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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,
v.
ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,
Appellants.

INGERSOLL and FREED,
Respondents,
v.
ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,
Appellants.

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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Filed
Washington State Supreme Court
MAR - 9 2016
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Heirn v. Bridault,
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West Chester & Phila. R.R. Co. v. Miles,
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Page(s)

Washington Law Against Discrimination, Ch. 49.60.030 RCW ..... passim

OTHER AUTHORITIES:

110 Cong. Rec. 13,206-07 (1964) 14

ACLU, Non-Discrimination Laws: State by State Information – Map, *available at* http://bit.ly/1yYAb6A (last visited Jan. 21, 2016) 17

Alexander H. Stephens, *"Corner Stone" Speech*, Savannah, Georgia (Mar. 21, 1861), http://bit.ly/1deFCoK 11

C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955) 6

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David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645 (1995) 8

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Page(s)

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Laws of 1889-90, Reg. Sess., ch. 16 ..... 5, 6

Letter from a Birmingham Jail 6-7 (Apr. 16, 1963) 7

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Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004) 14

R. Randall Kelso, *Modern Moral Reasoning & Emerging Trends in Constitutional and Other Rights Decision-Making Around the World,* 29 Quinnipiac L. Rev. 433, 437 (2011) 11, 16

Richmond, Va., April, 1863, *An Address to Christians Throughout the World*, at 7, *available at* http://bit.ly/1JINW0o 10

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Statement about Race at BJU, Bob Jones Univ., http://bit.ly/1Nnpc8s (last visited Jan. 21, 2016) 16

Timothy J. Dailey (Family Research Council), *The Bible, the Church, & Homosexuality: Exposing the "Gay" Theology* 24 (2004) 18

William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657 (2011) 14, 19

INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a not-for-profit legal organization that has fought for 75 years to enforce the guarantees of the United States Constitution and eradicate barriers to the full and equal enjoyment of social and political rights by African Americans and other people of color, including against discrimination in places of public accommodation and restrictions on interracial relationships and marriages. To that end, LDF has participated as *amicus curiae* in cases across the nation addressing the rights of gay men and lesbians. Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of the Washington Law Against Discrimination, Ch. 49.60.030 RCW ("the WLAD").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Until the passage of the Civil Rights Act of 1964, African Americans were legally relegated to second-class citizenship by a system of laws, ordinances, and customs that imposed a rigid system of racial segregation that separated white and African-American people in every area of life, including restaurants, buses, trains, hotels, hospitals, schools, neighborhoods, jobs, marriages, and even cemeteries. Religious beliefs about divinely created differences and hierarchies between the races often justified these discriminatory laws and customs. A core objective of the

Civil Rights Movement was the abolition of *de jure* racial segregation through the enforcement of the federal constitutional guarantee of equal protection and the enactment of federal and state laws prohibiting such discrimination. In particular, laws banning discrimination in public accommodations, such as Title II of the Civil Rights Act of 1964 ("Title II")[1] and the WLAD, were enacted to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[2] And although discrimination against African Americans persists, the religious arguments that supported segregation and anti-miscegenation laws have been wholly discredited.

Gay men and lesbians have also been subjected to widespread discrimination in this country, facing criminalization, employment discrimination, and barriers to immigration, among other inequities.[3] However, in recent years, jurisdictions across the nation have passed laws prohibiting sexual orientation discrimination. Washington joined those states in 2006 by expanding its Law Against Discrimination to prohibit sexual orientation-based discrimination, including in public

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[1] 42 U.S.C. § 2000a.

[2] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. Rep. No. 88-872, at 16-17 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2370); *see also* RCW 49.60.010 (stating the legislative purpose of the WLAD that race and sexual orientation discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state").

[3] *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484-85 (9th Cir. 2014).

accommodations.[4] The enactment of this legislation followed debate in which several proponents of the law analogized discrimination against gay men and lesbians to the indignities suffered by African Americans and other racial minorities in the segregated South.[5] The State thus recognized that discrimination against gays and lesbians in public accommodations—like racial discrimination—deeply and unfairly undermines human dignity.

Religion has been used to justify discrimination against gay men and lesbians in the same way as it was used to justify discrimination against African Americans. Although these arguments are now often framed as opposition to marriage equality and favoring the Biblical, "traditional" marriage between one man and one woman, they echo the religious arguments that were used to justify slavery, defend Jim Crow segregation, uphold anti-miscegenation laws, and deny African Americans the full and equal enjoyment of places of public accommodation.

