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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

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

Appellants.

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INGERSOLL and FREED,

Respondents,

v.

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

Appellants.

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**APPELLANTS' RESPONSE TO *AMICI CURIAE***

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## I. INTRODUCTION

*Amici* contend that values like tolerance, respect, and equal citizenship require forcing Mrs. Stutzman to create artistic expression promoting a view of marriage that she does not hold. Brief for Lambda Legal Def. & Educ. Fund et al. as *Amici Curiae* Supporting Respondents (“Lambda Legal”) 16, 19; Brief for Wash. Buss. as *Amici Curiae* Supporting Respondents (“Wash. Buss.”) 8. These values are undoubtedly important. But equality of opportunity, like tolerance, is “a two-way street.” *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). No need exists to protect some citizens but exclude others when both can be accommodated.

Turning a customer away based solely on their sexual orientation is invidious discrimination that is unlawful and morally wrong. But that is not what happened here. Mrs. Stutzman has cared for, befriended, employed, and served LGBT persons for decades. The only thing she cannot do is design and create custom floral arrangements honoring any marriage—a religious observance in her Southern Baptist tradition—that is not between one man and one woman. Those who see marriage differently are free to obtain custom wedding arrangements from a variety of other floral design artists in the Tri-Cities area and beyond.

Mrs. Stutzman poses no obstacle to Messrs. Ingersoll’s and Freed’s ability to marry and have the wedding of their dreams. The path towards

peaceful coexistence in these limited circumstances, where cherished free speech rights and public accommodation laws come into conflict, is the narrow message-based exception Mrs. Stutzman seeks. Appellees desire not a hamburger, a hotel room, or car repairs—none of which are expressive—but custom floral art beautifying their unique wedding ceremony and honoring their religious marriage vows. Under these narrow facts, involving an expressive business, an artistic product, and compelled speech, a message-based exception is warranted.

Maintaining a pluralistic and freedom-loving nation requires that certain personal liberties be respected. Freedom of speech and thought are among them. *See Hurley v. Irish-Am Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573-81 (1995). Mrs. Stutzman stands with all artists who invest their mind, heart, and soul into their work. That includes the African-American artist who declines to paint a portrait of a member of the Aryan Nation in full regalia and the LGBT print shop owner who declines to create t-shirts for the Westboro Baptist Church. Their artistic freedom is worth protecting and so is Mrs. Stutzman's here. All this Court need do is recognize a "live and let live" approach to free speech.

Washington prohibited discrimination based on sexual orientation discrimination in 2006. Citizens of the State voted to legalize same-sex marriage in 2012. The question is not whether LGBT persons in the State

will be accepted but whether a small group of religious dissenters will be allowed to live alongside them. This Court should hold that peaceful coexistence is not only possible but desirable and reverse the judgment of the trial court.

## II. ARGUMENT

### A. Forcing Mrs. Stutzman to Create Artistic Expression Would Violate Her Free Speech Rights.

#### 1. Americans United and Wolff seek to use the WLAD to force Mrs. Stutzman to create pure speech.

Because the text of the WLAD makes no mention of speech, *amici* contend that it simply regulates conduct. Brief for Ams. United for Separation of Church & State as *Amicus Curiae* Supporting Respondents (“Ams. United”) 6; Brief for Professor Tobias B. Wolff as *Amicus Curiae* Supporting Respondents (“Wolff”) 3. That is a good reason for this Court to exempt protected expression like Mrs. Stutzman’s custom floral art from the WLAD’s scope. But it does not address Appellees’ effort to *apply* the WLAD to force Mrs. Stutzman to create protected speech.

The WLAD, like the public accommodation law in *Hurley*, 515 U.S. at 572, is not “unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content.” Had *Hurley* ended its analysis there and held for the private plaintiffs, *amici* would doubtless be correct that public accommodation laws do not implicate any free speech

interests. But the Supreme Court noted that the Massachusetts law had been “*applied in a peculiar way*” to declare the parade “sponsors’ speech itself to be the public accommodation.” *Id.* at 572-73 (emphasis added). This odd use of the law violated “the fundamental rule of” free speech, that a speaker has the autonomy to choose the content of [her] own message.” *Id.* at 573. *Hurley* thus teaches that certain applications of public accommodation laws are impermissible; specifically, that courts should take a “live and let live” approach to free speech.

*Amici* contend that the WLAD simply affords Messrs. Ingersoll and Freed “equal access” and does not regulate what Mrs. Stutzman must “say.” Tobias Wolff 12 (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006)) (“*FAIR*”). That sentiment rang true in the context in which it was originally made. But it has no relevance here. *FAIR* involved military recruiters’ equal access to a room on campus in which to meet with students. *See id.* at 58. Law schools did not have to draft the recruiters’ talking points. No endorsement of the recruiters’ views or practices was required. All the law schools had to do was provide an empty space (or blank slate) to military recruiters. Providing a room for third parties to engage in their own speech is not expressive.<sup>1</sup> *Id.*

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<sup>1</sup> If this were true, the government would endorse all expression in a traditional or limited public forum, which would invalidate speech forum doctrine wholesale. *See, e.g., Perry*

at 64. The law schools were not engaged in any speech of their own. *See id.* at 64 (noting that law schools are “not speaking when they host interviews and recruiting receptions”). They simply allowed employers a physical space in which to speak “to assist their students in obtaining jobs.” *Id.* No pure speech was at issue.

Nor were the law schools engaged in expressive conduct because the act of “treating military recruiters differently from other recruiters” is not “overwhelmingly apparent.” *Id.* at 66 (quotation omitted). Any communicative impact of military recruiters holding meetings outside of the law schools was “not created by the conduct itself but by the speech that accompanies it.” *Id.* at 66. There were many possible explanations for military recruiters meeting with students elsewhere, including overflow or JAG officers’ independent decision-making. *Id.*

Given the lack of any pure speech or expressive conduct, the Supreme Court deemed the law schools’ related provision of email or posters with the date, time, and location of military recruiters’ meetings irrelevant. *Id.* at 61-62. This speech was “incidental to the Solomon Amendment’s regulation of [non-symbolic] conduct” and therefore was not protected. *Id.* at 62. The *FAIR* Court’s logic makes sense when the

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*Educ. Ass’n v. Perry Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983) (describing speech forum doctrine generally).

provision of physical space for *others* to speak is all that is legally required. *See also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (explaining that the law in question merely required allowing other citizens to “exercise [their own] state-protected rights of free expression and petition on shopping center property”). Mrs. Stutzman’s selling of raw flowers and related materials, which others may use to create their own expression, is the closest analogy here. That is, of course, something Mrs. Stutzman is perfectly willing to do, even if the materials are used by others to celebrate a same-sex wedding. CP 546.

But *FAIR*’s rationale does not apply to forcing Mrs. Stutzman to create speech *herself*. That is the equivalent of asking the law schools in *FAIR* to draft a JAG officer’s speech promoting the military’s recruitment goals. Indeed, Mrs. Stutzman’s artistic creations are pure speech that enjoy *per se* protection. *See Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (explaining that “[t]he concept of pure speech is fairly capacious” and includes things like “the sale of original artwork”).

The argument that this Court should focus on the supposed act of “not sell[ing] bouquets for a particular same-sex couple’s wedding” does not hold water, *Ams. United 8*, because it presupposes that custom floral arrangements are sitting on the shelf ready to “sell.” But custom designs require Mrs. Stutzman to get to know the particular couple, their

personalities, their likes, their history, and their wedding and combine all of that information into a unique design that celebrates their specific union. Mrs. Stutzman must then turn that vision into reality by creating custom pieces of floral art. CP 117-18, 539-40, 654-56, 1967.

Though *amici* fail to meaningfully address it, the principle that artistic expression is constitutionally protected as speech is well established by decades of precedent.<sup>2</sup> Both Ninth Circuit and Washington caselaw prove this point. The Ninth Circuit has held that “the arts . . . constitute protected forms of expression,” *White v. City of Sparks*, 500 F.3d 953, 955 (9th Cir. 2007), and that such “purely expressive activities” receive “full constitutional protection without relying on the *Spence* test,” *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010).<sup>3</sup> The Court

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<sup>2</sup> See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (accepting as a first principle that “artistic speech” qualifies for free speech protection); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (“[E]xpression about . . . artistic, . . . matters . . . is . . . entitled to full First Amendment protection.”); *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (noting that free speech protection “extends to various forms of artistic expression”); *Steadman v. Tex. Rangers*, 179 F.3d 360, 367 (5th Cir. 1999) (recognizing that speech protection “extends to many activities that are by their very nature non-verbal,” such as “an artist’s canvas”).

<sup>3</sup> The Ninth Circuit has thus squarely rejected the argument that symbolic conduct analysis and the *Spence-Johnson* factors apply to artistic expression. *But see, e.g.,* *Ams. United 6*. Symbolic conduct analysis is for “processes that do *not* produce pure expression but rather produce symbolic conduct that, on its face does not necessarily convey a message” and “can be done for reasons having nothing to do with any expression,” such as burning a flag or draft card. *Anderson*, 621 F.3d at 1061 (quotation omitted). As Messrs. Ingersoll and Freed admit, there is nothing ambiguous about the message sent by Mrs. Stutzman’s custom designed wedding arrangements. They necessarily create a “celebratory atmosphere,” “beautify the ceremony,” “add a mood,” and a certain “elegance” to the wedding service. CP 1752, 1858.

of Appeals reached essentially the same conclusion over a decade before. *See City of Everett v. Heim*, 71 Wash. App. 392, 396 (1993) (recognizing that “artistic expression [is a] form of protected speech”).

Forcing Mrs. Stutzman to design artistic wedding arrangements thus compels her to create pure speech. Courts have “never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full [free speech] protection.” *Anderson*, 621 F.3d at 1062. No less is true of the process of designing and creating artistic floral arrangements. Mrs. Stutzman’s artistic design process is just as “inextricably intertwined with [her] purely expressive product” as the process of writing is connected to the book that results. *Anderson*, 621 F.3d at 1062. It is simply impossible to distinguish Mrs. Stutzman’s “process of creating a form of pure speech . . . and the product of these processes” when it comes to constitutional protection. *Buehrle*, 813 F.3d at 977.

