STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 (consolidated with 13-2-00953-3) DEFENDANTS' RESPONSE TO PLAINTIFFS' TWO MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY
ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	

I. INTRODUCTION

Barronelle Stutzman did not violate the Washington Law Against Discrimination

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(WLAD) or the Consumer Protection Act (CPA). She did not refuse to provide wedding services to Robert Ingersoll. And she did not refer Mr. Ingersoll to another florist "because of" his sexual orientation.

Generally, this case is about whether Washington can impose its marriage orthodoxy on 70-year-old florist Barronelle Stutzman and her expressive business by compelling them to participate in weddings that violate her religious beliefs. But the heart of this motion goes to *what* Barronelle Stutzman did and *why* (the "because of") she did it—something that turns on factual disputes about Barronelle's March 1, 2013 conversation with Robert Ingersoll. Because factual disputes exist about what Barronelle Stutzman was asked to do, and why she did was she did, summary judgment is precluded.

Barronelle is a Christian who believes God created marriage to be between one man and one woman. She is also a floral designer who owns and operates Arlene's Flowers, a floral shop in Richland, Washington. For 32 years, Barronelle has created floral arrangements at Arlene's, befriended customers, and participated in many of their significant life events. For nine years, Barronelle did the same for Robert Ingersoll—a man whom she knew was gay and for whom she regularly created beautiful and complex floral arrangements.

On March 1, 2013, Rob asked Barronelle about flowers for his upcoming wedding to Curt Freed, and Barronelle explained she couldn't "do" his same-sex wedding because of her relationship with Jesus Christ. After the media reported this, Washington State and both Rob and Curt sued Barronelle and Arlene's Flowers, alleging discrimination based

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on sexual orientation in violation of Washington's Law Against Discrimination (WLAD) and the Consumer Protection Act (CPA).

These Plaintiffs now seek summary judgment against Barronelle and Arlene's on the assumptions that a) Barronelle declined to sell to/serve Rob because of his sexual orientation and b) the State can compel Barronelle to participate in events contrary to her religious beliefs. These assumptions are wrong and summary judgment is unjustified for three reasons.

First, disputed facts exist about Barronelle's conversation with Rob. While Plaintiffs accuse Barronelle of discriminating during this conversation, Plaintiffs have varying stories as to what actually occurred. Rob and Curt say Barronelle declined to "sell flowers," but the State says Barronelle declined to provide undefined "floral services." Later, Rob and Curt alleged that they merely wanted to purchase sticks and twigs (raw materials) from Barronelle. But Barronelle never declined to sell Rob raw materials or pre-arranged flowers. Because of her prior dealings with Rob, Barronelle believed he was asking her to create floral arrangements, attend, greet guests, encourage his wedding party and perform other similar activities. In turning this down, Barronelle did not decline to sell or to serve; she declined to intimately participate in Rob's wedding. And Barronelle never declined anything because of Rob or Curt's sexual orientation. Not only did Barronelle know of Rob and Curt's sexual orientation and repeatedly provide them flowers, Barronelle has hired employees that identify as gay. Because she does not discriminate against anyone for identifying as gay or lesbian, Barronelle lovingly

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declined Rob's request for a different reason—her religious beliefs. Indeed, Barronelle would've reached the same decision about Rob's request had it come from a polyamorous relationship or from two men who weren't attracted to each other but who nonetheless wanted to marry for financial reasons.

Second, taking the facts in her favor, Barronelle did not violate the WLAD or the CPA. Barronelle did not violate WLAD's prohibition on sexual orientation discrimination because marriage and sexual orientation differ. Barronelle can (and did) act "because of" the former without regard to the latter. Likewise, Barronelle did not violate the CPA's prohibition on unfair acts impacting the public interest because the state allows others to commit the very same act as Barronelle. Because Washington allows ministers and religious organizations to manage their public accommodations without participating in same-sex wedding ceremonies, Barronelle can do the same without violating the CPA.

Third, the Washington and federal constitutions protect Barronelle's right to promote and participate in weddings consistent with her religious beliefs. Contrary to Plaintiffs' assertions, local anti-discrimination statutes do not override constitutional protections of free speech and free religious exercise. Courts have frequently enjoined statutes that substantially burden religious practices and even public accommodation laws that compel speakers to express messages impacting their speech. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

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Barronelle's situation is no different.

Nor does accommodating Barronelle allow businesses to discriminate anytime they speak to provide a service. The compelled speech doctrine does not protect typical businesses that use speech incidental to conduct, *i.e.*, speech used to provide non-expressive services. But this doctrine does protect those rare expressive businesses, like television studios or newspapers or floral artists, whose essence or central mission is expressive.

