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**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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**ATTORNEY GENERAL'S ANSWER TO BRIEFS OF  
AMICI CURIAE**

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## I. INTRODUCTION

The amicus briefs supporting Defendants Arlene's Flowers and Barronelle Stutzman make a range of arguments, but they share one common message: if the Court somehow rules for Defendants, "everyone can win." Becket Fund Br. at 20. They claim that the Court can protect everyone by creating a new exemption from anti-discrimination laws, whether for religious business owners, for "expressive" businesses, or for businesses whose would-be customers can obtain service elsewhere.

These amici are wrong. Their requested exemptions are legally baseless and practically unworkable. As the amicus briefs supporting the State and private Plaintiffs demonstrate, if the Court created any such exemption, it would allow discrimination by all manner of businesses against all manner of people. Everyone would not win; rather, the losers would be the very people that anti-discrimination laws were enacted to protect. The Court should not take such a giant leap backwards.

The primary argument advanced by Defendants' amici is that because Defendants acted based on religion, their conduct either was not discriminatory or was legally protected discrimination. But this was discrimination, even if religiously-motivated. As the NAACP points out, for decades many religious groups, including Ms. Stutzman's own faith tradition, justified race discrimination based on religion, but that never

made it any less discriminatory. NAACP Legal Defense & Educ. Fund Br. at 10-14; State's Response Br. at 38 n.12. And Defendants' willingness to serve gay customers for other occasions does not make their actions here nondiscriminatory. Just as a business cannot say that it will serve interracial couples for some occasions but not for their weddings, so too defendants cannot escape liability by arguing that their discrimination is only partial. And this discrimination was not legally justified. Neither the Washington Law Against Discrimination (WLAD) nor the constitution protects a business owner's right to discriminate against customers.

Alternatively, some amici argue that because Defendants' business involves expressive elements, they must be exempt from anti-discrimination laws. Nonsense. That rule would exempt every movie theater, design business, photographer, graphic designer, law firm, tattoo parlor, or other professional who could plausibly claim that his work involved expression. That is not the law.

Finally, some of Defendants' amici argue that this whole case is a waste of time because other businesses near Defendants are willing to provide flowers for weddings of same-sex couples. That argument turns the law on its head. It has never been a defense to a discrimination claim that the service was available elsewhere. Adopting that rule would lead to the untenable outcome that the more rare and outlandish a person's

discriminatory views, the more protection they get, because if a view is rare, the patron turned away will always be able to get service elsewhere. That makes no sense.

The bottom line is simple. There is no legal basis for exempting Defendants from anti-discrimination laws, and there is no way to excuse Defendants' discrimination here without undermining anti-discrimination laws. The Court should reject the unsupported and unworkable approaches suggested by Defendants' amici and instead follow longstanding precedent by enforcing the plain language of state law.

## **II. ARGUMENT**

### **A. Defendants Refused to Serve Mr. Ingersoll and Mr. Freed Because They Are Gay, Violating the WLAD and CPA**

#### **1. The WLAD's plain language prohibits Defendants' refusal to serve Mr. Ingersoll and Mr. Freed**

This case involves a straightforward application of the WLAD and Consumer Protection Act (CPA) where a place of public accommodation refused to serve members of a protected class based on sexual orientation. Nonetheless, Defendants' amici offer convoluted arguments as to why refusing to serve gay and lesbian people for their weddings is not discrimination based on sexual orientation. Their arguments are untenable.

Concluding that discrimination "menaces the institutions and foundation of a free [and] democratic state," the Legislature adopted the

WLAD to protect the “public welfare, health, and peace of the people of this state,” and directed that the law be liberally construed. RCW 49.60.010, .020. The WLAD establishes that the right to be free from discrimination because of sexual orientation is a civil right that includes “full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public . . . accommodation.” RCW 49.60.030(1)(b). “Full enjoyment” includes the right to purchase any service or good offered for sale to the public, “without acts directly or indirectly causing persons of any particular . . . sexual orientation . . . to be treated as not welcome, accepted, desired, or solicited.” RCW 49.60.040(14). It is illegal and an unfair practice to deny this full enjoyment based on sexual orientation. RCW 49.60.215(1). In refusing to prepare floral arrangements for Mr. Ingersoll and Mr. Freed for their wedding, Defendants denied them full enjoyment of the right to purchase goods and services from a place of public accommodation, violating the WLAD and thus CPA.

At least one amicus, however, asserts that the refusal to serve here was not “because of” sexual orientation, because Defendants had served Mr. Ingersoll in prior instances, despite knowing that he is gay. RCW 49.60.030(1). Legal Scholars Br. at 4, 16-20. But this argument ignores common sense and the “full enjoyment” requirement of the WLAD.