Such is the case here. Respondents Robert Ingersoll and Curt Freed asked Appellant Barronelle Stutzman and her business, Arlene's Flowers, Inc., to provide floral arrangements for their wedding. Despite Washington's clear prohibition against sexual orientation discrimination,

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[4] Laws of 2006, ch. 4, § 3 (codified at RCW 49.60.030).
[5] S.J. 06-019 (Wash. 2006) (remarks by Sens. Franklin and Shin).

Appellants refused to serve the couple, claiming that their sincerely-held religious beliefs do not allow them to support same-sex marriages.

While the United States Constitution scrupulously protects the right to free exercise of religion, religious beliefs can be subjected to regulation when those beliefs violate generally applicable laws that prohibit discrimination based on an individual's identity.[6] Such regulation is appropriate here because states have a compelling interest in eliminating sexual orientation discrimination in public accommodations and protecting against the deprivation of personal dignity that such discrimination imposes upon gay men and lesbians.

The Superior Court properly concluded that Appellants' refusal to provide flowers for Mr. Ingersoll and Mr. Freed's wedding violated the WLAD, as well as the Washington Consumer Protection Act, RCW ch. 19.86. Given the similarities between the harms arising from racial and sexual orientation discrimination—as well as the inherent flaws in religious challenges to anti-discrimination laws—this Court should affirm.

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[6] *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968); *see also Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 262 (2002) (discussing the compelling state interest in preventing discrimination in public accommodations).

ARGUMENT

I. FULL AND FAIR ACCESS TO PUBLIC ACCOMMODATIONS IS A CIVIL RIGHT.

Immediately after the Civil War, northern states and Reconstruction governments in the South recognized that discrimination in public accommodations was a vestige of the racial caste system of slavery. They therefore passed laws guaranteeing access to public accommodations, culminating with the federal Civil Rights Act of 1875.[7] After the Civil Rights Act was declared unconstitutional,[8] many states—including Washington[9]—responded by passing public accommodations protections grounded in state statutes and constitutions.[10]

Many southern states, on the other hand, repealed their Reconstruction-era public accommodations statutes and enacted legislation imposing strict legal, social, political, educational, and economic barriers between African Americans and whites.[11] This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking," and "to

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[7] Massachusetts, Pennsylvania, and New York passed such statutes in 1865, 1867, and 1873, respectively; most Reconstruction governments passed laws between 1867 and1873. Joseph William Singer, *No Right to Exclude*, 90 Nw. U. L. Rev. 1283, 1374 (1996).
[8] *The Civil Rights Cases*, 109 U.S. 3 (1883).
[9] Laws of 1889-90, Reg. Sess., ch. 16, at 524.
[10] Singer, *supra* note 7, at 1374.
[11] John Hope Franklin, *History of Racial Segregation in the United States*, *in* Ira De A. Reid, *Racial Desegregation and Integration* 6-9 (1956).

virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries."[12] After Reconstruction, "[t]he major assumptions of the slave regime, the cornerstone of which was the permanent inferiority of the Negro, were still so powerful as to be controlling in most matters involving Negroes."[13]

Such racial segregation was not limited to the post-Civil War South. To the contrary, northern states and the federal government also practiced and enforced segregation in many areas of life; for example, many northern states outlawed interracial marriages and maintained separate schools for white and African-American children, and the federal government segregated the military and other departments.[14] Washington state even tolerated segregation, despite its early enactment of legislation prohibiting discrimination in public-accommodations.[15]

This system of racial segregation unquestionably stripped African Americans of their human dignity. Indeed, Dr. Martin Luther King, Jr., in

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[12] C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955).
[13] Franklin, *supra* note 11, at 4.
[14] *Id.* at 5-6; *see also* Kathleen L. Wolgemuth, *Woodrow Wilson and Federal Segregation*, 44-2 J. of Negro Hist. 158, 158-73 (1959).
[15] *See Fraternal Order of Eagles*, 148 Wn.2d at 243-46 & 244 n.76 (discussing history of public accommodations protections in Washington and court decisions upholding discriminatory conduct).

his "Letter from a Birmingham Jail," eloquently described the pain inherent in the country's system of racial segregation:

> [Y]ou suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky.[16]

Notwithstanding this reality, courts throughout the country upheld laws, policies, and customs that relegated African Americans to second-class citizenship and upheld the system of white supremacy that was established during slavery. For example, in *Plessy v. Ferguson*,[17] the Supreme Court declared that segregated railroads were not unconstitutional, concluding disingenuously that a "statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races."[18]

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[16] Martin Luther King, Jr., *Letter from a Birmingham Jail* 6-7 (Apr. 16, 1963), *reprinted in Why We Can't Wait* 76 (1964). *See generally* Nat'l Park Serv., U.S. Dep't of the Interior, Nat'l Historic Landmarks Program, *Civil Rights in America: Racial Desegregation of Public Accommodations* 22-83 (2004, rev. 2009) (comprehensively reviewing segregation challenges).
[17] 163 U.S. 537 (1896).
[18] *Id.* at 543.