Likewise, accommodating religious views on marriage does not give businesses free reign to discriminate. Washington only has to accommodate religion when the State substantially burdens religion for no compelling reason. And forcing Barronelle to participate in same-sex weddings is far from compelling. Indeed, Washington already exempts religious ministers and religious organizations from participating in same-sex wedding ceremonies in their public accommodations. And even with these accommodations, Washington has been able to successfully implement and enforce its new laws regarding marriage. A similar exemption for Barronelle will not impede the state's objectives.

Thus, a host of important legal and factual disputes preclude summary judgment for Plaintiffs. These disputes also advise caution. This Court should only decide the merits of this important case when it knows all the facts and knows them precisely. Venturing into murky factual waters to decide a controversial case of constitutional significance is neither wise nor warranted. Trial is a better course. This Court should take this course

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and deny Plaintiffs' motions for summary judgment.

II. STATEMENT OF FACTS

The religious beliefs of Barronelle Stutzman have animated and inspired her successful business, Arlene's Flowers, for over 30 years. Loving her neighbors, Barronelle has befriended many customers in her floral business and participated in many of their significant life events. Disregarding the thousands of customers that she has successfully served, or the beauty that Arlene's Flowers has brought into the intimate occasions (both sad and joyous) of the Tri-Cities community, the State has shattered notions of both diversity and tolerance within Washington's business community. Rather, the State now seeks to command Barronelle to do business its way and, in the process, compel her to violate her religious beliefs.

<u>The relationship: Barronelle develops a "warm and friendly" relationship with Robert Ingersoll</u>

Barronelle and Robert Ingersoll were friends. Stutzman Decl. ¶ 39. For nine years, Barronelle served Rob at her floral shop in Richland, talking with him as he frequently browsed and placed orders. Stutzman Decl., ¶ 39; Becker Dep. 32:16-25 (noting Rob was a regular customer). These conversations led to what Rob considered a "warm and friendly" relationship, a relationship where "Barronelle was always pleasant and happy to see me." Ingersoll Dep. 25:17, 25:21-23.

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And Barronelle was happy to see Rob. Barronelle loved and respected Rob as a natural outgrowth of her religious beliefs about loving her neighbor. Stutzman Decl. ¶ 39. Barronelle also knew Rob was gay, and Rob knew Barronelle was religious. Ingersoll Dep. 25:12-14, 26:14-16; Stutzman Dep. 69:23-71:9; Stutzman Decl., ¶ 40. Freed Dep. 10:25-11:23. Rob's sexual orientation, however, did not change how Barronelle valued him as a customer or as a friend. Barronelle Dep. 70:23-71:13; Ingersoll Dep. 26:2-8.

Barronelle's relationship with Rob was hardly unusual. While working in her mom's floral shop decades ago, Barronelle learned that florists should develop close relationships with their customers. Stutzman Decl., ¶ 17. Barronelle even put this philosophy into her floral shop's employment policies:

> Arlene's has been in business for over 47 years. Service is what we are all about; we want to be our customers PERSONAL FLORIST, not just a florist. We want our customers from birth to death…Customers come first, whoever they are, however they are dressed, whatever they look like, whatever color or creed, what they are willing to spend. They are to be waited on promptly, courteously, in a helpful matter and efficiently.

Waggoner Decl. Ex. 12 (Bates p.43). Barronelle has now practiced this philosophy at Arlene's for 32 years, continually serving some customers for as long as 30 years while creating flowers for their significant life events like Valentine's Day, Easter, Mother's Day, anniversaries, birthdays, weddings, baptisms, and relative's funerals. Stutzman Decl., ¶ 18; Ingersoll Dep. 25:17-26:5; Mulkey Decl.¶1.5; Perry Decl., ¶ 1.4.

Barronelle developed these relationships with all types of customers. Stutzman Decl., ¶ 19. Barronelle respects and loves her customers and employees regardless of their race, religion sex, or sexual orientation. Stutzman Decl., ¶ 20. Thus, Barronelle has served and

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befriended customers who identified as homosexual, and Barronelle has employed people who identify as homosexual. Ingersoll Dep. 25:17-26:5; Stutzman Decl., ¶ 21; Mulkey Decl. ¶ 1.5. As one of her gay, former employee notes, "[Barronelle] was a great boss and I enjoyed my time there. I never witnessed her make unkind, demeaning, derogatory, rude, or insulting comments to any employees or customers….I never felt like Barronelle treated me differently because of my sexual orientation even though she was very religious." Mulkey Decl. ¶ 1.5; Stutzman Decl., ¶ 21.

