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

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT INGERSOLL and CURT FREED
Plaintiffs-Respondents,

vs.

ARLENE FLOWERS, INC., et al.
Defendants- Appellants.

STATE OF WASHINGTON
Plaintiff-Respondent,

vs.

ARLENE FLOWERS, INC., et al.
Defendants- Appellants.

BRIEF OF RESPONDENTS INGERSOLL AND FREED IN
ANSWER TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

When a company and its owners obtain a Washington business license and open their doors to the general public, the Washington Law Against Discrimination, ch. 49.60 RCW (“WLAD”), requires them to sell their goods and services without discriminating against customers based on statutorily protected characteristics. The fact that those goods or services involve the creation of something expressive or that the purveyor has a religious (or other) opinion about a group of potential customers does not excuse the purveyor from the WLAD’s prohibition against discrimination. The WLAD, like other anti-discrimination laws around the country, exists for a compelling reason. By ensuring that everyone—and those who are most likely to be discriminated against in particular—has the ability to purchase goods and services at will without fear of being turned away, the WLAD, like other public accommodations laws, assures our full participation in civil society as equals.

Several amici supporting Appellants, in particular The Becket Fund and The Cato Institute (collectively, “Amici”), strain to make this case about something other than a business and its owner’s decision to discriminate against a customer because he is gay. They urge application of a First Amendment analytical framework that balances Appellants’ asserted religious and expressive rights against the State’s compelling interest in ensuring equal access to public accommodations. They contort First Amendment doctrine in the effort. Courts have never

applied this balancing framework in this context. Courts around the country have appropriately recognized that there is simply no balance to be struck when a business turns people away on the basis of their membership in a protected class.

Courts have never employed a First Amendment balancing framework in cases involving the sale of goods and services in public commerce for an important policy reason: allowing businesses to opt out of anti-discrimination laws on religious or expressive-associational grounds would create an exemption that swallows the rule. There is no reasoned limiting principle that would prevent a business from refusing on these grounds to serve racial or religious minorities as well as other statutorily-protected consumers. Indeed, our nation has a long history of attempts to circumvent these kinds of laws precisely on religious and expressive-associational grounds. Adopting the framework urged by Amici puts at risk a century of progress towards a more equal, free, and just society.

II. ARGUMENT

The Court should decline Amici's invitation to be the first in the nation to apply a First Amendment balancing test in a case like this one, in which the accommodation at issue sells goods and services to the general public. No court has used such a balancing test in a case like this one, and there are important reasons why no court has done so. Those reasons apply with equal force here.

A. Courts Have Applied a First Amendment Balancing Test to Public Accommodation Laws Only in Cases Where the Public Accommodation at Issue Is an Expressive Association.

Courts have repeatedly recognized that, as a general matter, public accommodation laws are within a state's police power and do not run afoul of the First and Fourteenth Amendments. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). In most public accommodation cases, as here, the accommodation at issue is for "the provision of publicly available goods, privileges, and services . . ." *Id.*

There are, however, a handful of cases where the accommodation at issue is membership in a private group or the ability to participate in a private group's expressive activities. *See, e.g., New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (facial challenge to public accommodation ordinance prohibiting discrimination in membership); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (enforcement of public accommodation law against organization that denied membership

to women); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) (enforcement of public accommodation law against organization that revoked local chapter's charter for admitting women into membership).

At stake in these cases is a private group's freedom of expressive association, which "protects a group if the enforcement of the legislation in question substantially alters a group's activities." See also Margaret E. Koppen, *The Private Club Exemption from Civil Rights Legislation—Sanctioned Discrimination or Justified Protection of Right to Associate?*, 20 Pepp. L. Rev. 643, 653 (1993) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). Two United States Supreme Court cases, *Hurley*, 515 U.S. 557, and *Boy Scouts of America v. Dale*, 530 U.S. 640, 644-45, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), are instructive. Amici discuss both cases, and, in doing so, they conflate the critical difference between cases in which the accommodation is a non-profit membership group that expresses its own viewpoint and cases in which the accommodation is a for-profit business that sells goods and services in public commerce.

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the issue was whether Massachusetts' public accommodation law "may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." 515 U.S. at 559. In that case, the Supreme Court applied a balancing test under the First Amendment because the "state courts'

application of the statute had the effect of declaring the sponsor's speech itself to be the public accommodation." *Id.* at 573. This particular kind of "use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of *his own message*." *Id.* (emphasis added). Importantly, the issue in *Hurley* was not whether the parade organizers had the right to turn away people who wished to view the parade.