At base, it is incongruous for *amici* to claim that Mrs. Stutzman’s custom designs are not artistic expression. *Ams. United 12*. Art is defined as “something that is created with imagination and skill and that is beautiful or that expresses important ideas or feelings.” Merriam Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/art>. Messrs. Ingersoll and Freed spent thousands of dollars commissioning custom

designs from Mrs. Stutzman, rather than getting flowers at the grocery store, precisely because they valued her “exceptional creativity,” CP 1741, 1852, “creative and thoughtful” designs, CP 1745, “amazing work,” CP 1746, 1797-98, and “wonderful arrangements,” CP 1737. Her floral designs were beautiful and effectively conveyed the message or feelings they wanted. That is why they wanted Mrs. Stutzman to design their wedding flowers.

There may be creativity and skill involved in fixing cars, managing properties, and making a sandwich but none of these things are noted for their beauty or expression of ideas. *Ams. United* 12. Mrs. Stutzman’s custom wedding designs “create a mood or feeling consistent with the personalities of the couple” and that “express the unity of the couple” and play an “important role” in “helping to beautify and formalize” the wedding ceremony in a way that purely utilitarian services like fixing a carburetor, maximizing rental income, and making the perfect Reuben never could. CP 673-74; *see* Brief for The Cato Institute as *Amicus Curiae* Supporting Appellants 5-10 (explaining that Mrs. Stutzman’s custom floral arrangements are art protected as pure speech).

**2. The pure speech that Mrs. Stutzman creates is attributable to her, not solely to others as Americans United and Wolff claim.**

*Amici* further suggest that the artistic expression Mrs. Stutzman creates is attributable not to her but solely to the patrons who commission

it. *See, e.g.*, *Ams. United* 7; *Tobias Wolff* 13. But given the undisputed record in this case, there is no doubt that Mrs. Stutzman engages in artistic expression and independently contributes to the “creative process” that results in her custom wedding arrangements. *Anderson*, 621 F.3d at 1062. She does not engage in “the rote application of standardized designs” but devises her own unique floral designs to honor each couple’s wedding. *Buehrle*, 813 F.3d at 978; *see* CP 539-43, 671-74, 724-790, 888-905, 1984-88. Her work, no less than the art of tattooing, “emphasizes creativity and expression and is quite-self-consciously [part of] an expressive movement.” *Buehrle*, 813 F.3d at 978 (quotation marks and citation omitted.)

Mrs. Stutzman’s application of her own “creative talents” are, as a matter of course, attributable to her as well as to the couple who commissions her art. *Anderson*, 621 F.3d at 1062. After all, speech protection is not a zero sum game or, as one court put it, “a mantle[] worn by one party to the exclusion of another.” *Buehrle*, 813 F.3d at 977. Both the state and federal constitutions protect Mrs. Stutzman’s creation of “a piece just as surely as it protects the [person] who displays it, the buyer who purchases it, and the people who view it.” *Id.*

Under *amici’s* contrary logic, free speech protection would not apply to “writing most newspaper articles—after all, writers of such articles are usually assigned particular stories by their editors, and the editors

generally have the last word on what content will appear in the newspaper” (and they are written to inform the public). *Anderson*, 621 F.3d at 1062. And a biography written based on interviews with the subject would not be attributable to the author. That cannot be right. “As with all collaborative creative processes,” both Mrs. Stutzman and patrons requesting her custom wedding arrangements “are engaged in expressive activity” that is constitutionally protected. *Id.* at 1062.

**3. Forcing Mrs. Stutzman to create art violates the compelled speech doctrine.**

Mrs. Stutzman’s art is speech and that speech is attributable to her. She thus has “the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). *Amici’s* effort to prove otherwise are inventive but their arguments lack merit.

**a. The right to free speech may preempt the application of public accommodation laws despite what Americans United and Wolff suggest.**

*Amici* argue that free speech protection simply does not apply when a public accommodation statute is at issue. *See, e.g.*, *Ams. United* 10; *Tobias Wolff* 4. But, as Mrs. Stutzman explains herein, *Hurley* and *Dale* invalidated the application of “evenhanded” public accommodation laws on free speech grounds and many courts have done the same in the years since.

*See infra* Part II.D.1. It is thus inaccurate to claim that free speech protections have no bearing here.

**b. Mrs. Stutzman’s speech is protected even though she operates an expressive business contrary to Americans United’s and Wolff’s claims.**

*Amici* emphasize that Mrs. Stutzman operates a business and is not solely engaged in the creation of art for art’s sake. *See, e.g.,* *Ams. United* 10; *Tobias Wolff* 17. But *Hurley*, 515 U.S. at 574, explained that the rule of speaker autonomy is “enjoyed by business corporations generally.” And many of the Supreme Court’s foundational compelled speech cases were lodged by for-profit businesses. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), involved a successful compelled speech claim brought by a for-profit newspaper, and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), saw a privately owned, for-profit utility company win on compelled speech grounds. “It is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988).

**c. Compelled speech doctrine applies to laws that are not viewpoint discriminatory on their face even though Wolff suggests otherwise.**

*Amici* maintain that compelled speech protection is limited to regulations that are viewpoint discriminatory on their face and thus “compel

a specific message.” Tobias Wolff 10-11. Precedent does not support this view. The right of reply statute at issue in *Miami Herald*, 418 U.S. at 244, which empowered candidates criticized in a newspaper to publish a reply in that newspaper free of charge, was not crafted to advance particular viewpoints over others but to ensure balanced news coverage. The regulation at issue in *Pacific Gas*, 475 U.S. at 4, was also an attempt at ideological balance and consisted of providing equal space in a newsletter to an organization that represented consumers. Such measures were not viewpoint discriminatory on their face. In a government speech forum, inclusion of these opposing viewpoints would have been required. *Miami Herald* and *Pacific Gas* turned out differently because they involved private forums for private speech.

The same was true in *Hurley*. Massachusetts’ public accommodations law did not, “on its face, target speech or discriminate on the basis of its content” and thus was not facially viewpoint discriminatory. *Hurley*, 515 U.S. at 572. But the Supreme Court held that applying the law to produce private “speakers free of . . . biases” who are “at least neutral toward . . . particular classes” of citizens is not in the State’s power. *Id.* at 579. Forcing Mrs. Stutzman to speak in a neutral manner about opposite-sex and same-sex marriage is what *amicus* seeks. That “is a decidedly fatal objective.” *Id.* Indeed, to the extent the WLAD’s public accommodation

provision is applied to bar message-based choices that cause protected persons to feel “not welcome, accepted, desired, or solicited,” RCW 49.60.040(14), the law is content based. Statutes applied to “target speech based on its communicative content are presumptively unconstitutional” and must hurdle strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

**d. Compelled speech doctrine focuses on individual freedom of mind not others’ perceptions or legal requirements as Americans United and Wolff maintain.**

*Amici* contend that others would not view Mrs. Stutzman’s design of custom wedding flowers for Messrs. Ingersoll and Freed as endorsing same-sex marriage largely because that artistic expression is legally required. *See, e.g.*, *Ams. United* 8; *Tobias Wolff* 16. Others’ perceptions may be relevant when determining whether conduct represents symbolic expression outside the compelled-speech context. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (“[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.”). But Mrs. Stutzman’s visual art is pure speech that receives *per se* protection. *See supra* Part II.A.1. Symbolic conduct

analysis is not relevant or required. *See, e.g., Wooley*, 430 U.S. at 713 (“We find it unnecessary to pass on the ‘symbolic speech’ issue . . .”).

When it comes to compelled speech, the proper focus is not on what others may think but on the speaker’s individual freedom of mind. *See id.* at 714 (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.” (quotation omitted)). No one but the Wooleys thought that driving with a “Live Free or Die” license plate fostered an ideological view. *Id.* at 715. But *they* did and the Supreme Court ruled in their favor because freedom of speech protects “the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.” *Id.*

That “most Americans” saw the matter differently was beside the point. *Id.* By definition, freedom of thought cannot be defined by reference to external forces. *See id.* at 714 (“We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”). Consequently, the perception that Mrs. Stutzman is just “comply[ing]” with the law is irrelevant. *Ams. United 8*. Mrs. Stutzman’s understanding of the consequences of her speech is all that matters to her freedom of mind. *See Agency for Int’l Dev. v. Alliance for Open Soc. Int’l*,

*Inc.*, 133 S. Ct. 2321, 2327 (2013). If the perception of those who think “the government made me do it” forecloses personal responsibility were controlling, the compelled speech doctrine would never apply and thus cease to exist.

Private speakers like Mrs. Stutzman are always intimately connected to speech they must engage in themselves. *See Hurley*, 515 U.S. at 576 (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”). The professional fundraisers in *Riley* were connected with the disclosure of the gross receipts they gave to charity because these unwelcome statements came from their own mouths. *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). The Supreme Court even found that private organizations would be associated with any unwanted anti-prostitution policy they promulgated for the *express* purpose of receiving federal funds. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2325-26 (2013). The justification that speakers were “just following the law” has never avoided a compelled speech violation.

The same is true here. Forcing Mrs. Stutzman to create custom flowers for Messrs. Ingersoll’s and Freed’s wedding entails an entire artistic design process. Mrs. Stutzman must first interview the couple and learn

about their wedding and relationship before developing floral designs to honor their specific marital union. Only then does she create those custom floral arrangements. Much more than reciting or hosting an unwanted message is required. Appellees and their *amici* seek to force Mrs. Stutzman to research and draft a message honoring same-sex marriage before bringing that message to life in three dimensional form.

If that is not compelled speech, nothing is. *See Pac. Gas*, 475 U.S. at 16 (explaining that government cannot require speakers “to affirm in one breath that which they deny in the next”). Mrs. Stutzman wants to use her artistic expression to advocate the unique beauty of God’s design for marriage. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”). She cannot do that if the State compels her to promote any message about marriage that a patron desires.