The artwork: Barronelle uses her skill and imagination to create "off the wall" floral arrangements for Rob

Barronelle and Rob were more than friends. To use Rob's words, Barronelle was "our florist." Ingersoll Dep. 49:9-15. Rob bought at least 30 arrangements from Barronelle for different occasions, including birthdays, anniversaries, and Valentine's Day. Ingersoll Dep. 10:11-24; Stutzman Dep. 71:7-13. And Rob rarely, if ever, ordered pre-prepared arrangements. Stutzman Dep. 74:18-75:2; Ingersoll Dep. 12:1-7. He always asked Barronelle to create custom design arrangements that were "unusual," "creative," and "off the wall." Stutzman Dep. 74:18-75:13; Stutzman Decl., ¶ 40. During the order process, Rob typically picked out a vase with Barronelle's help and then told Barronelle to "just do your thing"; Rob would then "trust her judgment" to create arrangements that captured the mood or expression Rob wanted to convey. Ingersoll Dep. 13:13-14:2, 20:18-24; Stutzman Dep. 75:4-75:8.

And Barronelle always came through for Rob who was "always pleased" with what Barronelle created. Ingersoll Dep. 12:21-23. In Rob's opinion, Barronelle was a "very

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gifted florist" who used her "exceptional creativity" to create "great work" and "wonderful arrangements." Ingersoll Dep. 12:12-20, 15:22-16:4. *See also* Ingersoll Dep. 20:9-11 (admitting that Barronelle was "creative and thoughtful in the way that she puts things together."); Freed Dep. 14:4-19 (admitting that Arlene's did not simply produce "a ball of flowers" but produced something more "freeformed."). Simply put, Barronelle did "amazing work." Ingersoll Dep. 21:11-13 & Waggoner Decl. Ex. 2.

But this amazing work required years of training. In the mid-1970's, Barronelle learned the art of floral design at her mom's shop in Connell and began to design floral arrangements and develop her own floral design style. Stutzman Decl. ¶ 6. Barronelle learned the art of floral design from her mom and other floral designers who worked with her mom. Stutzman Decl. ¶ 7. Thus, Barronelle has worked in floral shops and practiced her craft for decades, while she also periodically attended floral design schools and shows to "hone [her] creativity." Stutzman Dep. 7:21-13:3; Becker Dep. 20:16-25. Barronelle eventually deployed her skills at Arlene's, which she began to manage in 1982 and bought from her mom in 1996. Stutzman Decl. ¶ 8. And Barronelle still practices her craft at Arlene's, designing flowers either at the Arlene's shop or from home. Stutzman Dep. 19:22-20:4.[1] Thus, Barronelle sharpened her design skills for nearly 40 years. Stutzman Decl. ¶ 5,

[1] Besides creating floral arrangements, Barronelle also oversees Arlene's business operations as Arlene's President. Stutzman Dep. 16:15-24. Arlene's usually employs around ten employees, including drivers who deliver flowers in Arlene's owned delivery vans and four floral designers. Stutzman Dep. 20:18-21:25; Becker Dep. 26:15-27:11. During busy seasons like Mother's Day, Easter, and Christmas, Arlene's adds around ten more part-time employees to its ranks and 18 additional drivers. Stutzman Dep. 19:18-21; 21:1-22:16.

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Floral design requires much precision. Stutzman Decl. ¶ 9. A floral artist like Barronelle typically starts with raw material (such as flowers, a container, or a vase) and arranges them in an artistic fashion until her creation conveys the desired mood and message. Stutzman Decl., ¶ 9; Stutzman Decl. Ex. 1, pp. 1, 3, 4, 15; Mulkey Decl. ¶1.7. The final product is almost unrecognizable from the raw flowers the artist began with:

Raw Product

Barronelle's Arrangement

Stutzman Decl. Ex.1, pp. 4, 9. *See also* Stutzman Decl. Ex.1, pp. 1-20 (for more before-and-after pictures); Mulkey Decl. ¶1.7 ("Although the customer pays for the product, the final floral design is the personal creation and expression of the artist."). A leading floral art treatise summarizes the process this way: "As in any art, the floral designer embellishes the form with personal interpretation." Robbins Decl. Ex. 2 , p.30.