Despite the very real threat of serious physical harm or death, African Americans and others staged protests and boycotts to end racial segregation.[19] And strategic legal challenges to discrimination in access to the franchise,[20] interstate buses,[21] graduate school facilities,[22] law school admissions,[23] and public school education[24] slowly but steadily chipped away at segregation's reach.

Finally, in 1964, Congress passed the Civil Rights Act, which, in Title II, prohibits discrimination or segregation in places of public accommodation.[25] The legislative history accompanying Title II reveals that Congress's intent was to address segregation's deleterious effects on a person's dignity. Quoting the testimony of then-NAACP Executive Secretary Roy Wilkins, the Senate Committee on Commerce explained that African Americans were "bruised in nearly every waking hour by differential treatment in, or exclusion from, public accommodations of

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[19] *See generally* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645 (1995).
[20] *Smith v. Allwright*, 321 U.S. 649 (1944) (outlawing white-only primary election).
[21] *Morgan v. Virginia*, 328 U.S. 373 (1946) (Virginia law requiring segregated buses interfered with freedom to travel interstate).
[22] *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (segregated graduate school facilities unconstitutional).
[23] *Sweatt v. Painter*, 339 U.S. 629 (1950) (separate law school unconstitutional).
[24] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (segregated public schools unconstitutional).
[25] *See* 42 U.S.C. § 2000a.

every description,"[26] as illustrated by Wilkins's example of a vacation road trip:

> How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white? . . . You just live uncomfortably, from day to day.[27]

Proponents of racial discrimination challenged public-accommodations laws, asserting they violated constitutional guarantees of free association and free exercise. However, none succeeded and by 1964 "the constitutionality of such state statutes [stood] unquestioned."[28]

Today, the WLAD honors this history by ensuring that, in Washington, goods and services are available to all people regardless of their personal characteristics or identity. Given the deprivation of personal dignity that accompanies a discriminatory refusal of service, there is no question that full and fair access to public accommodations, like Appellants' floral shop, is a civil right that must be vigilantly recognized, protected, and preserved.

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[26] S. Rep. No. 88-872, at 16-17 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2369.
[27] *Id.* at 1964 U.S.C.C.A.N. at 2370.
[28] *Heart of Atlanta*, 379 U.S. at 259-60 & n.8 (listing states); *see also In re Johnson*, 71 Wn.2d 245 (1967) (rejecting constitutional challenges to Washington's statute).

II. RELIGION HAS HISTORICALLY BEEN USED TO JUSTIFY BLATANT FORMS OF RACIAL DISCRIMINATION.

From the early years of the Republic, sincerely-held religious beliefs were used to justify racial discrimination and subordination. For example, Christian leaders often relied on religion to support the forced enslavement of Africans:

> [W]e testify in the sight of God, that the relation of master and slave among us, however we may deplore abuses in this, as in other relations of mankind, is not incompatible with our holy Christianity, and that the presence of the Africans in our land is an occasion of gratitude on their behalf, before God.[29]

These religious justifications were also commonly cited by the courts. In 1852, the Supreme Court of Missouri, in denying Dred Scott's[30] claim for freedom from slavery, lamented the purported fact that the "consequences of slavery" are "much more hurtful to the master than the slave," and explained that "we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God, . . . a means of placing that unhappy race within the pale of civilized nations."[31]

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[29] Convention of Ministers Assembled at Richmond, Va., April, 1863, *An Address to Christians Throughout the World*, at 7, *available at* http://bit.ly/1JINW0o.

[30] *Dred Scott v. Sandford*, 60 U.S. 393, 397 (1856), *superseded* by constitutional amendment, U.S. Const. amend. XIV.