In *Boy Scouts of America v. Dale*, the issue was whether a public accommodation law could prohibit the Boy Scouts from revoking the membership of a scoutmaster because he was gay. 530 U.S. at 644-45. The Supreme Court determined that the Boy Scouts "engaged in expressive association," *id.* at 648-53, and found that "a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct." *Id.* at 653-59. In light of these circumstances, the Supreme Court held "the state interests embodied in [its] public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659. Unlike *Dale*, no one in this case has argued that Arlene's Flowers is a membership organization of any sort, much less an expressive association.

In both cases, the Supreme Court recognized that public accommodation laws were "applied in a peculiar way." *Id.* at 658 (quoting *Hurley*, 515 U.S. at 572-73). The states in both cases were using their laws to force a private group to express, either directly or by association, a view

the group did not share. “So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State’s interest on the other.” *Id.* at 658-59. These kinds of cases are rare, and, most importantly, this case is not one of them. The accommodation here is not a private group expressing a particular viewpoint or message. Rather, it is the most traditional type of public accommodation: a business selling goods and services to the general public, with products and services that express only those messages purchased and approved by its customers. There is no compelled expressive-association here.

B. Courts Have Never Applied a First Amendment Balancing Test Where the Public Accommodation at Issue Sells Goods and Services to the General Public.

No court has applied a First Amendment balancing test in a case like this, in which a for-profit enterprise has refused to sell to a specific group of people the goods or services that it otherwise sells to the general public. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 65 (N.M. 2013) (“The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation.”). The reason why is simple: a for-profit business is neither engaged in expressive association nor its own speech when it sells its products and services to the public.

- 1. Any message conveyed by flower arrangements offered as a commercial service belong to the customer and not the arranger.**

Amici, particularly The Cato Institute, argue that the First Amendment applies because floral arrangements may involve artistic expression, citing the works of Jackson Pollock, the music of Arnold Schoenberg, and the poetry of Lewis Carroll as examples of constitutionally protected expression. These observations are beside the point. When a floral business sells flowers and flower-arranging services to the general public, any messages conveyed by the flowers are the *customer's* message and *not the business's*.¹ The court in *Elane Photography* emphasized this point: "It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)." 309 P.3d at 69-70. The situations in which courts have used a First Amendment balancing test "are distinctly different because they involve direct government interference with the speaker's own message, as opposed to a message-for-hire." *Id.* at 66; *see also* Br. of Prof. Tobias B. Wolff as Amicus Curiae in Supp. of Respondents ("Wolff Br.").

¹ This same reasoning also undercuts the argument of the Ethics & Religious Liberty Commission of the Southern Baptist Convention, which contends that Arlene's Flowers must accommodate Baronelle Stutzman's religious objection to creating flower arrangements for gay couples. Any message conveyed by such flower arrangements is the customer's expression and not that of Arlene's Flowers or its employees or owners. *See also* Br. of Amicus Curiae Americans United for Separation of Church and State in Support of Respondents.

2. The WLAD does not compel Appellants to express a particular message or incorporate a different speaker's words into their own message.

Ultimately, Amici want to make this a compelled-speech case.

It is not. Compelled-speech cases arise when the government requires a speaker to: (1) express a particular message; or (2) incorporate unwanted elements of another's speech into her own. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1942).

The WLAD does neither of these things.

The first line of compelled-speech cases involves laws that require an individual to "personally speak the government's message." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 63, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *see also Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (state law requiring motorists to display objectionable motto on their license plate); *Barnette*, 319 U.S. 624 (school policy forcing students to recite pledge of allegiance). The WLAD does not require the communication of any government message. It regulates only commercial conduct. In discussing New Mexico's anti-discrimination law, the New Mexico Supreme Court explained in *Elane Photography*:

[New Mexico's law] applies not to Elane Photography's photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not.

309 P.3d at 68. Likewise, the WLAD regulates Appellants' business operations, not the content of their flower arrangements. *See also* Wolff Br. 4. In fact, the WLAD specifically states that it "shall not be construed to endorse any specific belief, practice, or orientation." RCW 49.60.020.