**B. Compelling Mrs. Stutzman to Design and Create Custom Floral Arrangements Promoting Same-Sex Marriage Violates Her Right to the Free Exercise of Religion.**

- 1. Society must leave ample freedom for individuals to decide for themselves whether religion has deleterious effects contrary to ADL’s and NAACP’s view.**

*Amici* state that religion is the cause of many of the world’s social ills. *See, e.g.,* Brief for Anti-Defamation League et al. as *Amici Curiae*

Supporting Respondents (“ADL”) 6-8; Brief for NAACP Legal Def. & Educ. Fund, Inc. as *Amicus Curiae* Supporting Respondents (“NAACP”) 3. Private organizations, like *amici*, are entitled to that view. *See, e.g.*, ADL 5. But others think differently and their views must have a place in our free society. Many citizens, including Mrs. Stutzman, believe the “civil rights movement and the abolition movement were church-led revolutions.” Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 303 (2002). Ordinary people “put their faith into practice and changed the nation.” *Id.* Dr. Martin Luther King was not a humanist but a Baptist minister.

The roots of [Dr.] King's success were in the Bible. First, the civil rights movement relied on prophetic Black religion, which declared segregation sinful, inspired solidarity and sacrifice, and encouraged a David-versus-Goliath belief in victory. It is hard to imagine masses of people lining up for years of excruciating risk against Southern sheriffs, fire hoses and attack dogs without some transcendent or millennial faith to sustain them.

Bradley S. Tupi, *Religious Freedom and the First Amendment*, 45 DUQ. L. REV. 195, 249 (2007) (quotation omitted).

Christian concepts of the “brotherhood of man” and “the universal appeal of individuals standing equally before God” ultimately transformed into “the concepts of equality of opportunity and justice equally administered under the law.” Vine DeLoria Jr., *GOD IS RED: A NATIVE*

VIEW OF RELIGION 48 (1994). Religion was thus key to ending many of the societal injustices that *amici* cite. Nor did religion cause African-American slavery or the Jim Crow era. Those evils are unique to the American experience. Christianity is not.

At times, *amici* argue not against religion in general but Mrs. Stutzman's beliefs in particular. See NAACP 4 (arguing that Mrs. Stutzman's "beliefs violate . . . laws that prohibit discrimination based on an individual's identity." (emphasis added)). *Amici's* concern is with her "religious disapproval" of same-sex marriage, ADL 14, and purportedly outdated religious beliefs, see, e.g., ADL 19; NAACP 20. But it is not for *amici* or the Court to tell Mrs. Stutzman that her religion is wrong. "Government in our democracy, state and national, must be neutral in matters of religious, theory, doctrine, and practice." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). The Supreme Court has steadfastly refused to denigrate Mrs. Stutzman's religious beliefs, see *Obergefell*, 135 S. Ct. at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."), and this Court should do the same.

**2. A religious exception to certain egregious applications of the WLAD is constitutionally required notwithstanding Lambda Legal's and WSAJF's objections.**

*Amici* recognize that the free exercise of religion is a “fundamental right,” Brief for Wash. State Ass’n for Justice Found. as *Amicus Curiae* Supporting Respondents (“WSAJF”) 15 (quotation omitted), and that this essential right “generally protects both belief and religiously motivated conduct,” WSAJF 20 n. 19 (quotation omitted). Nevertheless, they dismiss Mrs. Stutzman’s argument for a narrow religious exception. Lambda Legal 14. But just as there are free speech exceptions to antidiscrimination laws, *see infra* Part II.D.1, free exercise exceptions may be required as well.

The purpose of free exercise protections is to ensure that secular laws’ conflict with religious duties are considered. No particular class of laws is immune from such scrutiny. A good, but not perfect, example is the Supreme Judicial Court of Massachusetts’ decision in *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994). That case involved a conflict between a public accommodation’s laws “mandate that a landlord not discriminate against unmarried couples in renting” housing and a landlord’s religious belief against facilitating unmarried cohabitation. *Id.* at 234. In

applying the state Free Exercise Clause to this situation, the *Desilets* Court used the pre-*Smith* balancing test.<sup>4</sup> *Id.* at 236.

Holding that the State had “the task of establishing that it has a compelling interest in eliminating housing discrimination against cohabiting couples that is strong enough to justify the burden placed on the defendants’ exercise of their religion,” the *Desilets* Court remanded the case. *Id.* at 241. It has recognized that strict scrutiny been met “successfully in some cases and not in others.” *Id.* No inflexible rule favoring the plaintiffs or defendant could apply. This Court should hold the same. “[L]iberty of conscience” is an essential aspect of personal freedom. Wash. Const. art. I, § 11. Appellees should not be able to force Mrs. Stutzman to violate hers without first satisfying strict scrutiny.

**3. Free exercise rights adhere both to religious institutions and the religious individuals that comprise them irrespective of WSAJF’s novel claims.**

WSAJF makes the novel argument that free exercise claims brought by religious individuals receive second-class treatment. It argues that no regard for individual conscientious objector’s claims is warranted. *See* WSAJF 16. But *amicus* has simply mistaken the results in a few extreme cases for a constitutional principle. The State’s interests in *State v.*

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<sup>4</sup> *Amici* recognize that, under article I, section 11, this Court also applies “the strict scrutiny test that [the Supreme Court] abandoned in *Smith*.” WSAJF 15.

*Motherwell*, 114 Wn.2d 353 (1990) (child abuse reporting), *Backlund v. Board of Commissioners of King County Hospital District 2*, 106 Wn.2d 632 (1986) (professional medical liability insurance), and *State v. Norman*, 61 Wn. App. 16 (1991) (refusal to provide medical care), involved avoiding serious physical injury or even death. *See* WSAJF 17. It is unsurprising that such interests prevailed.

But even in such drastic circumstances, state courts gave deference to religious individuals' claims. *See, e.g., Motherwell*, 114 Wn.2d at 363-66 (concluding that, even though religious counselors failed to show that reporting child abuse violated their beliefs, that bringing child abuse to light via a simple reporting statute served a compelling interest in the least restrictive means possible); *Backlund*, 106 Wn.2d at 646-48 (holding that a professional liability insurance requirement served the compelling interest of ensuring "patients who successfully bring malpractice claim" against physicians are able to recover in the least restrictive means possible); *Norman*, 61 Wn. App. at 24 (finding that prior precedent showed that mandating parents to seek medical care for their minor children satisfied strict scrutiny by combatting a "grave and immediate danger to [child welfare] interests which the state may lawfully protect").

*Amici's* efforts to apply the WLAD to Mrs. Stutzman are not targeted to prevent such grave physical harm. They seek artistic floral

arrangements. *But see* WSAJF 17. And no precedent of this Court suggests that religious individuals receive lesser treatment under either article I, section 11 or the First Amendment in such a context. *See CLEAN v. State*, 130 Wn.2d 782, 805 (1996) (explaining that an inherent limit on the police power is that it “not violate any constitutional mandate”). Religious organizations are simply groups of religious people. *See, e.g., City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 664 (2009) (considering the impact on “parishioners” to reflect the burden placed on a church). And many pre-*Smith* cases upheld individual free exercise claims that—like Mrs. Stutzman’s—involved faith and work. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 399-400 (1963) (Seventh-day Adventist denied unemployment benefits because her beliefs precluded working on Saturdays); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 709-10 (1981) (Jehovah’s Witness denied unemployment benefits because of religious objection to fabricating tank turrets).

**4. Forcing Mrs. Stutzman to design custom floral arrangements for same-sex weddings substantially burdens her exercise of religion under article I, section 11.**

*Amicus* give several reasons why forcing Mrs. Stutzman to design and create custom floral arrangements for Messrs. Ingersoll’s and Freed’s

same-sex wedding would not substantially burden her free exercise of religion under article I, section 11. None bear scrutiny.

- a. **The substantial burden test focuses on pressure to change, not a religious mandate to engage in business as WSAJF suggests.**

*Amicus* argues that Mrs. Stutzman’s religious beliefs do not “obligate [her] to engage in the floral business,” as if a religious person must forego their chosen line of work, which is otherwise compatible with her beliefs. WSAJF 19. This argument misconstrues the substantial burden standard. “Government burdens religious exercise if the *coercive effect* of an enactment operates against a party in the practice of [her] religion.” *City of Woodinville*, 166 Wn.2d at 642-43 (quotation omitted) (emphasis added). What matters is the coercive effect of the WLAD on Mrs. Stutzman’s free exercise of religion in her daily life, *i.e.*, whether the WLAD “imposes a substantial burden on [Mrs. Stutzman’s] ability ... to conduct business in accordance with [her] religious beliefs,” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014), not whether she is religiously impelled to run a business in the first place.<sup>5</sup>

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<sup>5</sup> Because Mrs. Stutzman operates a small closely-held business, there is no distinction between her and her business for free exercise purposes. See *Hobby Lobby*, 134 S. Ct. at 2768 (“[P]rotecting the free-exercise rights of [closely-held] corporations . . . protects the religious liberty of the humans who own and control those companies.”).

The Supreme Court rejected a similar argument in *McDaniel v. Paty*, 435 U.S. 618, 621 (1978), after the Tennessee Supreme Court held that excluding an ordained minister from elected office “imposed no burden upon [his] ‘religious belief’” because it was not religiously required. Conditioning McDaniel ability to run for office on his willingness to violate his faith “effectively penalize[d] the free exercise of [his] constitutional liberties.” *Id.* at 628. Here, the State’s conditioning of Mrs. Stutzman’s right to own and operate an expressive business on her willingness to forego the free exercise of religion does the same. *See State v. Clifford*, 57 Wash. App. 127, 131-32 (1990).

“Coercive effect” is just another term for “pressure.” Appellees’ and their *amici*’s application of the WLAD and Consumer Protection Act (“CPA”) to Mrs. Stutzman strongly pressures her to “choose between following the precepts of her religion” or abandoning them to avoid fines and damages awards against her personally and professionally, injunctions, and attorneys’ fees awards. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see Desilets*, 636 N.E.2d at 237 (citing “significant sanctions for” violating a housing discrimination law as evidence of a substantial burden). Whether the substantial pressure for Mrs. Stutzman to abjure her faith and comply with the WLAD and CPA is direct or indirect is immaterial. An indirect

burden is sufficient. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 226 (1992).

*Amici* claim the fact that wedding flowers are only about 3% of Mrs. Stutzman's business precludes a substantial burden, as if a religious person must give up an appreciable portion of their income as a precondition of conducting their business. *See* WSAJF 19. In addition, it only took one referral to spark Appellees' claims for injunctions, fines, potentially ruinous attorneys' fees awards, and years of litigation. Those very real penalties place substantial pressure on Mrs. Stutzman to violate her beliefs. If a fine "the sum of \$5 each" is sufficient to establish a substantial burden on religion, the considerable penalties at issue here are doubly so. *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972).