[31] *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852); *see also Heirn v. Bridault*, 37 Miss. 209, 232 (High Ct. of Err. & App. 1859) (citing "the Divine and natural law" in denying African-American woman's claim of freedom), *disapproved of by Berry v. Alsop*, 45 Miss. 1 (1871); *Vance v. Crawford*, 4 Ga. 445, 459 (1848) ("Neither humanity, nor religion, nor common justice, requires of us to sanction or favor domestic emancipation;

Similarly, prior to the start of the Civil War, many Southerners, including Jefferson Davis, the President of the Confederate States of America, used the Bible to support the institution of slavery, stating that "[slavery] is sanctioned in the Bible, in both Testaments, from Genesis to Revelation. . . . it has existed in all ages, has been found among the people of the highest civilization, and in nations of the highest proficiencies in the arts."[32] Similarly, Alexander Stephens, Vice President of the Confederate States of America, argued that enslaving African Americans fulfilled God's plan: "[All] of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system."[33]

Religion was also used to justify anti-miscegenation laws. The Georgia Supreme Court upheld a criminal conviction of an African-American woman for cohabitating with a white man, opining that no laws create "moral or social equality between the different races or citizens of

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to give our slaves their liberty at the risk of losing our own. They are incapable of taking part with ourselves, in the exercise of self-government. To set up a model empire for the world, God in His wisdom planted on this virgin soil, the best blood of the human family.").

[32] R. Randall Kelso, *Modern Moral Reasoning & Emerging Trends in Constitutional and Other Rights Decision-Making Around the World,* 29 Quinnipiac L. Rev. 433, 437 (2011).

[33] Alexander H. Stephens, *"Corner Stone" Speech*, Savannah, Georgia (Mar. 21, 1861), http://bit.ly/1deFCoK.

the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it."[34] The Virginia Supreme Court also invoked religion to uphold the conviction of an interracial couple under the state's anti-miscegenation statute, opining that divine will required that the races "should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion."[35]

Addressing a challenge to segregation on railroads, the Pennsylvania Supreme Court noted that "the Creator" made two distinct races, and that "He intends that they shall not overstep the natural boundaries He has assigned to them."[36] The court held that such segregation "is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of the races established by the Creator himself, and not to compel them to intermix contrary to their instincts."[37] The Kentucky Supreme Court used religion to uphold a law prohibiting integrated schools, noting that "separation of the human family

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[34] *Scott v. State*, 39 Ga. 321, 326 (1869).
[35] *Kinney v. Commonwealth*, 71 Va. 858, 869 (1878).
[36] *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 209, 213 (1867).
[37] *Id.* at 214.

into races, distinguished . . . by color . . . is as certain as anything in nature" and is "divinely ordered."[38]

Religion-based adherence to racial discrimination was particularly intense in the education context. In a concurring opinion one year after *Brown v. Board of Education*, justices of the Florida Supreme Court criticized school integration, explaining that "when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man."[39] And, when addressing states' obligation to comply with *Brown*, these judges declared that "we are now advised that God's plan was in error and must be reversed."[40] Similarly, in his infamous 1963 "Segregation Now, Segregation Forever" inaugural address, Alabama Governor George Wallace declared that the federal government's effort to enforce desegregation "is a system that is the very opposite of Christ."[41]

Even the Civil Rights Act of 1964 initially faced religion-based resistance from those seeking to perpetuate racial discrimination. For example, West Virginia Senator Robert Byrd criticized the Act, citing multiple Bible passages, including "the Levitical rules against

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[38] *Berea Coll. v. Commonwealth*, 94 S.W. 623, 626 (1906), *aff'd*, 211 U.S. 45 (1908).
[39] *State ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20, 28 (Fla. 1955) (concurring opinion).
[40] *Id.*
[41] Governor George Wallace, Inaugural Address (1963): The "Segregation Now, Segregation Forever" Speech (Jan. 14, 1963), http://bit.ly/1Nnp9cK.

interbreeding cattle and sowing with 'mingled seed'" to conclude that "God's statutes, therefore, recognize the natural order of the separateness of things."[42] Congress nonetheless refused to offer exemptions to Title II for the religious beliefs of proprietors of public accommodations.[43] As explained below, steadfast efforts of the civil rights community eventually discredited religious defenses of discrimination and segregation.

III. MODERN COURTS HAVE REJECTED RELIGIOUS MOTIVATIONS AS A JUSTIFICATION FOR RACIAL DISCRIMINATION.

By the middle of the twentieth century, courts stopped accepting religious motivations as acceptable rationales for racial discrimination after civil rights attorneys and other advocates launched a broad-based attack on racial segregation by challenging discriminatory laws in court. In *Loving v. Virginia*, the Supreme Court struck down Virginia's anti-miscegenation laws, expressly rejecting the trial court's reasoning that "Almighty God . . . did not intend for the races to mix."[44]

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[42] William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 675 (2011) (quoting 110 Cong. Rec. 13,206-07 (1964)).

