religious beliefs, and

I cannot allow my business and employees to participate in same-sex wedding ceremonies on Arlene's behalf without violating my religious beliefs. This is true even if I am fined or ordered to do so.

62. If necessary, I would close my business and stop participating in all weddings before violating my religious beliefs.

63. Indeed, after this lawsuit against me and my business began, Arlene's instituted a policy of turning down requests to provide service or support for any wedding, except weddings for my immediate family members. Arlene's will not provide any floral wedding services or support for any customers besides my immediate family until this case ends.

64. After this lawsuit began, Arlene's has received requests to provide services and support for same-sex wedding ceremonies and opposite-sex wedding ceremonies. But Arlene's declined all these requests, including the requests about same-sex wedding ceremonies, because of Arlene's interim policy – initiated because of and after this lawsuit – to decline wedding requests from anyone besides my immediate family.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 8, 2014.

Barronelle Stutzman

STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 (consolidated with 13-2-00953-3) EXPERT DECLARATION OF JENNIFER ROBBINS

ROBERT INGERSOLL and CURT FREED,

Plaintiffs,

v.

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

Defendants.

I, JENNIFER ROBBINS, am over the age of 18 and competent to testify, and declare the following under oath and penalty of perjury of the laws of the State of Washington that:

I. BACKGROUND

1. I am a floral design artist and have served as the owner/operator of J Robbins Florist, a floral design studio located in Tacoma, Washington, for nearly twenty years. I am trained and educated in floristry. Part of my floral education included the history of floral arrangements. My educational and professional experience is summarized on the curriculum vitae attached to this declaration. See Exhibit 1.

2. Over the last nineteen years, I have designed and created flowers for over 1,500 weddings and other events of all budgets and types.

3. One of the primary focuses of my business is designing and creating floral arrangements for wedding ceremonies in the Seattle area.

4. I also collaborate with local floral design artists to design and create floral arrangements for large-scale weddings in Napa, California.

5. On November 18, 2013, I visited Mrs. Barronelle Stutzman at her business, Arlene's Flowers and Gifts, in Richland, Washington.

6. I spoke with Ms. Stutzman about the process she uses in designing and creating flower arrangements for wedding ceremonies, including her initial meeting with clients, cost estimates, subsequent client meetings, floral design and creation, and the process used to fulfill orders and place arrangements for a wedding ceremony.

7. I also viewed pictures of floral arrangements designed and created by Ms. Stutzman, which are attached as Exhibit 1 to the Declaration of Barronelle Stutzman.

8. In addition, I reviewed Ms. Stutzman's deposition testimony in (1) *State of Washington vs. Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts, and Barronelle Stutzman*, Superior Court of the State of Washington for Benton County, Cause No. 13-2-00871-5; and (2) *Robert Ingersoll and Curt Freed*

vs. Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts; and Barronelle Stutzman, Superior Court of the State of Washington for Benton County, Cause No. 13-2-00953-3.

II. ASSUMPTIONS

For purposes of rendering my opinions, I have assumed the following facts to be true:

9. Barronelle Stutzman is a Christian in the Southern Baptist tradition.

10. Ms. Stutzman is a florist, and she owns and works at a florist shop that she operates as a business for profit.

11. The florist shop is separately incorporated as Arlene's Flowers, Inc.

12. The shop has had other florist-employees who do not necessarily share Ms. Stutzman's faith, some of whom have been openly gay.

13. Robert Ingersoll and Curt Freed have been customers of the shop for some period of time.

14. Ms. Stuzman arranged flowers for Messrs. Ingersoll and Freed knowing that they identified as gay.

15. On March 1, 2013, Mr. Ingersoll went to the shop for the purpose of asking Ms. Stutzman to design and create floral arrangements for a same-sex marriage ceremony between him and Mr. Freed. Ms.

Stutzman told him that she could not do it because of her relationship with Jesus Christ.

16. Ms. Stutzman declined to create the floral arrangements for the ceremony, based on her religious belief that marriage should only be between one man and one woman.

17. Ms. Stutzman and her shop design and create floral arrangements without regard for the religious or philosophical beliefs of wedding participants, as long as the marriage is between one man and one woman.

18. Ms. Stutzman is willing merely to sell flowers off the shelf to anyone, even with the knowledge that the flowers would be used for a same-sex marriage ceremony. However, she cannot *design and create* floral arrangements for a same-sex marriage ceremony because she believes that would be contributing her creative and artistic talents to support something she believes to be a sin against God.