**b. Running an expressive business does not preclude a substantial burden on the free exercise of religion despite WSAJF's claims.**

*Amicus* contends the fact that Mrs. Stutzman runs a small closely-held business negates the substantial burden on her free exercise of religion. *See, e.g.*, WSAJF 21. The *Desilets* Court rejected this argument and rightly so:

The fact that the defendants' free exercise of religion claim arises in a commercial context, although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened. This is

not a case in which a claimant is seeking a financial advantage by asserting religious beliefs.

636 N.E.2d at 238. Mrs. Stutzman *lost* business due to her religious objection to designing custom flowers for Messrs. Ingersoll's and Freed's wedding. Neither commercial purposes nor a profit motive entered into her decision. Failing to recognize the substantial burden on Mrs. Stutzman's exercise of religion would thus be unjust. *But see* WSAJF 19.

Article I, section 11 protects not just religious belief but religiously motivated conduct. *First Covenant Church*, 120 Wn.2d at 224. "Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus a law that operates so as to make the practice of religious beliefs more expensive in the context of business activities," such as by imposing fines and attorneys' fees awards, "imposes a burden on the exercise of religion."<sup>6</sup> *Hobby Lobby*, 134 S. Ct. at 2770 (quotation and alteration omitted).

**c. Third party impact does not negate a substantial burden as WSAJF contends.**

*Amici* maintains that the asserted impact on third parties of Mrs. Stutzman's exercise of religion forecloses finding a substantial burden. *See, e.g.,* WSAJF 9. This Court did consider the "impact on others in the city"

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<sup>6</sup> *United States v. Lee*, 455 U.S. 252, 257 (1982), is not to the contrary; in fact, it recognized a burden on free exercise rights. There was simply no less restrictive alternative to the unconditional payment of taxes. *See Hobby Lobby*, 134 S. Ct. at 2784.

as part of “[t]he context” of whether any unique burden was placed on the church in *City of Woodinville*, 166 Wn.2d at 644. But even though “a homeless encampment likely affect[ed] the neighbors who live nearby far more than it impacts most parishioners,” the Court found a substantial burden on the church’s free exercise of religion. *Id.*

Substantial burden analysis thus focuses not on third parties but on the religious claimant in a real world context that includes other people and interests. Balancing competing interests is the job of strict scrutiny. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2781 n.37 (explaining that the burden of a religious accommodation on others is relevant to the strict scrutiny inquiry); *Desilets*, 636 N.E.2d at 329 (asking at the strict scrutiny stage whether a religious claimant could be accommodated “without significantly impeding the availability of rental housing for people who are cohabitating or wish to cohabit”). Otherwise, “[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds.” *Hobby Lobby*, 134 S. Ct. at 2781 n.37. That is what *amici* advocate. *See, e.g., Ams. United 1; Lambda Legal 2.* But accepting their argument would render article I, section 11 a nullity. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 (recognizing that *amici*’s argument would give “the Government an entirely free hand to impose burdens on religious exercise so long as those

burdens confer a benefit on other individuals”). That cannot be what the framers of Washington’s Constitution intended.

**d. Freedom of conscience is a core aspect of religious freedom notwithstanding WSAJF’s suggestion otherwise.**

*Amicus* contend that no substantial burden on Mrs. Stutzman’s free exercise of religion exists because the WLAD does not “implicat[e] a core aspect of [her] religious freedom, such as the right to worship.” WSAJF 22. WSAJF does not venture to explain how to distinguish “core” verses “non-core” aspects of Ms. Stutzman’s religious freedom, and fails to acknowledge or address her testimony and the testimony of expert witnesses regarding the relationship between her actions in this case and her “core” beliefs. In any event, free exercise rights are not confined to worship under the text of Wash. Const. art. I, § 11, which expressly includes “acts” and “practices” and “clearly protects both belief and conduct” outside of the church door. *First Covenant Church*, 120 Wn.2d at 224.

Maintaining that the WLAD has no effect on core religious freedom is remarkable given that the Legislature thought otherwise. That is why it specifically provided that ministers and religious organizations need not provide wedding services that violate their religious beliefs. See RCW 26.04.010(4)-(7). *Amicus* is surely aware that “[m]arriage is sacred to those who live by their religions.” *Obergefell*, 135 S. Ct. at 2594. Traditionally,

marriage was considered a religious sacrament. And marriage undoubtedly has deep religious significance to Mrs. Stutzman. CP 606-09. By promoting same-sex marriage through her art, Mrs. Stutzman sincerely believes that she would *personally* jeopardize her relationship with God. CP 607-09. Complying with *amicus*' conception of the WLAD would thus "seriously violate[] [her] religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2775.

It is not *amicus*' place to question Mrs. Stutzman's understanding of this "important question of religion and moral philosophy." *Id.* at 2778; *see, e.g.*, WSAJF 20. Without question, WSAJF's argument would require this Court to rule that Mrs. Stutzman "misunderstand[s] [her] own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). But "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989).

**e. Mrs. Stutzman's free exercise of religion does not compromise the peace and safety of the State as WSAJF contends.**

*Amicus* suggest that Mrs. Stutzman's kind and considerate referral of Messrs. Ingersoll's and Freed's request for custom wedding arrangements is inconsistent with "the peace and safety of the State" and

thus receives no protection under article I, section 11. *See, e.g.*, WSAJF 22-23.<sup>7</sup> But this Founding Era language has a well-established meaning, not that religious freedom may have no effect on others but that it does not justify “immediate, concrete, and serious [harms] like assault and theft.” Thomas Berg, *Religious Exemptions and Third-Party Harms*, 17 FEDERALIST SOC’Y REV. 50, 51 (2016).

Thomas Jefferson, for instance, spoke of supporting “religious freedom for actions that ‘neither pick my pocket nor break my leg.’” *Id.* (quotation and alterations omitted). “Peace and safety” thus refers to “a limited set of direct harms to another’s body, physical or financial property, or contractual rights.” *Id.* If Mrs. Stutzman, for example, claimed a religious right to refuse a tuberculosis test while attending college, *see State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 863 (1952), or to practice medicine without a license, *State v. Verbon*, 167 Wn.2d 140, 149-50 (1932), she would pose a public safety hazard and receive no state free exercise protection. But referring Messrs. Ingersoll and Freed to three other floral design artists due to her religious compulsion against arranging flowers for a same-sex wedding, when Ms. Stutzman has otherwise demonstrated her

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<sup>7</sup> Viewing the peace and safety language of article I, section 11, at such a high level of generality, as WSAJF and other amici do, is also incompatible with strict scrutiny. *See infra* Part II.C.

willingness to arrange flowers for them on other occasions, poses no such immediate and severe harm.

The fact that we live in a pluralistic society in which citizens disagree with each other on important moral questions is a cause for celebration, not alarm, even when those differences cause discomfort or emotional pain. *See infra* Part II.C.1; Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 628 (2015) (“[T]he dignity harm of knowing that some of your fellow citizens condemn your way of life is not one from which the law can or should protect you in a regime of free speech.”).

**C. Applying the WLAD and CPA to Mrs. Stutzman Does Not Withstand Strict Scrutiny.**

- 1. The WLAD and CPA do not serve a compelling interest as applied to Mrs. Stutzman in this case despite ADL’s, Americans United’s, Lambda Legal’s, NAACP’s, NCLC’s, NCLR’s, WELA’s and WSAJF’s suggestions otherwise.**

*Amici* maintain that the State’s generalized interest in eradicating discrimination (invidious or not) is sufficient to uphold applying the WLAD and CPA to Mrs. Stutzman. *See, e.g.*, ADL 20; Lambda Legal 2; Brief for Nat’l Ctr. for Lesbian Rights et al. as *Amici Curiae* Supporting Respondents (“NCLR”) 8; WSAJF 23. It is well established, however, that the compelling interest the WLAD serves is prohibiting invidious

discrimination. *See, e.g., Apilado v. N. Am. Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151, 1163 (W.D. Wa. 2011) (recognizing that the WLAD’s goal is to “stamp out invidious discrimination”); *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 184 (1997) (explaining the WLAD is “designed to forestall invidious treatment”). Mrs. Stutzman’s actions do not qualify because they are “based on decent and honorable religious or philosophical premises.” *Obergefell*, 135 S. Ct. at 2602.

Moreover, the compelling interest test may only be “satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (quotation omitted); *see also Thomas v. Review Bd.*, 450 U.S. 707, 719 (1981) (noting that the compelling interest “inquiry” must be “properly narrowed”). The court in *Desilets*, 636 N.E.2d at 325, for instance, recognized that “[t]he general objective of eliminating discrimination of all kinds referred to in [state public accommodation law] cannot alone provide a compelling State interest that justifies the application of” that law in a particular case. The compelling-interest analysis “must be more focused.” *Id.* Whether Appellees can demonstrate one depends on the particular situation at hand.

No compelling interest exists here because Mrs. Stutzman's religious objection may easily "be accommodated[] . . . in the [Tri-Cities] area, without significantly impeding the availability" of floral design services for same-sex couples. *Id.* at 329. This is the first case of its kind in the State because religious objections to creating speech promoting same-sex marriage are rare. *Id.* (explaining that "[market forces often tend to discourage" such scruples). Messrs. Ingersoll and Freed readily obtained wedding floral arrangements from two floral design artists in the Tri-Cities area. CP 1746, 1801. Mrs. Stutzman referred Mr. Ingersoll to one of these floral design artists and he was aware that her shop had participated in "Pride in the Park," an LGBT event. CP 1746-48.

No evidence of limited market access exists; indeed, the opposite is true. Messrs. Ingersoll and Freed testified that they generally had no problem accessing services in the Tri-Cities area, CP 1732, 1846, and they received multiple offers from floral design artists to create their wedding flowers for free, CP 1860, 1867. Applying the WLAD and CPA to Mrs. Stutzman thus serves only to deprive her of autonomy over the content of her speech, *Hurley*, 515 U.S. at 573-76, "stigmatize [her] in the eyes of many[,] and . . . burden the exercise of" her constitutional rights. *Desilets*, 636 N.E.2d at 238. It does not provide Messrs. Ingersoll and Freed with any artistic service they do not have wide access to already.