The second line of compelled-speech cases are those in which the statute requires a speaker to incorporate the message of others into its own message. In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974), the United States Supreme Court held that a Florida statute violated the compelled-speech doctrine by requiring newspapers to print replies to editorials that attack a political candidate's personal character. The Court held that the statute infringed on the newspaper editors' freedom of speech by manipulating the message the editors chose to print. *See also Hurley*, 515 U.S. 557 (law applied to require private parade organizers to include gay and lesbian group in parade). In these cases, the laws at issue ran afoul of the First Amendment because "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63. Application of the WLAD in this case does not require Appellants to alter their own messages. If the flowers requested by Mr. Ingersoll and Mr. Freed represented any viewpoint at all, it was *their* viewpoint and not that of Appellants.

The analytical framework advanced by Amici simply does not apply. Appellants do not have any expressive or associational rights at stake in this case. They are a for-profit business that sells flowers and

flower-arranging services to the general public, and the WLAD requires only that they offer those goods and services to everyone without discriminating against consumers in protected classes. RCW 49.60.215. No court has used a First Amendment balancing test in a case like this one, and this Court should not be the first.

3. The WLAD serves a compelling government interest in preventing the social and individual harms of discrimination.

What is more, application of the balancing test would not actually favor Appellants. Amici attempt to minimize the harms of Appellants' discriminatory refusal to serve Mr. Ingersoll and Mr. Freed, disregarding decades of U.S. Supreme Court jurisprudence holding that anti-discrimination laws like the WLAD serve compelling government interests. *See, e.g., Roberts*, 468 U.S. at 624 (holding that public accommodations law "plainly serves compelling state interests of the highest order"); *New York State Club Ass'n*, 487 U.S. at 14 n.5 (recognizing state's "'compelling interest' in combating invidious discrimination").

The WLAD serves to eradicate systemic societal discrimination, which both "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life." *Roberts*, 468 U.S. at 625. "[T]he fundamental object of [federal civil rights legislation] was 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). As Justice Goldberg eloquently explained:

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

Id. at 291-92 (Goldberg, J., concurring). Washington courts have “long recognized damage is inherent in a discriminatory act.” *Negron v.*

Snoqualmie Valley Hosp., 86 Wn. App. 579, 587, 936 P.2d 55 (1997).

An act of discrimination “in itself carries with it the elements of an assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering, are elements of actual damages for which a compensatory award may be made.” *Id.* at 587-88 (quoting *Anderson v. Pantages Theatre Co.*, 114 Wash. 2d, 31, 194 P. 813 (1921)).²

In enacting the WLAD, the Legislature recognized that the kind of discrimination at issue here “threatens not only the rights and proper

² Some amici, particularly The Becket Fund, have attempted to conflate this case with cases in which the government censored or punished pure speech because the speech was offensive. Br. of Amicus Curiae The Becket Fund For Religious Liberty in Support of Reversal 14-16; *see also* Br. as Amici Curiae in Support of Appellants of The Frederick Douglass Foundation. This is not a censorship case involving offensive speech; it is a case in which a commercial enterprise operating as a public accommodation denied goods and services to Washington consumers because of their sexual orientation. This is a fundamentally different kind of harm.

privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. Its purpose, “to deter and eradicate discrimination in Washington,” is “a policy of the highest order” for the benefit of all members of society seeking access to public accommodations. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.3d 655 (2002). It is irrelevant that Appellants do not discriminate against gay customers in every context or that Appellants’ refusal to serve Mr. Ingersoll and Mr. Freed was not expressly unkind.

There is no judicial precedent for applying a First Amendment balancing test in cases like this because, ultimately, this case is not about the First Amendment. It is about a business and its owner’s decision to discriminate in a public accommodation.

C. Expanding Application of a First Amendment Balancing Test to Commercial Enterprises Open to the General Public Would Have Far-Reaching and Dangerous Consequences.

Not only would use of a First Amendment balancing test be unprecedented, it would open a Pandora’s Box our courts and legislative bodies have long labored to close. There is no limiting principle that would prevent the kind of exemption sought here from swallowing the rule:

Accepting [Amici’s] argument would exempt from antidiscrimination laws any business that provided a creative or expressive service. 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.

Elane Photography, 309 P.3d at 72. Photography and floral arrangements are not the only businesses involving elements of artistry and expression. Bakeries have recently used the same arguments in trying to circumvent public accommodations laws after refusing to bake wedding cakes for gay and lesbian couples. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. Aug. 13, 2015), *cert. denied* No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed* (July 22, 2016) (U.S. No. 16-111) (bakery violated public accommodations law by refusing to create a wedding cake for a same-sex wedding); *In re Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor & Indus. July 2, 2015) (same); see also Jacquelyn Cooper, *Modern Day Segregation: States Fighting to Legally Allow Businesses to Refuse Service to Same-Sex Couples Under the Shield of the First Amendment*, 15 Rutgers J.L. & Religion 413 (2014).