A place of public accommodation cannot offer a member of a protected class access to some goods and services offered to the general public but refuse access to others. It cannot, for example, give people of color access to only part of a restaurant or hotel; say that gay or lesbian patrons are welcome in an athletic club, just not in the locker rooms; or offer women access to a club house, but not the golf course. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (“[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers.”).

The same amicus suggests that refusing to serve same-sex weddings is not sexual orientation discrimination because “very occasionally heterosexual individuals of the same sex may choose to marry.” Legal Scholars Br. at 9. This argument is specious. If a company said, we don’t serve people who wear yarmulkes, that would plainly be religious discrimination, even though not all Jews wear yarmulkes and even though non-Jews occasionally wear yarmulkes, *e.g.*, to attend a Jewish funeral or wedding. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”). The right to marry is just as important to Washington’s gay and lesbian residents as it is to heterosexuals. Amici demean that right by arguing that Defendants are not

discriminating against gays and lesbians because they would serve them if they just married someone of the opposite sex they do not wish to marry.

**2. The rights to marry and to be free from discrimination in public accommodations are far more fundamental than any alleged right to discriminate**

Amici Legal Scholars assert that Mr. Ingersoll's conduct in marrying another man is not the same as his identity, while other amici contend that if Mr. Ingersoll's choice to marry a man is inseparable from his identity and status as a gay man, Ms. Stutzman's refusal to serve Mr. Ingersoll is equally inseparable from her identity as a member of the Southern Baptist faith. *E.g.*, Legal Scholars Br. at 15-20; Christian Legal Soc'y Br. at 2-3, 8-10. They also assert that to force Ms. Stutzman to act contrary to her religious beliefs constitutes impermissible discrimination against her under the WLAD. Amici rely on a false comparison.

Amici ignore the fundamental connection—recognized by the U.S. Supreme Court—between a person's identity and their choice of a spouse. *Obergefell v. Hodges*, \_\_\_ U. S. \_\_\_, 135 S. Ct. 2584, 2599, 192 L. Ed. 2d 609 (2015) (“[D]ecisions concerning marriage are among the most intimate that an individual can make.”); *see also United States v. Windsor*, \_\_\_ U. S. \_\_\_, 133 S. Ct. 2675, 2689, 186 L. Ed. 2d 808 (2013) (couples “define themselves by their commitment to each other.”). Discrimination based on a person's decision to marry a person of the same sex is

discrimination based on the person's very identity; to hold otherwise would ignore the U.S. Supreme Court's analysis in these cases. Refusal to serve a same sex couple for their wedding is discrimination based on their fundamental identity as gay and lesbian people, which the WLAD and CPA prohibit.

Ms. Stutzman can claim no equal discrimination against her under the WLAD, nor can she assert that her business conduct is similarly fundamental to her identity. The State acknowledges that a person's religious beliefs can be fundamental to their identity. But the WLAD and CPA restrict actions, not beliefs. And neither Defendants nor their amici have cited any case holding that discriminating in operating a business is fundamental to a person's identity. Similarly, their amici point to no case allowing a business owner to use the WLAD's creed provision as a sword to refuse service to a person of a protected class. Amici Legal Scholars propose hypothetical examples where religious shop owners would be justified in refusing service, but neither of their examples involves refusal to serve a member of a protected class. Legal Scholars Br. at 11-12. Amici never explain what language in the WLAD protects the owner of a place of public accommodation, rather than the patron.

To the contrary, both this court and the United States Supreme Court have recognized that when a person freely chooses to enter a

profession, they necessarily face regulation as to their own conduct, and their own “personal limitations cannot override the regulatory schemes which bind others in that activity.” *Backlund v. King County Hospital Dist. 2*, 106 Wn.2d 632, 648, 724 P.2d 981 (1986). When a business is open to the public, and the owner enjoys the economic benefits of the enterprise, those benefits come with corresponding burdens, including regulations that protect others from harm. *Id.* Thus, the interest in running a business as one chooses is not so absolute as to override the public good. *See id.* This is true even where the business owner raises a religious objection to a government regulation. *Id.*; *see also United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”). For these reasons, Defendants cannot validly claim that the WLAD’s protection from discrimination in places of public accommodation based on creed prevents the State from enforcing its anti-discrimination provisions.