Given the one-sided nature of the harm in question, *amici* claim that the State has an independent interest in avoiding dignitary harm to LGBT persons. *See* Ams. United (citing a dignity harm that results from the denial of access to public establishments); NAACP at 2 (same); NCLR at 6 (same). They posit that social ostracism results in humiliation, insult, and stigma that the State has a compelling interest to prevent. *See* Lambda Legal 12; NAACP 1, 5; Brief for Nw. Consumer Law Ctr. as *Amicus Curiae* Supporting Respondents (“NCLC”) 3; NCRL 5. While authorities do mention some of these concepts, *amici* take them wholly out of context.

The dignity harm to which cases like *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), allude is the inability of African Americans to access essential services, like food and lodging, while traveling through the South. State-imposed or encouraged “white supremacy” during the Jim Crow era led to many African Americans being told, “We don’t serve your kind here.” *See* Roy Brooks, *In Defense of the Black/White Binary*, 12 BERKELEY J. AFR.-AM. L. & POL’Y 107, 132 (2010) (“[S]outhern states used an elaborate system of laws specifically enacted to intimidate blacks.” (quotation omitted)). Excluding an entire group of citizens wholesale from political, economic, and cultural life is what second-class citizenship truly means. *See* Douglas Laycock, *Religious Liberty for Politically Active Minority Groups*, 125 YALE L.J. FORUM 369,

376 (2016) (noting that segregation involved “a dominant majority that controlled political and economic power and public opinion” and that “[t]he present situation [involving LGBT persons] is nothing like that”).

LGBT persons in the State have never been marginalized in this way. See Dwight Duncan, *How Brown is Goodridge?*, 14 B.U. PUB. INT. L.J. 27, 35 (2004) (“[H]omosexuals do not share the same bitter legacy of slavery, lynching and disenfranchisement as African-Americans.”). Specifically, Messrs. Ingersoll and Freed testified that they had a very positive experience in the Tri-Cities area. CP 1732-35, 1846-48. And, more generally, the protection of sexual orientation under the WLAD itself demonstrates that LGBT persons exercise significant political power. *Anderson v. King Cnty.*, 158 Wn.2d 1, 20-21 (2006). In this case, the State exercises its full power to prosecute Mrs. Stutzman in tandem with Messrs. Ingersoll and Freed. In economic and cultural terms, Appellees are supported by some of the largest businesses in the State, if not the world, as well as by the largest LGBT and allied chamber of commerce in North America and the nations’ largest LGBT legal organization. See Wash. Buss. 4; Lambda Legal 3. No argument for social ostracism is plausible here. The identity of Appellees and their *amici* proves that.<sup>8</sup> See Brief for The

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<sup>8</sup> Just as importantly, Messrs. Ingersoll and Freed were not marginalized by Ms. Stutzman over the long course of their relationship. She readily supplied flower arrangements for

Frederick Douglass Found. et al. as *Amici Curiae* Supporting Appellants 18-20 (explaining why *amici*'s historical comparisons to discrimination against African-Americans fail).

What *amici* appear to mean when they cite dignitary harm is “feelings of social disapproval, rejection, and disrespect.” NCLR 13. *But see Boos v. Barry*, 485 U.S. 312, 322 (1988) (rejecting such “[a] ‘dignity’ standard”). But the government has no legitimate interest in “prevent[ing] criticism” of LGBT persons’ moral “beliefs or even their way of life.” *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011). No one in this country has an interest “in being free from public criticism,” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), even if exposure to opposing views causes “severe emotional distress,” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). Free speech protection is, after all, designed to protect “choices of content that in someone’s eyes are misguided, or even hurtful.” 515 U.S. at 574.

The feelings of disapproval LGBT persons may experience are based on offensive speech’s “communicative impact.” *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *see* Brief for The Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Appellants 10-12

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them for all types of occasions, with the sole exception of their wedding because of her religious beliefs.

(explaining that avoiding dignitary harm, in this context, punishes or coerces expression). But our nation strongly protects “even hurtful speech on public issues” like same-sex marriage. *Snyder v. Phelps*, 562 U.S. 443, 461 (2011). That means private citizens must sometimes “tolerate insulting, and even outrageous, speech.” *Id.* at 458 (quotation omitted). Government cannot avert their “pain by punishing the speaker,” *Id.* at 461, because doing so would “effectively empower a majority to silence dissidents.” *Cohen v. California*, 403 U.S. 15, 21 (1971). In this case, the Supreme Court has explicitly held that religious dissidents like Mrs. Stutzman “may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” *Obergefell*, 135 S. Ct. at 2607.

Furthermore, ending dignity harm cannot be the State’s compelling interest because dignitary harm cuts both ways. Mrs. Stutzman’s religion is just as central to her own dignity as an equal citizen as Messrs. Ingersoll’s and Freed’s sexuality are to theirs. *See Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (noting “free exercise is essential [to] preserving [the] dignity” of people of faith). Mrs. Stutzman has always treated Messrs. Ingersoll and Freed with respect. In contrast, *amici* compare Mrs. Stutzman to proponents of slavery, racists, and even those who perpetrate vile physical assaults on LGBT persons. *See, e.g.*, Lambda Legal 10; NAACP 7; Brief for Wash. Emp’t Lawyers Ass’n as *Amicus Curiae* Supporting

Respondents (“WELA”) 9. The result of this case has, quite simply, been the vilification of Mrs. Stutzman (including obscene personal attacks and death threats) and her faith, not an avoidance of any dignitary harm. See CP 1309-23; Brief for The State of Arkansas et al. as *Amici Curiae* Supporting Appellants 6-8 (explaining why respecting freedom of conscience reduces human suffering and bolsters social stability); Laycock, *supra*, at 378 (noting the “dignitary harm on the religious side”); Koppelman, *supra*, at 629-30 (discussing the relative balance of harms).

To the extent *amici’s* dignitary-harm argument is tied to their claim that enforcing the WLAD and CPA against Mrs. Stutzman is needed to maintain “the institutions and foundations of a free democratic state,” they are incorrect. WELA at 5; WSAJF at 4. Standardization of beliefs about marriage “either by legislature, courts, or dominant political or community groups” is fundamentally undemocratic. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949). The right to speak freely and differ as to things that matter without fear of punishment by the State is what “sets us apart from totalitarian regimes.” *Id.* at 4; see *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (recognizing that “toleration of criticism” and disagreement is the unique “source of our [national] strength”), Laycock, *supra*, at 376.

That is why *amici’s* citation of the results of the 2012 vote on Washington Referendum 74 misses the point. See, e.g., NCLC 6. Nearly

47% of voters opposed legalizing same-sex marriage, thus demonstrating that Mrs. Stutzman's beliefs are not on the fringe. When these voters lost no disruption of same-sex marriages occurred. Neither Appellees nor their *amici* have produced any substantiated complaint of sexual orientation discrimination, CP 1508-34, or any other example in which expressive business owners in the State have referred same-sex couples elsewhere. If they experienced "an 'actual problem'" obtaining wedding-related services, four years later it would be apparent. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

**2. Forcing Mrs. Stutzman to Create Unwanted Artistic Expression is Not the Least Restrictive Means of Serving the WLAD's and CPA's goals as WSAJF claims.**

*Amicus* argues that the least restrictive means of serving the government's interests is "enforcing the law as written." WSAJF 24. But *Motherwell*, the case it cites, sets no such rule. There the State imposed a light burden "only . . . of reporting" child abuse and there was simply "no less inhibitory manner" of bringing such harmful behavior to light. 114 Wn.2d at 366. The same is not true here where the State seeks to ensure that Messrs. Ingersoll and Freed have access to custom floral design services for their wedding. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2780 (defining least-restrictive means as the government showing a lack of "other means of achieving its desired goal without imposing a substantial burden

on the exercise of religion”). Many less restrictive means exist of ensuring that they can readily locate these services in the Tri-Cities area.

Commentators who support same-sex marriage have suggested, for instance, that expressive business owners like Mrs. Stutzman be required to “announce their religious concerns in advance in order to qualify for exemption,” as this would “confine accommodation to those with the strongest scruples, those who are willing to pay the cost in lost economic opportunities.” Koppelman, *supra*, at 628. Mrs. Stutzman is perfectly willing to make her religious beliefs public and has already reaped the results. This would protect both her constitutional rights and avoid any undue surprise to those with contrasting views on marriage.

**D. The Proper Focus of Public Accommodation Laws is on the Motive for Referring Another Elsewhere—Strict Liability Runs Headlong Into Free Speech and Free Exercise Rights.**

- 1. Free speech exceptions to antidiscrimination laws are well established, mandate consideration of expressive purpose, and foreclose the strict liability approach that NCLR, Washington Businesses, WELA, and WSAJF advocate.**

*Amici* maintain that recognizing Mrs. Stutzman’s expressive reasons for acting would be out of step with American law. *See, e.g.,* Wash. Buss. 7; WSAFJ 11. But since *Hurley* was decided over twenty years ago the potential for antidiscrimination statutes to conflict with free speech rights has been clearly established. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640,

657 (2000) (recognizing “the potential for conflict between state public accommodation laws” and free speech). This clash renders Mrs. Stutzman’s motives highly relevant.

Far from raising a novel argument, *see, e.g.*, NCLR 10, Mrs. Stutzman’s position that antidiscrimination laws must adopt a “live and let live approach” when it comes to free speech is the majority view in state and federal courts. Even antidiscrimination statutes as revered as Title VII “steer[] into the territory of the First Amendment” when “pure expression is involved.” *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596-97 (5th Cir. 1995); *see also McDermott v. Ampersand Publ’g, Inc.*, 593 F.3d 950, 962 (9th Cir. 2010) (explaining that the First Amendment protects a “publisher’s choice of writers”).

This principle is equally true in the public accommodation context.