This process involves many inputs as well. When designing arrangements, floral artists like Barronelle must include many creative, artistic, and expressive components

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like design, harmony, unity, balance, proportion, scale, focal point, rhythm, line, form, color, space, depth, texture, and fragrance. Robbins Dep. 61:1-6; Robbins Decl., ¶20; Robbins Decl. Ex. 2, pp. 30-96; *id.* Ex. 3, pp. 20-37. Floral artists also commonly incorporate and harmonize the meaning and symbolism of particular flowers in their arrangements. Stutzman Decl., 10; Robbins Dep. 61:1-6; Robbins Decl., ¶20; Mulkey Decl. ¶1.7; Robbins Decl. Ex. 4; *see also,* Waggoner Decl. Ex. 5; *id.* Ex. 6; *id*. Ex. 14.

And floral design artists also use distinct styles just like painters. Robbins Decl. ¶ 22. Barronelle, for example, uses a botanical style with traditional and Asian influences. Robbins Dep. 65:10-69:19 (explaining how Barronelle exemplifies these styles while using space and texture). But each designer's style is very personal: no floral design artist will incorporate the same style in the same manner, especially since clients generally leave the components and details of floral design to the artist's discretion. Robbins Dep. 65:5-9; Robbins Decl. ¶ 20; Stutzman Decl., 15.

Although each designer uses her own style, every Arlene's designer uses a style and form consistent with Barronelle's. Robbins Decl. ¶ 22. As Arlene's owner and chief floral artist, Barronelle personally supervises the design and creation of the arrangements and reviews them before they leave the shop. Robbins Dep. 71:13-19; Stuzman Dep. 83:25; Stutzman Decl. ¶ 14. This is done for quality and consistency—so that every arrangement from Arlene's maintains a consistent quality and style. Robbins Decl. ¶ 22. This quality and style shine through each of Barronelle's artistic creations:

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Stutzman Decl. Ex.1, pp. 22-23, 25-26, 28.

The weddings: Barronelle uses her skill and imagination to participate in wedding ceremonies.

Although Barronelle enjoys designing all types of floral arrangements, she particularly enjoys designing wedding arrangements because wedding ceremonies carry religious significance for Barronelle. Stutzman Decl. ¶ 23. Barronelle also enjoys learning about the engaged couple and celebrating with them. Stutzman Decl. ¶ 27. *See also* Stutzman Dep. 41:23-42:9; Perry Decl. ¶ 1.4; Robbins Dep. 48:1-25 (describing process Barronelle uses to learn about engaged couple).

Weddings present Barronelle her greatest challenge. Stutzman Decl. ¶ 23. Barronelle usually creates many arrangements for each wedding, and each arrangement uses multiple elements. Robbins Dep. 76:12-77:5; Robbins Decl. 25; Perry Decl. ¶¶ 1.6-1.8;

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Stutzman Decl. ¶ 31. To make matters more difficult, floral design artists must use their artistic discretion to create arrangements that fit the wedding location, that complement the colors chosen by the couple, and that capture the event's mood, including the couple's personalities. Stutzman Dep. 40:23-42:19; Stutzman Decl., 30; Robbins Dep. 76:12-77:5; Robbins Decl., ¶24. *See also* Ingersoll Dep. 27:12-21 (admitting that flowers add mood and elegance and convey a "celebratory atmosphere" at wedding). In light of this challenge, a floral artist will not usually begin to create custom wedding arrangements until she gains years of experience and training. Stutzman Dep. 14:1-6. *See also* Becker Dep. 8:19-9:3 (explaining her process of learning floral design).

Because Barronelle has this experience, she usually meets with her wedding clients several times to gather information necessary to design wedding flowers. Stutzman Decl., 28; Perry Decl. ¶ 1.4; Robbins Dep. 48:4-25. Few couples come to Arlene's with specific ideas of what they want, so Barronelle works with them to develop a comprehensive plan for every arrangement at their wedding, including boutonnieres, corsages, pew markers, table pieces, bouquets, and altar flowers. Stutzman Dep. 42:22-43:21; Perry Decl. ¶¶ 1.6-1.8. And though Barronelle sometimes shows her wedding customers pictures as a conversation starter, couples rarely choose the arrangements depicted in these pictures. Stutzman Decl., 29; Stutzman Dep. 47:2-7; Becker Dep. 29:2-4; 66:23-67:5.