19. As of 2006, the law of the State of Washington prohibits discrimination in public accommodations based on sexual orientation. As of 2012, the law of the State of Washington defines marriage as a civil contract between any two persons, who have each attained the age of eighteen years, and who are otherwise capable, without regard for their sex. The State of Washington and private plaintiffs contend that a florist shop is a public accommodation, and that declining to create floral arrangements for use at a same-sex marriage ceremony violates the

legal prohibition of discrimination based on sexual orientation.

III. SUMMARY OF OPINIONS

20. Floral design artists must include many creative, artistic and expressive components when creating floral arrangements. The artist must focus on a variety of components including, but not limited to, design, harmony, unity, balance, proportion, scale, focal point, rhythm, line, form, color, space, depth, texture, and fragrance. See Exhibit 2, pp. 30-97; Exhibit 3, pp. 20-37. The artist also often incorporates the meaning and symbolism of particular flowers in the arrangements that she creates, which is especially the case with wedding flower arrangements. The artist harmonizes all of these components when creating a beautiful custom arrangement. See Exhibit 4. No floral design artist will balance these components in precisely the same manner and clients leave these components largely to the discretion of the floral design artist.

21. While some florists may not approach their work as art, a floral design artist like Barronelle Stutzman strives to incorporate artistic creativity, originality, custom tailoring, and attention to detail in designing and creating floral arrangements. Formal study and training is not necessary to design such original and expressive work. A floral design artist displays a high level of talent, emotional and intellectual investment, and skill. Based on my experience and observations, Mrs. Stutzman demonstrates this level of commitment, intention, and skill when she designs arrangements.

22. As with most artistic mediums, each floral designer has his or her own style, which expresses itself in the final creation. Not only does Mrs. Stutzman express her own unique artistic style, but Arlene's Flowers does as well. The shop strives for a consistency of design and high level of quality. Mrs. Stutzman confirms that either she or the store manager review completed wedding floral arrangements to ensure they meet her expectations. This unique style is evident from my observations and review of the shop's work.

23. Florists like Mrs. Stutzman approach their work as an art form. The art of floral design and arrangement dates back to ancient times. See Exhibit 5. Floral artists incorporate components of previous eras and cultures. These components offer a great variety of creativity and expression thanks to the evolution of floral design from other cultures. Similarly, floral design artists like Mrs. Stutzman use fabrics, pictures, and a variety of other objects to generate ideas and inspire them to create arrangements.

24. Wedding floral arrangements require floral design artists to become even more personally involved in the creative process and final design. A floral design artist often forms a personal bond with clients. This typically occurs through several personal meetings which results in a floral designer's feeling emotionally invested not only in the final floral creation, but the ceremony. To serve the clients well, the artist must learn about the couple's individual and shared history, their desires, and the particular wedding dreams and details. The florist attempts to

create a mood or feeling consistent with the personalities of the couple and to create arrangements that express the unity of the couple. While the designer may use books or pictures as a conversation starter with the couple, she uses their preferences only as a guide. Ultimately, the arrangements not only reflect the mood and look desired by the couple, but also the personal style and creativity of the artist. The florist's personal style and creativity is recognizable from the designs and arrangements that she creates, and it is common for those who view the arrangements, especially wedding arrangements, to ask who created them.

25. The artist's emotional and creative investment in the wedding arrangements has nothing to do with the size or number of the arrangements. What many clients perceive as the simplest of arrangements, with very few elements, usually requires the artist to engage in even more intricate planning and creativity than larger arrangements. Regardless of size, weddings require an artist to meaningfully engage in the creative process. The floral design artist makes hundreds of decisions that factor in shapes, shades, colors, stem height, geometry, flower and foliage availability, physical location of the arrangements, and the overall presentation of every vase, flower, and filler, and how all separate arrangements – from the boutonnieres, pew markers, table centers, and bouquet – express their unique elements appropriate for their purpose.

26. Based on my conversations with and observations of Mrs. Stutzman, I concluded that Mrs. Stutzman brings intention, passion, and creativity to

the arrangements she creates as a floral design artist, that she approaches weddings arrangements as an artist with a particular sense of responsibility and joy because of the important role she has in helping to beautify and formalize the wedding ceremony, and that any custom design wedding arrangement created by Mrs. Stutzman necessarily requires her to become emotionally and creatively invested in that arrangement and ceremony and the final creation reflects Mrs. Stutzman's style and expression.