[43] 42 U.S.C. § 2000a. Similarly, the WLAD limits its religious entity exception to explicitly religious organizations. RCW 49.60.040(2) (excluding from the definition of public accommodation "any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution").

[44] 388 U.S. 1, 3 (1967) (quoting trial court); *see also* Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004) (considering *Loving* to be "one of the major landmarks of the civil rights movement"); John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*,

In 1964, LDF raised a Title II challenge to a restaurant owner's refusal to serve African-American residents of South Carolina because of their race.[45] The restaurant owner justified his discrimination by asserting that Title II impaired his right to the free exercise of religion.[46] The district court rejected this argument, explaining, "[t]he free exercise of one's beliefs, however, as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society."[47]

Nearly two decades later, in 1983, the United States Supreme Court rejected the religious justifications proffered by Bob Jones University to justify its policy of prohibiting prospective or current students from engaging in, or advocating for, interracial dating and marriage.[48] The Court held that the school's religious justification could not overcome Congress's interest in "a firm national policy to prohibit racial segregation and discrimination in . . . education."[49]

As courts shifted to a wholesale rejection of religious justifications for racial discrimination and societal attitudes evolved, religious

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51 Howard L.J. 15, 52 (2007) ("Legalizing interracial marriage was an essential step toward racial equality.").

[45] *Piggie Park*, 256 F. Supp. at 943-44.

[46] *Id.* at 945.

[47] *Id.*

[48] *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).

[49] *Id.* at 592-93.

arguments stopped being offered in mainstream society to defend racial segregation and subordination.[50] Indeed, Bob Jones University later apologized for its discriminatory policies,[51] and, in 1995, former Alabama Governor Wallace asked for forgiveness for supporting segregation.[52]

IV. RELIGIOUS BELIEFS CANNOT JUSTIFY SEXUAL ORIENTATION-BASED DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION.

Throughout much of our nation's history, gay men and lesbians have been subjected to blatant, abhorrent, and pervasive forms of discrimination. In *Obergefell v. Hodges*, the United States Supreme Court noted that, for most of the 20th century, homosexuality was treated as immoral, as an illness, and as a crime.[53] And, sadly, these discriminatory perspectives and practices persist. Indeed, in 2014, both the Seventh and Ninth Circuits acknowledged the persistent and ongoing discrimination against gay men and lesbians.[54]

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[50] *See* Kelso, *Modern Moral Reasoning*, *supra* note 32, at 439 ("[N]o major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws.").

[51] Statement about Race at BJU, Bob Jones Univ., http://bit.ly/1Nnpc8s (last visited Jan. 21, 2016).

[52] Colman McCarthy, *George Wallace—From the Heart*, Wash. Post, Mar. 17, 1995, at A27.

[53] 135 S. Ct. 2584, 2596 (2015).

[54] *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) ("[H]omosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world."), *cert. denied*, 135 S. Ct. 316 (2014); *SmithKline Beecham Corp.*, 740 F.3d at 486 ("Empirical research has begun to show that discriminatory attitudes toward gays and lesbians persist.").

That said, attitudes toward sexual orientation discrimination have evolved in recent years. As explained in *Obergefell*: "[i]n the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance."[55] Even before *Obergefell* guaranteed same-sex couples the right to marry under the U.S. Constitution, a majority of Americans supported marriage equality.[56]

The development of laws prohibiting sexual orientation discrimination in public accommodations is part of the cultural shift toward more widespread acceptance of gay men and lesbians. Currently, 21 states and the District of Columbia explicitly prohibit discrimination on the basis of sexual orientation in public accommodations.[57] In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[58] the United States Supreme Court noted that statutes prohibiting discrimination in public accommodations, including on the basis of sexual orientation, are "well within the State's usual power to enact when a legislature has reason

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[55] 135 S. Ct. at 2596.
[56] *CNN/ORC Int'l Poll* 11 (Feb. 19, 2015), *available at* bit.ly/1QQSYcG.
[57] *See* ACLU, Non-Discrimination Laws: State by State Information – Map, *available at* http://bit.ly/1yYAb6A (last visited Jan. 21, 2016).
[58] 515 U.S. 557 (1995).