Rather, Barronelle typically spends hours getting to know the couple, their background, their aspirations, and their likes and dislikes. Perry Decl. ¶ 1.4; Stutzman Decl. ¶ 28; Robbins Dep. 48:2-50:2. Barronelle asks the couple about what color scheme

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they chose for their wedding, what flowers they like, and where they're getting married. Stutzman Dep. 40:23-41:11. She also learns about the couple on a personal level — "get[s] to know their personalities" — and tries to capture the couple's "vision . . . of their wedding" and their shared story. Stutzman Dep. 40:23-41:11. In this process, floral artists like Barronelle become emotionally invested in the wedding and form a personal bond with their clients. Robbins Dep. 87:15-25, 73:2-17; Stutzman Decl. ¶ 27; Mulkey Decl. ¶ 1.7; Perry Decl. ¶ 1.4, 1.9-1.11; Robbins Decl., ¶25.

After learning about the couple, Barronelle incorporates elements of their relationship and personalities into the floral arrangements. Perry Decl. ¶ 1.4; Stutzman Decl. ¶ 30. *See also* Robbins Dep. 81:12-82:9 (explaining how couple's personal history influences floral design). As a result, Barronelle's wedding arrangements not only "reflect the mood and look desired by the couple, but also the personal style and creativity of the artist." Robbins Decl., ¶24. And this personal style speaks through the wedding arrangements, which explains why wedding guests usually ask who designed the flowers. Stutzman Decl. ¶ 24; Robbins Dep. 75:13-76:3.

Arlene's Flowers does not simply create floral arrangements for weddings. Arlene's also delivers these arrangements to the wedding venue in vans with Arlene's name and logo. Becker Dep. 26:15-27:11. Arlene's also offers to provide full

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wedding support. Stutzman Decl., ¶ 33. Arlene's frequently provides this full wedding support for large weddings or for long-time customers who have developed relationships with Arlene's employees. Stutzman Decl., ¶ 35; Stutzman Dep. 53:23-54:12. When providing full wedding support, Arlene's designers help before, during, and after the wedding ceremony. Perry Decl. ¶¶ 1.9, 1.10; Stutzman Decl. ¶ 33. At the wedding venue, the designers ensure all flowers appear beautiful, perform touch-ups and changes to the flowers if needed, attend the ceremony, and clean-up afterwards. Stutzman Decl. ¶ 33. The designers also help the bride in any other way they can. Barronelle, for example, has greeted guests as they arrived at wedding ceremonies, entertained children as the wedding party prepared, styled hair for wedding party members, and cleaned the wedding party's attire. Stutzman Decl. ¶ 36. Barronelle also encourages the wedding party as they prepare for the big day. Stutzman Decl. ¶ 37. She has even counseled and convinced one bride her to continue with the wedding ceremony after the bride expressed doubts about the groom. Stutzman Decl. ¶ 37.

The request: Rob asks Barronelle to participate in his same-sex wedding ceremony

In late February 2013, Rob visited Arlene's and inquired about wedding flowers for his upcoming wedding with Curt. Ingersoll Dep. 48:2-19; Stutzman Dep. 75:14-24; Ingersoll Decl., ¶6. At that time, Rob "had fairly decent idea of what we [he and Curt] wanted to do" for wedding flowers: they wanted "some sticks or twigs in a vase and then we were going to do candles. We wanted to be very simple and understated." Ingersoll Dep. 48:20-49:4. *See also* Freed Dep. 32:23-33:7 (noting that he and Rob wanted "twigs

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or branches or something to that effect…").[2] But Rob never told Barronelle he wanted sticks, twigs, or vases. Ingersoll Dep. 49:5-8; Stutzman Decl., ¶ 43. If Barronelle knew Rob wanted sticks, twigs, and vases, she would have gladly provided them. Stutzman Dep. 80:15-19, 98:1-5, 105:21-106:15.

In fact, Rob did not even speak with Barronelle at his February visit to Arlene's. Ingersoll Decl., ¶6. Rob spoke with Barronelle's co-worker who asked Rob to come back later to speak with Barronelle. Ingersoll Dep. 48:2-19. That co-worker then told Barronelle that Rob wanted to talk to her "about wedding flowers." Stutzman Dep. 75:14-76:3. Upon hearing this description, Barronelle thought Rob wanted her to provide full wedding support for his wedding ceremony. Stutzman Decl., ¶ 43. Barronelle reached this conclusion because she knew that Rob always asked for her, that Rob liked unusual and custom designs, and that Rob had a close relationship with her. Stutzman Decl., ¶ 43; Stutzman Dep. 75:22-76:1. Because of this close relationship, Barronelle expected Rob to request the same thing other long-time customers request for weddings: full wedding support, which would require Barronelle to custom design floral arrangements, deliver these arrangements in Arlene's delivery vans, attend Rob's wedding ceremony, perform touch-ups to the flowers at the ceremony, clean up after the ceremony, and provide other

[2] While Rob and Curt say at depositions they wanted sticks and twigs, Rob and Curt claim in written discovery later that they did not have "any particular expectations about products and services" when they asked Barronelle to participate in Rob's wedding ceremony. Waggoner Decl. Ex. 18 (Response to Admission #6). *See also id*. (Response to Admission #8) ("No particular 'floral arrangements' were requested from Arlene's Flowers and Barronelle Stutzman."); Waggoner Decl. Ex. 19. (Response to Interrogatory #34) (stating that Rob and Curt "did not make any final decisions" about floral orders and that Rob and Barronelle "did not discuss in any detail the types of goods or services Curt and I wanted Arlene's to provide.").