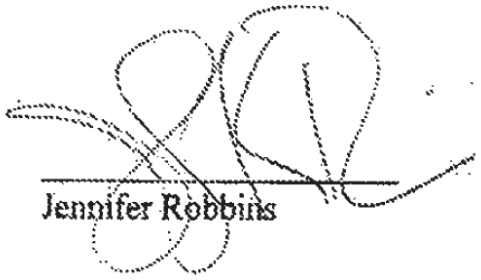
IV. EXHIBITS

The following documents are attached as exhibits to this declaration:

Exhibit 1	Curriculum Vitae of Jennifer Robbins
Exhibit 2	Norah T. Hunters, THE ART OF FLORAL DESIGN (Delmar, 2nd ed. 2000)
Exhibit 3	Gary L. McDaniel, FLORAL DESIGN & ARRANGEMENT (Prentice Hall, 3rd. Ed. 1996).
Exhibit 4	THE LANGUAGE OF POETRY OF FLOWERS (DeWolfe, Fiske & Co.)
Exhibit 5	Julie Berrall, A HISTORY OF FLOWER ARRANGEMENT (The Saint Austin Press, 1978).

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 8, 2014.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiff,

v.

ROBERT W. FERGUSON, in his official capacity as ATTORNEY GENERAL for the STATE OF WASHINGTON,

Defendant.

13-2-00871-5
~~No. 13-cv-05094-RMP~~

DECLARATION OF DAVID MULKEY

DECLARATION OF DAVID MULKEY

I, DAVID MULKEY, declare the following under oath and penalty of perjury of the laws of the State of Washington.

I. BACKGROUND

1.1 I am a floral design artist and have served in the floral industry for 6 years.

1.2 I have designed and created flowers for thousands of customers and for all budgets and types. I have worked in large and small floral shops.

1.3 I worked as a floral design artist at Arlene's Flowers from approximately April 2012 to August 2012. I now live in San Francisco, California, where I am a floral design artist. The primary focus of my business is designing and creating floral arrangements for high-end clientele and events.

1.4 Because I have family and friends in the Tri-Cities area, I have returned to the area periodically since then. When I'm in the area for an extended period, Arlene's Flowers has asked me to work in the store particularly during holiday seasons. Most recently, I worked at Arlene's for about five months in the summer of 2012.

1.5 While I disagree with Barronelle Stutzman's position on same-sex marriage and I wish she had not referred the same-sex wedding to another shop, I had a very positive experience working at Arlene's Flowers. It was a pleasant, friendly work environment. She was a great boss and I enjoyed my time there. I never witnessed her make unkind, demeaning, derogatory, rude, or insulting comments to any employees or customers. Nor did I hear other employees or customers make those kind of comments in the shop. I never felt like Barronelle treated me

differently because of my sexual orientation even though she was very religious. She made no secret of the fact that she believed her shop was "God's business" and that she kept the shop closed on Sundays because it was "God's day." Regardless of her religious views (or perhaps because of them), Barronelle is a very kind woman. In fact, she's one of the nicest women I've ever met.

1.6 Arlene's Flowers is a fairly standard shop for a small town. Many of the orders require the floral designer to follow the FTD instructions and do not involve custom design work. For standard work, FTD provides pictures and instructions detailing what kind and how many flowers to use. Arlene's Flowers did receive some custom design orders while I was there.

1.7 Custom design floral work is truly an art form, requiring originality and experience. One cannot create something beautiful without becoming personally invested in it. That's true for floral design as much as any other form of creative expression. The artist attempts to create a mood or look that will not only complement other aspects of the event, but also pleases the customer and the designer. A well-done custom arrangement requires artistic creativity and the designer becomes personally invested in the process. Although the customer pays for the product, the final floral design is the personal creation and expression of the artist. While artists who work on large-scale events may in some cases have more training or experience, custom design work can occur at small floral shops, too. What matters is whether

the artist approaches the project with the intention and commitment to create an original floral design.