Amici also suggest that the State here is seeking to disparage particular religious beliefs, prevent debate, or restrict the expression of ideas. *E.g.*, Legal Scholars Br. at 13-14; MacLeod Br. at 10; Becket Fund

Br. at 2-3; Christian Legal Soc’y Br. at 9-10. Some point out that the U.S. Supreme Court noted in *Obergefell* that “reasonable and sincere people” may continue to believe that marriage should only be between a man and a woman, and may advocate accordingly. Legal Scholars Br. at 4 n.2 (citing *Obergefell*, 135 S. Ct. at 2594); *see also* Becket Fund Br. at 2-3 (discussing *Obergefell*). But the fact that people may sincerely hold certain beliefs and express them publicly does not restrict the State’s ability to regulate their conduct in running a place of public accommodation. As many other amici point out, people have sincerely held a wide variety of discriminatory beliefs throughout American history, often based on religious convictions. *See* Anti-Defamation League Br. at 5-12, 15-20; NAACP Legal Defense & Educ. Fund Br. at 9-14, 16-19; Lambda Legal Defense & Educ. Fund Br. at 14-15. They were (and remain) free to express those views in a wide range of ways, but they cannot do so by discriminating in running a place of public accommodation. *See Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). This Court should not allow the WLAD to be swallowed by an exception that the statute’s plain language fails to support. RCW 49.60.030, .215.

**B. Freedom of Speech and Association Grant Defendants No Right to Discriminate in Operating Their Business**

Several amici attempt to justify Defendants' discrimination by elevating it to protected expression or association. This Court should reject those attempts. Contrary to these amici's assertions, the WLAD and CPA do not violate Defendants' free speech or association rights. The laws simply require Defendants to provide floral services on a nondiscriminatory basis. Such regulation of conduct is clearly permissible under First Amendment case law. *See, e.g., King & Spalding*, 467 U.S. at 78 (discrimination "'has never been accorded affirmative constitutional protections'") (quoting *Norwood v. Harrison*, 413 U.S. 455, 470, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973)); Prof. Wolff Br. at 1 ("The Free Speech Clause of the First Amendment is not a license for businesses to discriminate in the commercial marketplace.").

Relying primarily on *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), a few amici claim that the WLAD violates the prohibition against compelled expression. Specifically, they assert that by requiring Defendants to provide floral services on a nondiscriminatory basis, the WLAD requires Defendants to "engage in expressive conduct the government favors," to "foster . . .

concepts' with which [Defendants] disagree[ ],” and “to express artistic messages contrary to [Defendants'] religious convictions.” Becket Fund Br. at 6; Cato Inst. Br. at 11; Int'l Christian Photographers Br. at 13. These arguments misapprehend the law.

The WLAD and CPA do not require Defendants to engage in any expression, nor do they dictate the content of any expression by Defendants. Specifically, the WLAD and CPA do not require Defendants to provide floral arrangements for weddings, much less to arrange flowers in any particular way should they choose to provide floral arrangements. The laws simply require that *if* Defendants choose to provide floral services for weddings, they provide the services on a nondiscriminatory basis. Accordingly, the WLAD and CPA are starkly different from the laws at issue in *Wooley* and *Barnette*, which sought to compel individuals to speak or display a particular government-selected message. *Wooley*, 430 U.S. at 707 (state motto); *Barnette*, 319 U.S. at 628-29 (pledge of allegiance).

The WLAD and CPA regulate Defendants' business conduct—not Defendants' speech. Thus, they are more akin to the law in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, which regulates what universities must do—afford equal access to military recruiters—not what universities may or may not say. 547 U.S. 47, 60, 126 S. Ct. 1297, 164 L.

Ed. 2d 156 (2006). Such regulation of conduct is permissible, even if it has an incidental impact on speech. *Id.* at 62 (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)).

The WLAD and CPA do not require Defendants to express messages contrary to their religious convictions simply by requiring them to accommodate members of a protected class. Amicus Becket Fund disputes this, arguing that the WLAD requires Defendants to engage in compelled symbolic speech because providing floral arrangements and services allegedly conveys a message of approval of same sex marriage. Becket Fund Br. at 7. But it is well-established that reasonable observers understand that businesses sometimes do things with which they disagree in order to comply with the law. *E.g.*, *Rumsfeld*, 547 U.S. at 65; *Elane Photography*, 309 P.3d at 69-70; *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015). This case is no different. Defendants convey no message of approval simply by providing flowers for a wedding between members of the same sex. Any argument to the contrary flatly contradicts Defendants’ own view of their services. *See*

CP at 431 (stating that when they serve atheist couples for a wedding, they do not endorse atheism and when they serve Muslim couples, they do not endorse Islam). In short, the WLAD's and CPA's regulation of Defendants' business conduct satisfies the First Amendment.