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assistance at the ceremony like greeting guests and perhaps even encouraging the wedding party. Stutzman Decl., ¶ 43.

After hearing about Rob's request, Barronelle went home and spoke with her husband about Rob's request and how it conflicts with their faith. Stutzman Dep. 77:17-22. Barronelle adheres to the church's historic view on marriage and sexual activity. Stutzman Decl. ¶ 45. *See also* Burk Decl. ¶ 16-18 (explaining Southern Baptist beliefs on marriage). Specifically, she believes God created two distinct genders and ordained marriage to be between one man and one woman. Stutzman Decl. ¶ 45. Barronelle also believes that she cannot use her artistic talents for a marriage inconsistent with her religious beliefs. Stutzman Decl. ¶ 46. *See also* Burk Decl. ¶ 19-25 (explaining Southern Baptist beliefs about participating in same-sex wedding ceremonies). To do so would cause her to promote activities and express messages that conflict with her conscience. Stutzman Decl. ¶ 48.

Barronelle and her husband decided that "because of our faith," she couldn't participate in Rob and Curt's wedding "in good conscience." Stutzman Dep. 77:17-22. Having reached this conclusion, Barronelle agonized about what to tell Rob. She did not want to hurt her friend's feelings. Stutzman Decl., ¶ 51; Stutzman Dep. 76:6-8; 84:5-7.

<u>The referral: Barronelle declines to participate in Rob's same-sex wedding ceremony and refers him to other florists.</u>

When Rob returned to the store on March 1, he and Barronelle began to chitchat. Stutzman Dep. 79:17-24; Ingersoll Dep. 17:17-20:8; Ingersoll Decl., ¶7. Rob eventually said he was going to get married and wanted something for his wedding. *Id*. Barronelle

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then "put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding." *Id*; Ingersoll Dep. 38:15-40:3. With this response, Barronelle declined to provide full wedding support including assistance and attendance at the ceremony. Stutzman Decl., ¶ 53. *See also* Stutzman Dep. 80:3-11 ("I chose not to be a part of his event."); *id*. at 81:15-17 ("…I told him I wouldn't be part of his event."); *id*. at 81:24-82:5 ("I told him I could not do his wedding…Because of my relationship with Jesus Christ I could not do his wedding.").

Barronelle declined to participate in Rob's same-sex wedding ceremony solely because of her religious beliefs about marriage. Stutzman Decl., ¶ 50. She did not decline because of Rob's sexual orientation. Stutzman Decl., ¶ 50. Barronelle will serve weddings between one man and one woman regardless whether that man or woman is heterosexual, homosexual, or bisexual. Stutzman Decl., ¶ 50. Likewise, Barronelle will not participate in wedding ceremonies between two men or two women even if they are heterosexuals. Stutzman Decl., ¶ 50.

Because Barronelle's objection relates solely to participating in wedding ceremonies that conflict with her religious beliefs, Barronelle will continue to sell flowers and create custom arrangements for homosexual, bisexual, and all other customers. Stutzman Dep. 70:22-71:13, 101:18-20; Stutzman Decl., ¶ 58. Barronelle will even sell pre-arranged flowers for same-sex wedding ceremonies. Stutzman Dep. 80:15-23, 98:1-5, 105:21-106:15. But Barronelle cannot do what she thought Rob requested: use her imagination and artistic skill to intimately participate in same-sex wedding ceremonies. Stutzman

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Decl. ¶ 58. *See also* Stutzman Dep. 81:15-17 ("Didn't tell him I wouldn't sell him flowers, I told him I wouldn't be part of his event.").