Signed at San Francisco, California, this 13 day of March, 2014.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WASHINGTON
AT SPOKANE**

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

Plaintiffs,

13-2-00871-5
~~No. 13-cv-05094-RMP~~

Declaration of Nickole Perry in support of Motion

v. ROBERT W. FERGUSON, in his official capacity as ATTORNEY GENERAL for the STATE OF WASHINGTON, Defendant.	for Summary Judgment

DECLARATION OF NICKOLE PERRY

I, NICKOLE PERRY, declare the following under oath and penalty of perjury of the laws of the State of Washington.

I. BACKGROUND

1.1 In January 2007, I hired Barronelle Stutzman and Arlene's Flowers to arrange the flowers and floral decorations for my June 1, 2007 wedding. We later changed the wedding date to September 26, 2008.

1.2 I met Barronelle Stutzman in January 2007 and kept in contact with her until September 2008, when my wedding occurred. Throughout this time we had periodic meetings where she explained her communications with vendors and we talked about various flower arrangement options and prices.

1.3 I grew up in the Tri-Cities area and had used Arlene's Flowers for a variety of floral design projects. I liked Barronelle's style specifically and

knew I would use her for my to design my wedding floral arrangements.

1.4 From about January 2007 until September 2008, I kept in contact with Barronelle about the wedding arrangements. We met several times and spoke by phone. The first time we met, Barronelle asked my fiancé and me a lot of questions about how we met, our likes an dislikes, things we appreciated about each other, and unique aspect of our relationship and personalities. I had the sense that Barronelle felt it was important to get to know us well so that she could design arrangements that celebrated our marriage. Honestly, I was surprised at how many questions she asked and how engaged she was in learning about us a couple and our wedding plans. When we left, there was no question that Barronelle was really partnering with us to create a beautiful occasion.

1.5 When I came to Arlene's Flowers, I saw a beautiful bridal bouquet in a picture in the wedding room, and I knew I wanted something similar. I loved the distinctive look Arlene's Flowers had created for the bride in the picture, and I knew I was in good hands asking Barronelle to use her skills and creativity to arrange the flowers for my wedding.

1.6 In that first meeting, I told Barronelle that my wedding colors were dark wine, green, and cream, and she recommended flower options to go along with these. When I inspected the flowers the day before my wedding, I loved every bit of Barronelle's work. She had listened to all of my requests and had creatively and beautifully designed

all of the flower arrangements, from my bouquet, to Aunt Kel's corsage, to the tall floral centerpieces on the reception tables.

1.7 For the ceremony alone, Barronelle came up with thirteen different bouquets, boutonnieres, and corsages to outfit thirty-two people. From the flower girl to the minister, everyone's flowers were beautiful and exactly what I wanted.

1.8 For the reception, Barronelle created twenty tall table centerpieces, cake table flower arrangements, large flower arrangements to sit at the base of a gazebo, and another bouquet for me to throw. She also acquired accent ferns and pillars and placed them around the large reception venue. Everything was put together beautifully, and Barronelle made sure all of the flowers were set up properly at the venue.

1. 9 Barronelle was prepared for her role on my wedding day. She had come to the church with the delivery trucks to set up the flowers two hours before the ceremony. She also set up all of the flowers at the reception venue. Before the wedding, she helped all of the bridesmaids and groomsmen to get their flowers pinned and ready, and she was prepared for a floral mishap too. When my little brother destroyed his boutonniere before the wedding even started, Barronelle was ready with another one.

1.10 Barronelle was a fantastic florist, but she was more than that to me on my wedding day. She was a calming presence. She helped my bridesmaids and me to relax and laugh a little before we got in line

to enter the church sanctuary. Somehow I had a stain on my wedding dress, and Barronelle even helped me clean it off just before I walked down the aisle. She kept everything running on time, too. Throughout the day, Barronelle was available to check on all of the flowers on tables, as I would expect a florist to do. She went above and beyond by talking to the guests, helping them feel comfortable, and even calming my nervous parents! Barronelle also helped at the reception.

1.11 I don't know what I would have done without Barronelle on my wedding day. We received many questions about who arranged the flowers at the ceremony and reception. I suspected that selecting my florist was an important decision, but I had no idea the important role Barronelle would play in making the day beautiful and run smoothly, and I know she worked hard to make sure I experienced love and happiness that day. She truly invested herself and her artistic skills in designing the floral arrangements, but also in ensuring the wedding was a successful celebration of our union as man and wife.

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I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed August 26, 2014.