*But see, e.g.*, WELA 6. Here are just a few relevant examples:

- *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995): Cleveland prevented Nation of Islam ministers from delivering “separate speech to men and women” at a conference pursuant to a state public accommodations law that prohibited sex discrimination. *Id.* at 57. A federal district court recognized that forcing ministers to speak to a mixed gender audience would necessarily change “the content and charter of the speech” and barred application of the law. *Id.*
- *Claybrooks v. Am. Broadcasting Cos.*, 898 F. Supp. 2d 986, 989-90 (M.D. Tenn. 2012): African-American men who auditioned for, but were rejected by, ABC’s television show *The Bachelor* sued for racial discrimination under 42 U.S.C. § 1981. *Id.* at 989-90, 1000. A federal district court dismissed the suit because “the First Amendment protects the

producers’ right unilaterally to control their own creative content” and base their casting decisions “on whatever considerations the producers wish to take into account.” *Id.* at 999-1000.

- *S. Bos. Allied War Veterans Council v. City of Boston*, 297 F. Supp. 2d 388 (D. Mass 2003): Boston officials forced parade organizers to allow a Veterans for Peace group to march at the end of their St. Patrick’s Day parade, even though they had denied the anti-war group’s request to take part. *Id.* at 394. A federal district court held that these private speakers had the right “not [to] have the message of an opposing group forced on them by the state,” *id.* at 393, and that a distance of “no less than a mile” between the groups was required to adequately “distinguish the two sets of speech,” *id.* at 399.
- *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523 (1997): In an analogous context, a LGBT activist sued under the Fair Campaign Practices Act (“FCPA”) because a newspaper removed her from her position as a reporter for violating its conflicts-of-interest policy. *Id.* at 526-30. Although the newspaper’s actions violated the FCPA, *id.* at 534, the Court held that the First Amendment mandated an exemption because newspapers “must be free to exercise editorial control and discretion” over their own content, *id.* at 539. That “constitutionally protected sphere of control of editorial integrity and credibility” trumped in *Nelson* “even though the statute in question [was] a general law.” *Id.* at 542.

Decisions of judicial or quasi-judicial bodies—in addition to *Hurley* and *Dale*—have applied the principle of speaker autonomy to public accommodation claims brought by LGBT individuals or groups:<sup>9</sup>

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<sup>9</sup> The three rulings *amici* cite are not binding on this Court, whereas *Hurley* and *Dale* control for First Amendment free speech purposes. Mrs. Stutzman simply notes that (1) the holding in *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013), has been rightly criticized by commentators, *see, e.g.*, Nathan A. Berkeley, *Religious Freedom and LGBT Rights: Trading Zero Sum Approaches for Careful Distinctions and Genuine Pluralism*, 50 GONZ. L. REV. 1, 23-25 (2014); Eugene Volokh, *Amicus Curiae Brief: Elane Photography, LLC v. Willock*, 8 N.Y.U. J.L. & LIBERTY 116, 119-36 (2013), (2) the judgment in *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), *pet. for a writ of cert. filed* (No. 16-111) (July 2016), is not final because a petition for writ of certiorari is currently pending consideration by the United States Supreme Court, and (3) the facts of *Gifford v. McCarthy*, 23 N.Y.S. 3d 422, 428 (N.Y. App. Div. 2016), which

- *Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI 04474, at 10-11 (Fayette Cir. Ct. Apr. 27, 2015) (appeal pending): An LGBT organization brought a public accommodation claim against the owner of a closely-held small print and graphic-design shop because he referred its request for t-shirts promoting a LGBT pride festival. *Id.* at 10-11. Based on *Hurley*, a state trial court held that the county the county could not “compel [the print shop] and its owners to print a t-shirt conveying a message [they] do not support.” *Id.* at 11.
- *Bono Film & Video, Inc. v. Arlington Cnty. Human Rights Comm'n*, 72 Va. Cir. 256, 2006 WL 3334994 (Va. Cir. Ct., Nov. 16, 2006): An LGBT person requested that the owner of a closely-held film and video post-production company turn betacams of two LGBT films into VHS tapes and filed a complaint with the local human rights commission when he declined. *Id.* at \*1. After initially finding sexual orientation discrimination, the commission dismissed the case because the owner declined not based on the patron’s “sexual orientation” but on his opposition to the films’ “content,” which he found religiously objectionable. *Id.* at \*1-2.

The lesson taught by these cases is that constitutional protections “can trump the application of antidiscrimination laws to protected speech,” *Claybrooks*, 898 F. Supp. 2d at 993, and courts should construe these statutes accordingly. *Amici’s* argument for strict liability squarely conflicts with *Hurley’s* recognition of the “peculiar” and invalid application of antidiscrimination laws to private speech. 530 U.S. at 658; *see, e.g.*, WSAJF 7.

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concerned “a venue for wedding ceremonies and receptions,” bear no resemblance to those present here.

**2. Legislative intent poses no bar to considering motive or purpose under the WLAD as NCLR and WELA suggest.**

*Amicus* argues that if the Legislature had intended any exception to the WLAD “it would have said so.” NCLR 10. But that assumes a violation of the statute in the first instance and no evidence exists that the Legislature intended the WLAD to apply to speech. In fact, the WLAD’s plain language points the other way. Same-sex marriage was prohibited on grounds of an expressly stated compelling state interest when sexual orientation was added as a protected classification under the WLAD. *See* Laws of 1998, Ch. 1, § 2(1). When it added sexual orientation, the Legislature created a safe harbor in RCW 49.60.020, which provides that “[t]his chapter shall not be construed to *endorse* any specific belief, practice, behavior, or orientation.” (emphasis added.) Lastly, the WLAD distinguishes between sexual orientation, which is protected in the public accommodations context, and marital status, which is not. *See* RCW 49.60.030(1) & .215.

In addition, the Legislature was doubtless well aware that this Court will not uphold the application of “every measure ostensibly passed for the public’s health, safety, and welfare” but “must look to the constitution to determine if *in a particular case* a law reaches beyond reasonable limits.” *Myrick v. Bd. of Pierce Cnty. Comm’rs*, 102 Wn.2d 698, 702 (1984) (emphasis added). *But see* WELA 3. When a law “enacted to protect the

public health, the public morals, or the public safety ... is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Myrick*, 102 Wn.2d at 702 (quotation omitted).

**E. Mrs. Stutzman did not discriminate against Messrs. Ingersoll and Freed based on their sexual orientation and thus did not violate the WLAD despite Wolff’s, WELA’s, and WSAJF’s efforts to show otherwise.**

If Mrs. Stutzman, as *amici* suggest, told Messrs. Ingersoll and Freed that she would “prefer not to take business from gay patrons,” Tobias Wolff 18, or instituted a policy of telling LGBT persons that she did “not welcome gay customers” and would not “serve them,” WELA 15, she would discriminate based on sexual orientation. Treating an entire group of protected persons as stigmatic and “not welcome” in a stereotypical and invidious manner violates the WLAD. RCW 49.60.040(14). *Lewis v. Doll* involved exactly that kind of class-oriented prejudice: the owner barred all African-Americans from the store because she regarded them as shoplifters. 53 Wash. App. 203, 204 (1989) (“Boss left strict orders not to serve any blacks.”). But nothing could be further removed from what Mrs. Stutzman did here.

Mr. Ingersoll was one of Mrs. Stutzman’s favorite clients. CP 543, 1850-51. She designed artistic floral arrangements for Mr. Ingersoll for

nearly a decade. CP 543, 1736. Many of those designs were for his then-partner, now spouse, Mr. Freed. CP 147, 150-51. That Mrs. Stutzman made Mr. Ingersoll feel “welcome, accepted, desired, [and] solicited,” RCW 49.60.040(14), is amply illustrated by the fact that, over the years, he commissioned at least thirty arrangements from her and spent thousands of dollars on her art. CP 1736, 1850. Mrs. Stutzman was happy to create custom floral arrangements for Mr. Ingersoll then and she is ready and willing to do so now—provided she is not asked to promote a message with which she disagrees. CP 47, 538, 547. That free-speech-based caveat is not sexual orientation discrimination.

Not only has Mrs. Stutzman repeatedly expressed her personal regard for Mr. Ingersoll and her willingness to serve LGBT people, she has a long track record of doing so. CP 543-44. When Mrs. Stutzman explained her decision to Mr. Ingersoll, she took his hand, told him that she loved him dearly and thinks he is a wonderful person but that her religious beliefs would not allow her to take part in his same-sex wedding. CP 155, 350-51, 1851. What is more, Mrs. Stutzman regularly employs LGBT people in her shop. CP 538, 543-44. One of these employees testified: “I never felt like Barronelle treated me differently because of my sexual orientation even though she was very religious . . . . In fact, she’s one of the nicest women I’ve ever met.” CP 664. Mrs. Stutzman’s actions are not those of a person

with irrational prejudice towards LGBT persons. *See* Brief for Adam J. MacLeod as *Amicus Curiae* Supporting Appellants 4-13 (explaining that public accommodation laws, like the WLAD, bar acting with a discriminatory intent or purpose).

One *amicus* argues that “sexual orientation . . . was a substantial factor” in Mrs. Stutzman’s referral that this substantial factor is enough to violate the WLAD. WSAJF 7. The case often cited in support of this proposition is *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, 561 U.S. 661 (2010) (“*CLS*”). But *CLS* does not apply here for at least three reasons.