When Barronelle explained her religious beliefs to Rob, she was not rude. Barronelle spoke sincerely, kindly, and considerately, as Rob acknowledges. Ingersoll Dep. 38:24-39:22. Barronelle even gave Rob the names of other florists who might participate in Rob's wedding. Ingersoll Dep. 17:3-14; Stutzman Dep. 103:17-104:23. Rob and Barronelle then chitchatted about how Rob became engaged and how he wanted his mom to walk him down the aisle. Stutzman Dep. 82:8-21. They then hugged, and Rob left. Stutzman Dep. 82:8-9. Although their conversation was difficult for them both, Barronelle expected Rob to stay a friend and a customer. Stutzman Decl. ¶ 54. Stutzman Dep. 84:5-7; Ingersoll Dep. 38:10-21.

The policy: Barronelle creates unwritten Arlene's policy referring full service wedding requests for same-sex wedding ceremonies

Before Rob asked Barronelle to participate in his same-sex wedding ceremony, Barronelle never received a request like Rob's during her long career in the floral industry. Stutzman Decl. ¶ 57. But with Rob's request, coming on the heels of the 2012 legalization of same-sex marriage in Washington, Barronelle realized that other customers may ask her to participate in same-sex weddings just as Rob did. Stutzman Decl. ¶ 56. So to give her employees guidance, Barronelle created an unwritten policy about how Arlene's handles requests to participate in same-sex wedding ceremonies. Stutzman Decl. ¶ 56. According to this policy, Arlene's will not take or participate in same-sex wedding ceremonies, meaning Arlene's will not provide full service wedding

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packages for same-sex wedding ceremonies, and will refer these requests to other florists. Stutzman Decl. ¶ 56. Until this lawsuit began, Arlene's had never received a request to provide any service for a same-sex wedding ceremony except Rob's request for Arlene's to provide its full wedding support. Stutzman Decl. ¶ 57. Thus, until this lawsuit began, Barronelle never confronted the issue whether Arlene's would provide such services for same-sex wedding ceremonies. Stutzman Decl. ¶ 57.

The fallout: Rob receives "beautiful" flowers for his wedding ceremony; Barronelle receives hate mail for her religious convictions

After his conversation with Barronelle, Rob went home and told his partner Curt. Ingersoll Dep. 19:14-20:6. The next morning and without Rob's knowledge, Curt posted a message about the conversation on his Facebook page. Waggoner Decl. Ex. 1; Ingersoll Dep. 15:2-21; Freed Dep. 14:1-3, 20:25-21:8. The media picked up the story from this post. Freed Dep. 22:16-18; Ingersoll Dep. 35:3-15.

Rob and Curt in turn received an outpouring of support: "We have had enough support from florists that we could get married about 20 times and never pay a dime for flowers." Waggoner Decl. Ex. 4; Freed Depo 37:5-8. *See also* Ingersoll Dep. 47:16-23 (admitting that florists offered them services after Facebook post); Freed Depo. 21:14-19 (admitting that most feedback supported their position); Freed Depo. 28:12-29:9 (admitting that several florists offered to provide them free services). Media outlets also ran stories about Rob and Curt's relationships while Rob and Curt talked to numerous media outlets, including the Wall Street Journal, the Tri-City Herald, and the Stranger, about Barronelle. Waggoner Decl. Ex. 3; Freed Depo. 25:16-23; Ingersoll Depo. 33:19-

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34:16.

Rob and Curt eventually married in July 2014. Ingersoll Dep. 73:16-74:23; 77:19-79:2. They used Lucky's Flowers — a florist Barronelle recommended to Rob — for their wedding flowers because Lucky's supported lesbian, gay, bisexual, and transgender issues. Ingersoll Dep. 22:25-23:8, 74:24-75:1; Stutzman Dep. 103:17-104:23. And Lucky's did a great job: according to Rob, the wedding flowers were "beautiful." Ingersoll Dep. 22:2-7.

Barronelle, meanwhile, received the following messages through email or electronic order form:

- I hope someone stomps your guts out bitch!
- You don't deserve flowers at your funeral you homophobic cunt! Take your Jesus Christ & shove him up your pompous ass!
- Cunt! You will die!!!
- I will help see to it that your business is OVER…and you claim to be a 'christian'…go to hell, hatemonger!
- You deserve what ever pain and suffering, and hopefully loss of your lively hood, for your hatred….I hope you have a stroke and live out the rest of your miserable life in a bed and chair attended by only the most obvious of married gay men and women.
- Who are you to say that marriage should only be for man and woman? Oh wait, Jesus says so. He never even existed you dumb cunt. He was created to control closed minded idiots like yourself….I hope you get everything you deserve, go fuck yourself and stay in church where your priests rape little MALE children.

Waggoner Decl. Ex. 10. *See also* Becker Dep. 39:14-20 (noting that 95% of received calls were negative). Some people even sent death threats, including threats to burn down Arlene's Flowers. Stutzman Decl. ¶ 59. Because of these violent threats, Barronelle retained a private security firm to protect herself, her business, and her employees.