And surely no one would disagree that chefs, bartenders, and caterers create expressive foods and drinks; some are even works of art. Indeed, it is not difficult to foresee a fashion house, an architectural firm, a landscaping businesses, or, particularly in our state, a coffee shop, making the same argument as Appellants as they turn away a Muslim or Mexican-American customer. Appellants' own expert, Dr. Mark David Hall, agreed that there is no logical distinction between religiously-based discrimination against a same-sex couple and religiously-based discrimination against an interracial couple. CP 2101.

This is not a merely hypothetical concern. In fighting racial desegregation, private schools argued that integration was “a violation of God’s command.” *Bob Jones Univ. v. United States*, 461 U.S. 574, 583, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983). A state court once affirmed Virginia’s anti-miscegenation law because “Almighty God . . . did not intend for the races to mix.” *Loving v. Virginia*, 388 U.S. 1, 3, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).³ More recently, employers have attempted to use religion to avoid laws requiring equal treatment of women in the workplace.⁴ See, e.g., *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (finding that Title VII applied to a private religious school’s administration of employee benefits); *E.E.O.C. v. Pacific Press Pub. Assoc.*, 676 F.2d 1272 (9th Cir. 1982) (holding that Title VII applied to a nonprofit religious publishing house). Landlords have sought exemption from fair housing laws based on religious beliefs about unmarried couples. See, e.g., *Smith v. Fair Emp’t and Hous.*

³ Religious justifications for racial discrimination in particular have a deep and dark past. Courts once justified segregation on the railroads as “divinely ordered.” *Berea College v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906); see, e.g., *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (Pa. 1867); Br. of Amicus Curiae NAACP Legal Defense & Education Fund, Inc. 12-13. Religion was used to justify slavery and religious association was used to argue against the Civil Rights Act of 1964. See William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 665-75 (2011).

⁴ Respondents take no position on employer accommodation of an employee’s religious beliefs, as these are not the facts before the Court in this case. See Br. of Amicus Ethics and Religious Liberty Commission of the Southern Baptist Convention in Support of Appellants.

Comm'n, 913 P.2d 909 (Cal. 1996); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994).

Our progress toward a more integrated, equal, free, and fair society will be undone if courts start allowing businesses to opt out of anti-discrimination laws by claiming a right not to express a viewpoint with which they disagree. That is why no court has found the First Amendment implicated by application of anti-discrimination laws in the general commercial context, and there is no legal or policy reason why this Court should be the first. “The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.” *Roberts*, 468 U.S. at 634 (O’Connor, J., concurring).

III. CONCLUSION

This case is not about expressive association or compelled speech. Appellants are not a private organization devoted to the promotion of a particular point of view. Instead, they operate a for-profit commercial enterprise that sells goods and services to the general public. This is precisely the kind of business to which public accommodation laws, like the WLAD, apply and precisely the kind of business to which customers like Mr. Ingersoll and Mr. Freed should have equal access. This Court need not and should not deviate from decades of public accommodation

law affirming the right of consumers to access goods and services
regardless of how they look or who they are.

RESPECTFULLY SUBMITTED this 1st day of November, 2016.

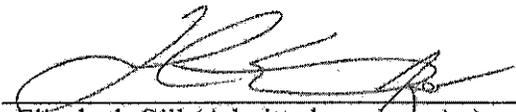
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CERTIFICATE OF SERVICE

On the date indicated below, I hereby certify that I caused to be served upon all counsel of record via email a true and correct copy of the foregoing document.

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

DATED this 1st day of November, 2016, at Seattle, Washington.


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Subject: RE: Ingersoll,, et al. v. Arlene's Flowers, Inc., et al.; Cause No. 91615-2

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From: Suzanne Powers [mailto:suzanne.powers@hcmp.com] **On Behalf Of** Jake Ewart

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Subject: Ingersoll,, et al. v. Arlene's Flowers, Inc., et al.; Cause No. 91615-2

- *Ingersoll, et al. v. Arlene's Flowers, Inc., et al.*; Cause No. 91615-2

Attached is the Brief of Respondents Ingersoll and Freed in Answer to Amicus Curiae Briefs and Certificate of Service in the above-referenced matter.

The person submitting this motion is Jake Ewart, Telephone: (206) 623-1745, WSBA No. 38655, e-mail address: jake.ewart@hcmp.com.

This brief is being served on all counsel of record by email.

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