to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."[59] As with racial discrimination, the fundamental purpose of these statutes is to prevent the harm to a person's dignity that arises from differential treatment based on inherent qualities or characteristics. Similar to racial discrimination, there is a loss of personal dignity associated with sexual orientation discrimination in places generally available to the public:

> "It is hurtful to see that we are less welcome than the family dog," stated a lesbian couple refused a room at a Vermont inn. . . . "I was devastated . . . . I was crying," explained a lesbian in New Jersey as she described the aftermath of being sent out of a bridal shop. "I can't tell you how much it hurt to be essentially told, 'we don't do business with your kind of people,'" said a woman who, along with her long-term girlfriend, was denied accommodations at a hotel in Hawaii.[60]

As with racial discrimination, religious beliefs are often proffered to justify discrimination against gay men and lesbians. For example, many who object to same-sex marriage rely on the biblical story of Adam and Eve to define "traditional" marriage as between a man and a woman.[61]

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[59] *Id.* at 572 (citing *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11-16 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-26 (1984); *Heart of Atlanta*, 379 U.S. at 258-62).

[60] Marvin Lim et al., *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & Pol'y 705, 706-07 (2014).

[61] Timothy J. Dailey (Family Research Council), *The Bible, the Church, & Homosexuality: Exposing the "Gay" Theology* 24 (2004) ("Jesus declared the marriage covenant between man and woman as an unalterable and sacred union: 'Have you not read that the one whom made them at the beginning "made them male and female," and said, "For this reason a man shall leave his father and mother and be joined to his wife,

This reliance on a particular religious understanding of human origins to justify discrimination closely mirrors the justifications for racial discrimination that were based in the story of Noah's sons as reflecting the supposed divine separation of the races.[62]

However, it is well-established that the right to the free exercise of religion is not absolute; states may regulate religiously motivated behavior to further important public goals, such as the elimination of discrimination.[63] Accordingly, religious challenges to state and local laws prohibiting discrimination on the basis of sexual orientation in public accommodations have consistently failed in courts,[64] just like the religion-based challenges to Title II that preceded them.

The WLAD is a targeted effort to promote an inclusive society free of discrimination. Whether that discrimination is on the basis of race or sexual orientation, the policy goals are the same: to prevent the incalculable harm to human dignity that arises from a refusal to provide

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and the two shall become one flesh"? So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate.'" (quoting *Matthew* 19:4–6 (NRSV))).

[62] Eskridge, 45 Ga. L. Rev. at 665-75.

[63] *See* Wash. Const. art. 1, § 11 (allowing infringements on religious exercise to protect the "peace and safety of the state"); *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court*, 44 Cal. 4th 1145, 1158 (2008) (noting the compelling interest in ensuring free and equal access to publicly available services).

[64] *See, e.g.*, *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453 (Colo. App. Aug. 13, 2015) (wedding cake); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (photography services); *Gifford v. McCarthy*, No. 520410, 2016 WL 155543 (N.Y. App. Div. Jan. 14, 2016), *cert. denied*, 134 S. Ct. 1787 (2014) (public wedding venue).

goods or services that is based on discriminatory beliefs about an individual's (or a group's) innate characteristics. To ensure a society where no one is deprived of their personal dignity, individuals must be free to enjoy places of public accommodation without fear of discrimination because of who they are. This Court should reject Appellants' religious justification for their refusal to serve based on the sexual orientation of their customers.

CONCLUSION

At the heart of Title II of the Civil Rights Act of 1964 and state anti-discrimination statutes—such as the Washington Law Against Discrimination—is the principle that no one should be denied the full and equal enjoyment of the goods and services of any place of public accommodation based on their innate characteristics. Just as the religious beliefs of a proprietor cannot be used to justify racial discrimination in places of public accommodation, they cannot be used to justify sexual orientation discrimination. The religious arguments supporting slavery, anti-miscegenation laws, and racial segregation have been relegated to the dustbin of history. So should the religious arguments supporting sexual orientation discrimination. This Court should affirm the Superior Court's judgments in favor of the State and Ingersoll and Freed.

Respectfully submitted,

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Dated: February 8, 2016

CERTIFICATE OF SERVICE

I, David A. Perez, attorney for Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., certify that on February 8, 2016, I caused to be served upon all counsel of record, via electronic and U.S. mail, a true and correct copy of the Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc.

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

Signed at Seattle, Washington, this 8th day of February, 2016.

/s/David A. Perez
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