Nonetheless, some of Defendants' amici—particularly the Cato Institute and the Becket Fund—argue that free speech and free association rights require that certain commercial professionals whose work involves expression be exempt from the WLAD. *See* Cato Inst. Br. at 15-20; Becket Fund Br. at 5-7. They argue that such an exemption would be narrow and would not undermine anti-discrimination laws. Cato Inst. Br. at 2, 16-20; Becket Fund Br. at 9. This argument is legally meritless and practically unpersuasive.

It is black letter law that businesses are not exempt from anti-discrimination laws simply because their work involves some expressive element. *See, e.g., King & Spalding*, 467 U.S. at 78 (holding that constitutional right of expression and association does not preclude application of Title VII to law firm's decision to deny female associate partnership status); *Elane Photography*, 309 P.3d at 71 (“While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such

individuals or businesses to violate antidiscrimination laws.”); Prof. Wolff Br. at 4 (“The First Amendment does not exempt companies from general business regulations simply because they sell creative goods or services”).

This rule makes sense. As other amici have recognized, an exemption for “expressive” businesses would be virtually limitless. Americans United for Separation of Church & State Br. at 3 (“Nearly ‘[a]nyone who makes goods might be thought to engage in an artistic endeavor.’” (quoting Mark Strasser, *Speech, Association, Conscience, and the First Amendment’s Orientation*, 91 Denv. U. L. Rev. 495, 525 (2014))); *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes.”).

Even Defendants’ amici inadvertently acknowledge how broad an “expressive” exemption would be. The Cato Institute, for example, points out that many businesses involve expression, from tattoo parlors to concert halls, from printmakers to movie theaters, and from photographers to makers of stained glass windows. Cato Inst. Br. at 7-9; *see also* Int’l Christian Photographers Br. at 1, 8 (noting that the exemption sought here reaches “far beyond the context of wedding florists” and would apply “to a whole range of professionals”). Under Cato’s view, any such business, along with countless others, would be exempt from anti-discrimination

laws. Any singer could say: “No black people may attend my concerts.” Any theater could say: “No Jewish people may attend this play.” And any graphic designer could say: “I don’t serve gays.” This cannot be the law, for the exemption would “swallow antidiscrimination law whole.” *Americans United for Separation of Church & State Br. at 13.*

Courts, too, have recognized the limitless scope of an exemption for creative professionals. *See, e.g., Elane Photography*, 309 P.3d at 72 (“Such an exemption would not be limited to religious objections or sexual orientation discrimination; it would allow any business in a creative or expressive field to refuse service on any protected basis, including race, national origin, religion, sex, or disability.”). Such an exemption would also put courts in an impossible position. As amicus *Americans United for Separation of Church & State* explains, “Courts would have to determine, case by case, whether each individual business in any given industry provided services of sufficient skill or artistry to claim a constitutional right to discriminate.” *Americans United for Separation of Church & State Br. at 13-14.* This is no easy task. By the *Cato Institute’s* own admission, “throughout history, people have debated what makes something art and who decides what is art and how to interpret it.” *Cato Inst. Br. at 9.* Should courts really have to address this issue in every anti-discrimination case? As the Supreme Court of New Mexico emphasized in *Elane Photography*:

“Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.” 309 P.3d at 71.

Because an “expressive” exemption would be so broad and indeterminate, it would completely undermine anti-discrimination laws. The exemption could apply equally to refusals to provide service on the basis of race, national origin, or religion. *Id.* at 72. It would allow businesses to “violate antidiscrimination laws with impunity,” forcing members of protected classes “‘to pick their merchants carefully, like black families driving across the South half a century ago.’” Americans United for Separation of Church & State Br. at 3 (quoting Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, Engage: J. Federalist Soc’y Prac. Groups, Sept. 2011, at 16-17, <http://tinyurl.com/WilsonandSinger>)). Indeed, Defendants’ own expert testified that if Defendants are entitled to an exemption, businesses should also be allowed to discriminate against interracial couples. CP 2155-56.

The exemption would also create a two-tiered system of rights and obligations. “No-frills providers would be required to comply with antidiscrimination laws, while skilled professionals would be free to discriminate at will.” Americans United for Separation of Church & State Br. at 13. Thus, “members of protected classes would be relegated to the

lowest-quality providers—replacing modern antidiscrimination protections with a rule of ‘separate and unequal.’” *Id.* at 14.

Finally, this Court should also reject amici’s argument that the WLAD violates Defendants’ right to freedom of association. Law & Rel. Practitioners Br. at 3. These amici assert that Defendants’ refusal to provide floral services to same-sex couples “bears elements of expression that are readily identifiable considering the wider cultural context.” *Id.* at 9. They further assert that prohibiting Defendants from discriminating forces Defendants “to associate with the State’s preferred messengers.” *Id.* at 10. In support of this argument, the amici rely on *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 111 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); and *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010). Law & Rel. Practitioners Br. at 11-18.