First, the law schools’ policy in *CLS* forbade even ideological exclusions. *See id.* at 671. The WLAD places no bar on philosophical objections like the religious distinction Mrs. Stutzman made here. Second, the Court characterized CLS’ request to access a student organization forum as “seeking what [was] effectively a state subsidy” and stated that “policies that require action” are far different than “those that withhold benefits.” *Id.* at 682. Appellees do not seek to deprive Mrs. Stutzman of a government benefit; instead, they seek to make her act by creating artistic expression that violates her faith. Third, CLS’ concern was with associating with those of different beliefs who engaged in a homosexual lifestyle. *Id.* at 672. But Mrs. Stutzman has never condemned Messrs. Ingersoll and Freed for living

in accordance with their beliefs. She has simply declined *personally* to celebrate any form of marriage other than that between a man and a woman. And the State's definition of marriage is not tied to sexual orientation. See RCW 26.04.010. Many heterosexual, homosexual, and bisexual persons choose not to marry and those who do select spouses for a variety of reasons.<sup>10</sup>

This Court's decision in *Fell v. Spokane Transit Authority*, 128 Wn.2d 618 (1996), which addressed discrimination based on disability under RCW 49.60.215, is not to the contrary. See WSAJF 6-7. In *Fell*, this Court turned to the *McDonnell Douglas* burden-shifting approach to determine whether a violation of the WLAD occurred. 128 Wn.2d at 634. That framework has three stages: (1) the plaintiff must initially prove a *prima facie* case of discrimination, (2) the defendant is then required to produce a nondiscriminatory reason for its actions; and (3) the plaintiff at that point bears the burden of showing the reason given is pretextual. *Id.*

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<sup>10</sup> See, e.g., Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 683 (2015) (“[B]y insisting that marriage is something that LGBT people now *do*, the courts (perhaps inadvertently) advance the notion that nonmarriage is no longer consistent with gay identity (or, more particularly, that it should not be.”); Kay Butler, *The New York Times*, *Many Couples Must Negotiate Terms of 'Brokeback' Marriages* (Mar. 7, 2006), [http://www.nytimes.com/2006/03/07/health/many-couples-must-negotiate-terms-of-brokeback-marriages.html?\\_r=0](http://www.nytimes.com/2006/03/07/health/many-couples-must-negotiate-terms-of-brokeback-marriages.html?_r=0) (“Gay and bisexual men continue to marry [opposite-sex spouses] for complex reasons, many impelled not only by discrimination, but also by wishful thinking, the layered ambiguities of sexual love and authentic affection.”).

At the *prima facie* stage of this analysis, which entails showing—among other things—that “disability was a substantial factor causing the discrimination,” this Court specified that “proof of intent to discriminate” is not required. *Id.* at 642 n.30. The Court could apply the same rule here but it would not establish that Mrs. Stutzman engaged in unlawful discrimination. She would simply be required to give a “legitimate nondiscriminatory reason” to rebut the *prima facie* case, *Marquis v. City of Spokane*, 130 Wn.2d 97, 115 (1996), and Mrs. Stutzman has done so.

Like the counseling student in *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012), Mrs. Stutzman is “willing to work with all clients.” She just declines to create expression for *any* client that sends an unconscionable message. What more could the WLAD require? *See id.*; *see also Fell*, 128 Wn. at 636 (rejecting “an unrestricted right to services” under the WLAD). It should be unobjectionable that no law can force a private citizen to affirm their neighbors’ view of marriage or any other subject. *See Ward*, 667 F.3d at 735. Tolerance, under the WLAD, must be “a two-way street;” otherwise, the law “mandates orthodoxy, not anti-discrimination.” *Id.*

Mrs. Stutzman’s provision of a nondiscriminatory reason for her actions would place the burden on Appellees to show that reason is pretextual. Significantly, the *Fell* Court recognized that plaintiffs show pretext by demonstrating “*intentional discrimination* by the defendant once

the burden-shifting scheme is satisfied.” 128 Wn. 2d at 643 (citing *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 494-95 (1993) (emphasis added); see also *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 364 (1988) (noting the “ultimate burden of persuasion” requires showing “pretext for what, in fact is a discriminatory purpose”). Because Mrs. Stutzman operated from benign reasons of faith and possessed no discriminatory intent or purpose, Appellees cannot meet their ultimate burden of proving sexual orientation discrimination here. See Brief for Legal Scholars as *Amici Curiae* Supporting Appellants 7-10 (explaining why it is apparent in this case that Mrs. Stutzman’s religious reasons were not a pretext for discrimination).

**F. Imposing Personal and Corporate Liability on Mrs. Stutzman, as NCLC Advocates, Would be Unprecedented and Excessive.**

*Amicus* recognizes that no precedent of this Court squarely holds that personal liability is appropriate in the public accommodations context absent a corporate officer engaging in deceptive, misleading, or patently false conduct. See NCLC 10, 12 (asking this Court to “clarify” the standard for personal liability and recognizing that “Washington courts have [required engaging in] deceptive acts or ‘particularly wrongful’ practices”). NCLC merely contends that *should* be the case. But this Court has always identified intentional misconduct before imposing personal liability on a

corporate officer. *See, e.g., Annechino v. Worthy*, 175 Wn.2d 630, 637 (2012) (summarizing this Court’s caselaw as holding corporate officers personally liable only where they “knowingly committed wrongful acts or directed others to do so knowing the wrongful nature of the requested acts”); *Parkinson v. Freedom Fidelity Mgmt.*, 10-CV-345, 2012 WL 1931233, at \*12 (E.D. Wash. May 29, 2012) (clarifying that, under state precedent, “‘wrongful conduct’ for purposes of imposing personal liability on a corporate officer is a question of degree”).

Mrs. Stutzman consistently acted honestly and in good faith a few months after same-sex marriage in the State began and never even contemplated that following her conscience could be illegal because this case is the first of its kind. If she had deceived Mr. Ingersoll as to her reasons, we would not be here today. Given her forthrightness, and nearly ten years of loyal service to Messrs. Ingersoll and Freed, the imposition of personal *and* corporate liability in this case would be unprecedented and unjust. This Court should not impose such an excessive punishment on a well-meaning grandmother who has already been irreparably “stigmatize[d] . . . in the eyes of many.”<sup>11</sup> *Desilets*, 636 N.E.2d at 324.

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<sup>11</sup> At the very least, this Court should determine that an award of “costs . . . including a reasonable attorney’s fee” to the State is not warranted in this case. RCW 19.86.080(1).

**G. Granting Mrs. Stutzman a Narrow Exemption In This Case Will Not Have the Deplorable Results that Americans United, Lambda Legal, Washington Businesses, and WELA Claim.**

The deplorable results that *amici* posit will not result from the narrow exception Mrs. Stutzman seeks. *See, e.g.*, Wash. Buss. 2. That exception only applies to speech creator’s message-based objections, not status-based discrimination. Mrs. Stutzman herself would continue to serve LGBT persons as she has always done. She would only refer requests for custom arrangements that promote messages she cannot support. In those circumstances, patrons should *desire* to find another floral design artist who can put her heart and soul into the work.

The suggestion that anyone “who makes goods might be thought to engage in an artistic endeavor” and thus qualify for the exception is untenable. *Ams. United Br. 3*. For decades, courts have determined whether a work—taken as a whole—objectively has “literary, *artistic*, political, or scientific value,” to gauge the application of obscenity laws. *Pope v. Illinois*, 481 U.S. 497, 498 (1987) (emphasis added); *State v. Holt*, 56 Wn. App. 99, 103 (1989) (emphasis added). Courts capable of identifying artistic expression in that context are equally capable of gauging it in this one.

*Amicus*’ claims to the contrary cite up-scale restaurants and hotels that engage in no expression, artistic or otherwise, by serving patrons food

or providing them lodging. *See* *Ams. United* 13. But it is a simple fact that public accommodations law's longstanding application to non-expressive businesses would be unaffected. The free speech exception Mrs. Stutzman posits would apply only to (1) a small class of businesses that create expression, such as newspapers, publicists, speechwriters, photographers, and other artists, (2) offering expressive goods or services, (3) in the public accommodation context. There is no historical record of public accommodation laws being applied against expressive businesses in this context. Hence, nothing would change.

Contending that the WLAD's employment nondiscrimination provisions would be undermined misses the mark. *See* WELA. 8-16. Mrs. Stutzman's argument is limited solely to the WLAD's public accommodation provision and for good reason. She recognizes that the State generally has a compelling interest in ensuring that all citizens are able to earn a living and has never discriminated against LGBT employees herself. CP 664. Nor does she desire to do so. Hiring a well-qualified applicant is not expression, artist or otherwise. *See* WELA 15-16. Neither is allowing employees to do whatever they like with their pay. *See* Wash. Buss. 3; WELA 14.

Under Mrs. Stutzman's suggested exception, a physician refusing to employ an LGBT person based on their sexual orientation would still

violate the WLAD. Lambda Legal 17. So would a secular employer firing or refusing to hire a LGBT person entering into a same-sex marriage. WELA 13. No employment laws would change. *Amici* raise these scenarios because they misunderstand Mrs. Stutzman and her message-based objection. Mrs. Stutzman does not object to Messrs. Ingersoll's and Freed's LGBT status or same-sex relationship. Any hypotheticals based on these factors miss the mark.

It is equally inappropriate for *amicus* to suggest that Mrs. Stutzman desires to harass and sermonize her LGBT employees. *See* Lambda Legal 17-18. Mrs. Stutzman has never tried to force her religious beliefs on her employees or clients. All Mrs. Stutzman has sought to do is live by them herself. The limited exception she posits in the public accommodation context is carefully tailored to allow nothing more.

*Amicus* also claims that any speech-based exception to the WLAD would harm the State's economy. *See* Wash. Buss. 3. But numerous studies of economic outlook show that states without laws like the WLAD consistently rank higher than states with such laws.

Forbes: Top Ten States for Business	Chief Executive: Top Ten States for Business <sup>12</sup>	ALEC: States with Best Economic Outlook <sup>13</sup>	The Pew Charitable Trust: Top Ten States for Job Growth <sup>14</sup>	Site Selection: Top Ten States for Business Climate <sup>15</sup>
Utah	<b>Texas</b>	Utah	<b>North Dakota</b>	<b>Georgia</b>
<b>North Carolina</b>	<b>Florida</b>	<b>North Carolina</b>	<b>Arizona</b>	<b>North Carolina</b>
<b>Nebraska</b>	<b>North Carolina</b>	<b>North Dakota</b>	<b>Texas</b>	<b>Kentucky</b>
<b>North Dakota</b>	<b>Tennessee</b>	<b>Wyoming</b>	<b>Colorado</b>	<b>Louisiana</b>
<b>Colorado</b>	<b>Georgia</b>	<b>Arizona</b>	<b>Florida</b>	<b>Ohio</b>
<b>Texas</b>	<b>Indiana</b>	<b>Indiana</b>	<b>Georgia</b>	<b>Texas</b>
<b>Virginia</b>	<b>Louisiana</b>	<b>Tennessee</b>	<b>South Carolina</b>	<b>Tennessee</b>
<b>Indiana</b>	<b>Nevada</b>	<b>Florida</b>	<b>Oregon</b>	<b>Utah</b>
<b>South Dakota</b>	<b>Arizona</b>	<b>Wisconsin</b>	<b>Idaho</b>	<b>Indiana</b>
<b>Washington</b>	<b>South Carolina</b>	<b>Oklahoma</b>	<b>Utah</b>	<b>South Carolina</b>

\* States in **bold** do not include sexual orientation or gender identity in their non-discrimination laws.