But Arlene’s Flowers is not an expressive nonprofit organization like the Boy Scouts (*Dale*), a group of people participating in an expressive parade (*Hurley*), or an expressive student organization (*CLS*). On the contrary, Arlene’s Flowers is a commercial business that sells goods and services to the general public for-profit. Its customers are not part of the business; rather, they come to the flower shop for the limited

purpose of purchasing goods or services. Requiring Defendants to serve same-sex customers does not impair Defendants' own ability to associate to express a message.

In sum, the WLAD and CPA do not unconstitutionally infringe on Defendants' rights to free speech and association. These laws do not compel any particular expression or require Defendants to accommodate or convey any particular message. The WLAD and CPA simply regulate Defendants' business conduct by requiring Defendants to serve customers equally. Such regulation of conduct is permissible even if there is an incidental impact on speech and even if Defendants' business involves expression.

**C. Applying the WLAD and CPA to Require Equal Treatment Does Not Violate article I, Section 11**

**1. This Court should decline to extend article I, section 11 to protect for-profit corporations**

Defendants and their amici ask this Court to extend the Washington Constitution's religious freedom protection to for-profit businesses. Arkansas Br. at 12. This Court should decline. While amici point to *Burwell v. Hobby Lobby Stores, Inc.*, \_\_\_ U. S. \_\_\_, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), that case interpreted a federal statute and sheds no light on whether the framers of article I, section 11 intended to protect for-profit companies.

Article I, section 11 of the Washington Constitution focuses on “every individual[’s]” “conscience,” “sentiment,” “belief,” and “worship”—things that are uniquely personal and individual. *Contrast* Wash. Const., art. I, § 11 *with e.g.*, Wash. Const., art. XII, § 5 (adopted in 1889 and defining “corporation”); *and* Wash. Const., art. VIII, § 5 (adopted in 1889 and specifically naming companies and corporations). Neither Defendants nor their amici point to any Washington authority to support the notion that for-profit corporations are protected by article I, section 11.

It makes sense that article I, section 11 has been applied solely to protect the free exercise of individuals and religious institutions. The exercise of religion is deeply personal, and it is people, not corporations, who have consciences, beliefs, feelings, thoughts, and desires. *See Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J. dissenting, citing *Citizens United v. Fed. Election Commission*, 558 U.S. 310, 466, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (Stevens, J. concurring in part and dissenting in part)). And religious organizations exist to support a community of believers, which is not true for for-profit corporations. *See Hobby Lobby*, 134 S. Ct. at 2795-96 (Ginsburg, J. dissenting).

This Court should therefore decline to extend article I, section 11 to protect for-profit corporations.

**2. Refusing to serve gay and lesbian customers is inconsistent with the peace and safety of the state**

Article I, section 11 of the Washington Constitution guarantees individuals “absolute freedom of conscience in all matters of religious sentiment, belief, and worship,” but it does not “justify practices inconsistent with the peace and safety of the state.” The Washington Legislature found that the WLAD was necessary to protect the “public welfare, health, and peace of the people of this state” because discrimination “menaces the institutions and foundation of a free [and] democratic state.” RCW 49.60.010.

Some amici ignore the Washington Constitution’s plain language allowing the limitation of religiously-motivated conduct that threatens the peace and safety of Washington’s citizens, while amici Arkansas et al. try to narrow this language to the point of meaninglessness. *See, e.g.*, Christian Legal Soc’y Br. at 2; Arkansas Br. at 14. But this language is directly implicated here given the very real harms that Washington’s gay and lesbian residents suffer when places of public accommodation refuse them service because of their sexual orientation. State’s Resp. Br. at 34-36; NAACP Legal Defense & Educ. Fund Br. at 16-18; Lambda Legal Defense & Educ. Fund Br. at 7-13; Ctr. for Lesbian Rights Br. at 10-14. The Court should apply this plain language, not ignore it.

**3. Requiring Defendants to treat customers equally does not substantially burden their religious practice**

Despite various amici's arguments to the contrary, applying the WLAD and CPA here does not substantially burden Defendants' religious practice. This court has rejected the idea that any burden on religion is invalid. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642-43, 211 P.3d 406 (2009). Rather, "[t]he argued burden on religious exercise . . . must be substantial," and must be "evaluated in the context in which it arises." *Id.* at 643-44.

This Court has recognized that prayer and services at the core of protected worship are different from other practices that are religiously-motivated. *Id.* (describing a difference between prayer or worship services and activities to house the homeless). This Court's analysis of whether a burden is substantial "necessarily encompasses impact [of the relevant activity] on others," with a recognition that private prayer or religious services do not impact third parties in the same way that other religiously-motivated activities may. *Id.* at 644.<sup>1</sup> While amici assert that forcing

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<sup>1</sup> Notably, the analysis this Court has engaged in under article I, section 11 when considering what constitutes a substantial burden is different from the analysis the U.S. Supreme Court has performed when applying the federal Religious Freedom Reformation Act. *See Hobby Lobby*, 134 S. Ct. 2751. The language of the federal statute is different from the language of Washington's constitutional provision. But, even if the language of the provisions were identical, nothing about the U.S. Supreme Court's analysis of the federal statutory requirements is binding on this Court's interpretation and application of the Washington Constitution. In addition, the financial burden asserted in *Hobby Lobby* was of a different degree altogether from the one asserted here—Hobby Lobby's

Defendants to comply with the WLAD and CPA would impose a substantial burden, their arguments ignore these distinctions.

Arranging flowers as a business activity does not implicate core religious prayer or worship as described in *City of Woodinville*, 166 Wn.2d at 644. While amici assume that Ms. Stutzman would be required to attend or personally participate in a wedding, she was not asked to do that here. CP at 426-27. The WLAD and CPA command only that she serve customers equally, not that she do anything and everything a customer might request.

Moreover, other options are available to Ms. Stutzman, including declining to provide flowers for weddings at all. The availability of alternative options is a factor that this Court has considered when evaluating whether a burden on religion is substantial. *City of Woodinville*, 166 Wn.2d at 644-45 (explaining that in that case, the church had “no alternatives” because the city had imposed a total moratorium). Taking into account the impact that her desired course of action would have on a protected class of Washington citizens and the other options available to her, this court should conclude that the WLAD and CPA do not place a substantial burden on Ms. Stutzman’s religious freedom.

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alternative option was to pay “an enormous sum of money,” “as much as \$475 million per year” in penalties. *Id.* at 2779.

Amici supporting Defendants contend that Washington and its gay and lesbian residents instead should be required to compromise in the spirit of pluralism, by allowing religious objectors operating Washington businesses to decline to serve weddings of gay and lesbian customers. Becket Fund Br. at 2-3; Christian Legal Soc’y Br. at 18-19; Arkansas Br. at 1-2; Legal Scholars Br. at 12-15. But respecting others’ rights to hold and express their own religious views does not require allowing them to discriminate based on those views in places of public accommodation. Indeed, article I, section 11 expressly limits its protection where religiously-motivated activity threatens the peace and safety of Washington residents, as here. And this Court has already recognized that those voluntarily entering the marketplace must accept some restrictions. *See, e.g., Munns v. Martin*, 131 Wn.2d 192, 204-05, 930 P.2d 318 (1997) (distinguishing between land use restrictions applied to a church or a church building used primarily for a religious purpose, versus as applied to a building primarily used for commercial purposes, even where the building would generate money for the church); *Backlund*, 106 Wn.2d at 648 (voluntarily engaging in a regulated profession that affects third parties creates some legitimate burdens on religious freedom). All of amici’s arguments ignore the balance that this Court, and many sister

courts, have already struck between civil rights and anti-discrimination on the one hand and religious freedom on the other.

**D. The Free Exercise Clause Does Not Require an Exemption From the WLAD and CPA for Religiously-Motivated Discrimination**

Amici supporting Defendants say little about the Free Exercise Clause of the First Amendment. There is little for them to say. As explained in the State's Response Brief at 42-46, the WLAD and CPA are neutral and generally applicable laws because they do not target religious practice, manifest hostility to religion, or selectively impose burdens on religiously-motivated conduct. They are therefore subject only to rational basis review. *Empl. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885-90, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The WLAD and CPA easily withstand rational basis review, and no party or amicus argues otherwise.

Although the United States Supreme Court has held consistently that religiously-motivated conduct can be regulated to protect public health, welfare, and safety,<sup>2</sup> some amici supporting Defendants insist that

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<sup>2</sup> See, e.g., *Cantwell v. Conn.*, 310 U.S. 296, 303-04, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (the Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."); *Lee*, 455 U.S. at 261 ("When followers of a particular sect enter into commercial activity as a matter of

religiously-motivated conduct must be exempted from anti-discrimination laws to protect the free exercise of religion. These amici ignore not only the law, as described above, but also this country's history of moving beyond religiously-motivated discrimination.