In contrast, studies show that states with laws like the WLAD rank near the bottom in terms of providing an attractive business climate.

<sup>12</sup> "2015 Best and Worst State Rankings," ChiefExecutive.net, <http://chiefexecutive.net/best-worst-states-business/> (last visited Oct. 21, 2016).

<sup>13</sup> Laffer, Arthur, et al., "Rich States, Poor States, Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index," American Legislative Exchange Council, <https://www.alec.org/publication/rich-states-poor-states/> (last visited Oct. 21, 2016).

<sup>14</sup> Prah, Pamela, "Which States Will Generate Jobs in 2014?," The Pew Charitable Trusts, Jan. 7, 2014, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/01/07/which-states-will-generate-jobs-in-2014> (last visited Oct. 21 2016).

<sup>15</sup> "Site Selection's 2015 Top State Business Climate Rankings," SiteSelection.com, <http://siteselection.com/issues/2015/nov/cover.cfm> (last visited Oct. 21, 2016).

- In Chief Executive’s rankings, 9 out of the bottom 10 states have laws similar to the WLAD that include sexual orientation as a protected status.
- In ALEC’s rankings, all 10 of the states with the worst economic outline have laws similar to the WLAD.
- In Pew’s listing of the bottom ten states for job growth, 8 out of 10 had likes like the WLAD.

This data shows that a no-exceptions approach to the WLAD cannot be a prerequisite to the State’s economic success. Excluding people of faith like Mrs. Stutzman from the expressive professions will not only reduce access to these services but cause palpable economic harm. “Small numbers of unusually devoted Christians are just trying to feed their kids” and no one “is benefited really by putting them out of business. It is abstract justice versus real concrete and unreasonable harm,” particularly when one considers the potential loss of livelihood to all those who small business owners like Mrs. Stutzman employ. Koppelman, *supra*, at 630-31 (quotation and alteration omitted).

**H. None of the *Amici* Except WSAJF Address Mrs. Stutzman’s Rights Under the WLAD and WSAJF Improperly Relies on a Limitation on the Human Rights Commission’s Enforcement Authority to Narrow the WLAD’s Declaration of Civil Rights.**

Mrs. Stutzman has argued that she has rights as a religious person that must be balanced against the rights of Messrs. Ingersoll and Freed to the extent the Court finds a violation of the WLAD. *See* Appellants Br. 21-

24; Reply Br at 40-43. Mrs. Stutzman's rights are based on the text of the WLAD, including the expansive declaration of civil rights, the nonexclusive list of circumstances in which those rights are protected, and the absence of any limitation on those civil rights when a citizen provides a public accommodation. RCW 49.60.030(1). These textual arguments are supported by the purpose of the WLAD, RCW 49.60.010, the statutory rule of liberal construction, RCW 49.60.020, and this Court's decision in *Marquis*, 130 Wn.2d at 107-14, which held that an independent contractor is protected from discrimination under the WLAD, notwithstanding the fact that the law never mentions independent contractors. Mrs. Stutzman does not contend that the rights of religious persons should trump rights based on sexual orientation under the WLAD, but only that these rights should be balanced when they conflict, and that balance tips in her favor under the narrow circumstances present in this case. None of the *amici* address this issue except WSAJF. *See* WSAJF at 11-12.

WSAJF contends that there is no need to balance because the WLAD protects customers rather than business owners. However, this argument is based on RCW 49.60.215, which reflects the Washington Human Rights Commission's ("HRC") enforcement authority, rather than a limitation on the expansive declaration of civil rights in RCW 49.60.030(1). *See* RCW 49.60.120(4) (limiting the HRC's authority to

“unfair practices); *see also Marquis*, 130 Wn. 2d at 111-12 (comparing RCW 49.60.030 with another HRC enforcement statute, RCW 49.60.180). WSAJF’s approach also seems contrary to the declaration of purpose in RCW 49.60.010, and the statutory rule of liberal construction in RCW 49.60.020, which are broad enough to encompass business owners and patrons, as well as RCW 49.60.030(1)(f)’s explicit protection of business owners from “discriminatory boycotts or blacklists.”<sup>16</sup> To the extent the Court finds a statutory violation, Mrs. Stutzman’s rights under the WLAD deserve to be weighed in the balance against those of Messrs. Ingersoll and Freed.

### III. CONCLUSION

The government cannot “dictat[e] what we see or read or speak or hear.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). *Amici* ask this Court to unsettle that bar in order to establish a uniform view of marriage in the public sphere. But the right to differ is the cornerstone of free expression and it is not limited to the trivial or arcane: it applies to subjects that touch “the heart of the existing order,” like marriage. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

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<sup>16</sup> WSAJF does cite RCW 49.60.030(1)(f), which prohibits discriminatory boycotts or blacklists, but only with a cryptic “cf.” signal. But the WLAD’s prohibition on discriminatory boycotts straightforwardly lends support to applying its declaration of civil rights to business owners.

Mrs. Stutzman does not seek to change state marriage law or the WLAD. She merely seeks personally to live by her faith and create artistic expression that accords with her beliefs. That others find this choice of content “offensive is not a sufficient reason for suppressing it.” *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745 (1978). Protecting unpopular minorities reflects the very best of our constitutional tradition. This Court should reverse the trial court to ensure that there is a place in Washington for everyone and that conservative people of faith may peacefully coexist with their LGBT brethren. Koppelman, *supra*, at 657.

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**Cc:** Kristen Waggoner; 'michael.scott@hcmp.com'; 'amit.ranade@hcmp.com'; 'jake.ewart@hcmp.com'; 'mchen@aclu-wa.org'; 'EGill@aclunc.org'; 'alanc@atg.wa.gov'; 'toddb@atg.wa.gov'; 'rebeccag@atg.wa.gov'; 'KimberleeG@atg.wa.gov'; 'noahp@atg.wa.gov'; 'kkemper@elmlaw.com'; 'ddewhirst@myfreedomfoundation.com'; 'solson@myFreedomFoundation.com'; 'JAbernathy@myFreedomFoundation.com'; 'mark.aaron.goldfeder@emory.edu'; 'anton.sorkin@emory.edu'; 'kah@stokeslaw.com'; 'sminter@nclrights.org'; 'cstoll@nclrights.org'; 'mark.holady@gmail.com'; 'tcborg@stthomas.edu'; 'kcolby@clsnet.org'; 'dlaycock@virginia.edu'; 'feivey@3-cities.com'; 'hbalson@pilg.org'; 'katskee@au.org'; 'green@au.org'; 'marshall@mcseylawfirm.com'; 'rebecca.zotti@sedgwicklaw.com'; 'jhelsdon@tacomalawfirm.com'; 'ishapiro@cato.org'; 'jweber@cato.org'; 'chris.mammen@hoganlovells.com'; 'kaitlyn.golden@hoganlovells.com'; 'jessica.ellsworth@hoganlovells.com'; 'laura.szarmach@hoganlovells.com'; 'nicole.schiavo@hoganlovells.com'; 'sfreeman@adl.org'; 'smarnin@adl.org'; 'mdeutchman@adl.org'; 'map@pattersonbuchanan.com'; 'mrienzi@becketfund.org'; 'akeim@becketfund.org'; 'dverm@becketfund.org'; 'mcpartland.bryce@mcpartlandlaw.com'; 'bterrell@tmdwlaw.com'; 'iruiz@kellerrohrback.com'; 'bchandler@terrellmarshall.com'; 'bgould@kellerrohrback.com'; 'bryanpharnetiauxwsba@gmail.com'; 'Kelby.fletcher@stokeslaw.com'; 'valeriemcomie@gmail.com'; 'lawoffice@tomolmstead.com'; 'csipos@perkinscoie.com'; 'dperez@perkinscoie.com'; 'sifill@naacpldf.org'; 'cswarns@naacpldf.org'; 'jnelson@naacpldf.org'; 'cmontag@naacpldf.org'; 'feldman@pwrk.com'; 'jajohnson@schwabe.com'; 'daniel@fahzlaw.com'; 'jneedlel@wolfenet.com'; 'jessew@mhb.com'; 'leccles@susmangodfrey.com'; 'dshih@susmangodfrey.com'; 'jpizer@lambdalegal.org'; 'seth@newtonkight.com'; 'caso@chapman.edu'; 'jeastman@chapman.edu'; Jeremy Tedesco; 'gahrend@ahrendlaw.com'; Jack Connelly; Rory Gray  
**Subject:** RE: 91615-2 - Robert Ingersoll, et al. v. Arlene's Flowers, Inc., et al. - Appellants' Motion to File Overlength Brief and Combined Response to Amici Curiae

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**From:** Amanda Rossiter [mailto:[arossiter@adflegal.org](mailto:arossiter@adflegal.org)]

**Sent:** Tuesday, November 01, 2016 4:23 PM

**To:** OFFICE RECEPTIONIST, CLERK <[SUPREME@COURTS.WA.GOV](mailto:SUPREME@COURTS.WA.GOV)>

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'kkemper@elmlaw.com' <kkemper@elmlaw.com>; 'ddewhirst@myfreedomfoundation.com'  
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<gahrend@ahrendlaw.com>; Jack Connelly <jconnelly@connelly-law.com>; Rory Gray <rgray@adflegal.org>  
**Subject:** 91615-2 - Robert Ingersoll, et al. v. Arlene's Flowers, Inc., et al. - Appellants' Motion to File Overlength Brief and  
Combined Response to Amici Curiae

Dear Clerk,

Attached please find Appellants' Motion to File Overlength Brief and combined Response to Amici Curiae for filing in Robert Ingersoll, et al., v. Arlene's Flowers, et al. (Case No. 91615-2).

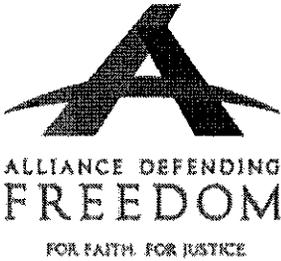
Thank you for your attention to his matter.

Sincerely,

Amanda Rossiter, on behalf of:  
Kristen Waggoner

WSBA No. 27790  
480-444-0020  
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---



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