Three amicus briefs filed in support of the private Plaintiffs and the State provide detailed histories of how religious beliefs have been used to justify discrimination and how both religious groups and the courts have come to reject that justification. Those briefs explain how supporters of slavery often relied on Christian scripture to insist that slavery was part of God's plan, how that was the dominant viewpoint of nearly every major religious group in the United States in the first half of the 19th century, and how these religious justifications were commonly cited by the courts. *See* Anti-Defamation League Br. at 5-12; NAACP Legal Defense & Educ. Fund Br. at 10-14; Lambda Legal Defense & Educ. Fund Br. at 14-15. The briefs show how, with the forced end of slavery, scripture was widely used to justify segregation—including segregation of schools and bans on interracial marriage—well into the second half of the 20th century. *See* Anti-Defamation League Br. at 9-11. *See also* *Bob Jones Univ. v. United*

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choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”); *Smith*, 494 U.S. at 878-79 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.”).

*States*, 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (raising scriptural argument in defense of its segregationist admissions policy).<sup>3</sup> And those briefs show how religion-based racial discrimination has been largely abandoned by major religious groups and universally repudiated in the courts. *See* Anti-Defamation League Br. at 13-15; NAACP Legal Defense & Educ. Fund Br. at 15-16.

These briefs also discuss how religious arguments have been used to justify discrimination against gay men and lesbians and how criminal laws were enacted based at least partly in response to those religious arguments. Anti-Defamation League Br. at 15-20; NAACP Legal Defense & Educ. Fund Br. at 16-19. They also review how, following the same pattern as religion-based racial discrimination, there have been changes in religious doctrine, with some religious groups supporting same-sex marriage and declaring, on religious grounds, that LGBT people are entitled to equal treatment; while other religious groups have taken more incremental approaches, which may include continued religious opposition toward same-sex marriage.<sup>4</sup>

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<sup>3</sup> One of the amicus briefs also reviews how similar religious arguments were used to support discrimination against women, and how those arguments were adopted by courts. *See* Anti-Defamation League Br. at 12-13. *See also* Lambda Legal Defense & Educ. Fund Br. at 15-16 (referencing religion-based discrimination against women in the workplace and against unmarried heterosexual couples).

<sup>4</sup> *See also* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev.

It is against this historical background that some amici supporting Defendants seek a religious exemption from anti-discrimination laws. *See, e.g.,* Arkansas Br. at 8-9. And it is against this background that courts have rejected religious motivation as a basis for sexual orientation discrimination in commercial contexts. *See* Anti-Defamation League Br. at 2-5 (citing cases); NAACP Legal Defense & Educ. Fund Br. at 19 n.64 (citing cases); Lambda Legal Defense & Educ. Fund Br. at 16-18 (citing cases). As accurately summarized in one amicus brief, “settled case law establish[es] that the Free Exercise Clause does not allow religious believers to thwart generally applicable anti-discrimination laws.” Anti-Defamation League Br. at 5. Courts have rejected religion-based exemptions from neutral and generally applicable anti-discrimination laws, and no amicus brief has offered any ground under the Free Exercise Clause for this Court to embark on a different course in this case. Because the WLAD and CPA are neutral and generally applicable, Defendants’ request for an exemption from these laws “seeks preferential, not equal treatment; [they] therefore cannot moor [their] request to the Free Exercise Clause.” *Christian Legal Soc’y*, 561 U.S. at 697 n.27.

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657, 685-710 (2011) (tracing history of religion-based sexual orientation discrimination in America).

**E. Even if Strict Scrutiny Applies, It Is Satisfied Here**

For the reasons given above and in the State's Response Brief, there is no basis under any of Defendants' theories to invoke strict scrutiny. But even if strict scrutiny applied, it would be satisfied here.

**1. The WLAD's public accommodation anti-discrimination provisions serve a compelling government interest**

Just as civil rights cases in the 1960s were about more than ensuring access to coffee at a lunch counter, this case is about more than ensuring access to "floral design services" (Br. of App. at 45) or "floral arrangements" (Ethics & Religious Liberty Comm'n of the S. Baptist Conv. Br. at 12, 17). It is about preventing discrimination based on sexual orientation—a refusal by the owner of a public accommodation to serve a same-sex couple on the same terms as an opposite-sex couple. It is about the core of the WLAD's anti-discrimination purpose, which this Court has described as "a policy of the highest order" that serves the State's "compelling interest in deterring and eradicating discrimination." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 262, 59 P.3d 655 (2002). *Accord Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). *See also* Br. of Resps. Ingersoll & Freed at 27 (identifying four distinct compelling government interests set out in RCW 49.60.010: (a) protecting the public welfare, health, and peace; (b) fulfilling state

constitutional provisions about civil rights; (c) protecting the rights of the State's inhabitants; and (d) protecting the State's democratic foundations).

The United States Supreme Court also has held that anti-discrimination laws like the WLAD serve compelling government interests. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 624, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (Minnesota's law barring discrimination in public accommodation "plainly serves compelling state interests of the highest order"). It has reached this conclusion in a wide range of contexts,<sup>5</sup> and the State's interest is no less compelling when directed at ending sexual orientation discrimination in public accommodations:

As with racial discrimination, the fundamental purpose of these statutes is to prevent the harm to a person's dignity that arises from differential treatment based on inherent qualities or characteristics. Similar to racial discrimination, there is a loss of personal dignity associated with sexual orientation discrimination in places generally available to the public.

NAACP Legal Defense & Educ. Fund Br. at 18. Statutes prohibiting discrimination in public accommodations on the basis of sexual orientation are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or

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<sup>5</sup> *See, e.g., Bob Jones Univ.*, 461 U.S. at 604; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987).

Fourteenth Amendments.” *Hurley*, 515 U.S. at 572. Unfortunately, legislatures have had—and continue to have—reason to believe that LGBT persons are the target of discrimination. *See* NAACP Legal Defense & Educ. Fund Br. at 16-18; Lambda Legal Defense & Educ. Fund Br. at 7-13.

One amicus brief supporting Defendants suggests there is no real harm if the victim of discrimination can obtain the goods or services elsewhere. Christian Legal Soc’y Br. at 14-15. This argument is just a reanimation of the discredited “separate but equal” arguments from the Jim Crow era, and would mean that racist business owners in many towns could discriminate at will, so long as other business owners did not share their views. Other amici supporting Defendants suggest that sexual orientation discrimination produces only dignitary or emotional harms that are not sufficiently compelling to survive strict scrutiny. *See* Becket Fund Br. at 13; Arkansas Br. at 16-17; Frederick Douglass Found. Br. at 17. Any legal legitimacy lingering in these kinds of arguments was put to rest a half century ago with the enactment of the Civil Rights Act of 1964, which was enacted to vindicate “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (quoting S. Rep. No. 88-872, at 16-17

(1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2370). Indeed, nearly a century ago, this Court observed that discrimination in public accommodations “carries with it the elements of an assault upon the person, . . . personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering.” *Anderson v. Pantages Theater Co.*, 114 Wash. 2d, 31, 194 P. 813 (1921). The State has a compelling interest in deterring and eradicating discrimination in public accommodations, and that interest is served and implemented through the WLAD.

**2. The WLAD’s public accommodation provisions are the least restrictive means of deterring and eradicating discrimination in public accommodations**

Defendants and their amici argue that same-sex couples have alternative sources for flowers and other wedding services, and exempting Defendants from the WLAD and CPA here would be less restrictive than requiring Defendants not to discriminate against same-sex couples. *See* Br. of App. at 45; Christian Legal Soc’y Br. at 18-19. But that argument ignores the fundamental purpose of the WLAD: “to deter and eradicate discrimination in Washington.” *Fraternal Order of Eagles*, 148 Wn.2d at 246. When, as here, the effectiveness of the challenged law would be undermined by granting the requested exemption or proposed alternative, this Court has held that enforcing the law as written *is* the least restrictive

means of achieving the State's interest. *See State v. Motherwell*, 114 Wn.2d 353, 366, 788 P.2d 1066 (1990) (in free exercise case, requested religious exemption from child abuse reporting statute would "unduly interfere" with the State's compelling interest in protecting children from physical and sexual abuse). *See also Roberts*, 468 U.S. at 628-29 (holding that Minnesota law against discrimination in public accommodation abridged no more speech or associational freedom than necessary to accomplish its purpose, which was to bar discrimination—it "responds precisely to the substantive problem which legitimately concerns" the State). In other words, if the public purpose is to prevent discrimination in public accommodations, a statute like the WLAD that directly and specifically prevents discrimination is narrowly tailored to that purpose. An exception allowing discrimination does not achieve the State's legitimate and compelling anti-discrimination goal.

### III. CONCLUSION

The amicus briefs supporting Defendants argue that enforcing state law here is just too onerous. But they ignore the basic point that anti-discrimination laws always come with costs: employers have to interview or hire applicants they would rather not, landlords have to rent to tenants they would rather not, and businesses have to serve customers they would rather not. But these are costs that we as a society have decided are worth

bearing to achieve the goal of eradicating discrimination. And neither the state nor the federal constitution prohibits our democratic decision to outlaw discriminatory conduct in places of public accommodation.

RESPECTFULLY SUBMITTED this 1st day of November 2016.

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I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, a true and correct copy of the foregoing document, upon the following:

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Dear Clerk:

Attached for filing in the above-noted matter, please find the State's Answer to Briefs of Amici Curiae and Motion for Overlength Brief.

All parties will be served by separate email.

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