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Stutzman Decl. ¶ 59. But Barronelle never criticized or directly responded to those who sent negative messages to her. Stutzman Decl. ¶ 59.

The witch-hunt: after learning about Barronelle in media reports, the Washington Attorney General sues Barronelle and Arlene's in unprecedented way for violating Washington's Law Against Discrimination.

Anonymous e-mailers were not the only group to respond to the media reports. The Washington Attorney General's Office also noticed the media spectacle. Waggoner Decl. Ex. 9 pp. 7-8, Answer #1. Attorney General Robert Ferguson even personally contacted Curt three times about Barronelle, saying he had attorneys researching ways the Attorney General's Office could pursue legal action against Barronelle and Arlene's. Freed Dep. 48:21-49:16; Waggoner Decl. Ex. 20 (Answer to Interrogatory #15).

In March 2013, the Attorney General's Office sent Barronelle and Arlene's Flowers a certified letter accusing them of violating Washington's Consumer Protection Act (CPA) by discriminating on the basis of sexual orientation in violation of the Washington Law Against Discrimination (WLAD). Waggoner Decl. Ex. 11. This letter neither sought Barronelle's side of the story, nor endeavored to better understand her religious beliefs, but demanded that Barronelle sign an assurance of discontinuance promising to provide "floral services" for same-sex wedding ceremonies. *Id*. In a subsequent letter, the Attorney General's Office again demanded that Barronelle sign the assurance or the Attorney General's Office "will pursue more formal options to address this matter, including but not limited to litigation." Waggoner Decl. Ex. 13.

But Barronelle did not sign the assurance. Stutzman Decl. ¶ 60. The Washington

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Attorney General's office then initiated this lawsuit on April 9, 2013, even though the Attorney General's office has never before filed a lawsuit using the CPA to rectify an alleged WLAD violation. *See, e.g.*, Defendants' First Motion for Summary Judgment Against State of Washington. A few months after the Attorney General filed suit, Rob and Curt filed their own lawsuit against Barronelle and Arlene's.

The stakes: Barronelle faces $2000 fines, losing her family business, and her personal assets, or forsaking her religious beliefs

The State accuses Barronelle and Arlene's of violating Washington's CPA and asks for an injunction requiring Barronelle and Arlene's to participate in same-sex wedding ceremonies. State Complaint ¶¶ 5.7-5.8, 6.3. The State also asks the Court to assess $2000 of damages against Arlene's and Barronelle in her personal capacity each time they decline to participate in a same-sex wedding ceremony. State Complaint ¶ 6.4. Finally, the State requests costs and attorney's fees. State Complaint ¶ 6.4.

This lawsuit is necessary, according to the State, to combat sexual orientation discrimination by public accommodations, even though the Washington State Human Rights Commission — the entity responsible for investigating discrimination claims — has *never* found a public accommodation liable for sexual orientation discrimination. *See* Waggoner Decl. Ex. 23. Meanwhile, the State has already exempted religious groups and ministers from solemnizing same-sex marriages and from offering services to solemnize same-sex marriages in public accommodations. RCW § 26.04.010. Just as Washington exempts these religious officials and organizations in its marriage law, throughout American history Washington and other government entities have frequently exempted

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conscientious objectors from laws, including laws requiring military service, oaths, compulsory school attendance, and vaccinations. *See* Hall Decl. Ex. 1 pp. 13-40. Although these laws served vital interests like national security and public health, governments still exempted religious objectors from these laws. *Id*. And these exemptions did not prevent the government from achieving its necessary policy goals. *Id*. The absence of discrimination in public accommodations based on sexual orientation suggests a similar posture here—that the State of Washington can still combat invidious discrimination while simultaneously accommodating its sincere religious adherents. That there is room for *all of us* is an idea that should still resonate.

In their lawsuit, Rob and Curt accuse Barronelle and Arlene's of violating WLAD, Individuals' Complaint, ¶¶ 19-28, and also ask for an injunction requiring Barronelle and Arlene's to participate in same-sex wedding ceremonies. Individuals' Complaint, Prayer for Relief, ¶ 1. They also request attorney's fees and treble damages from Arlene's and Barronelle in her personal capacity for the lost time and gas money needed to find another florist to service their wedding. Individuals' Complaint, Prayer for Relief, ¶¶ 2-3; Ingersoll Dep. 42:17-45:9; Freed Depo. 27:22-28:5 Waggoner Decl. Ex. 19 (Rob's Answers to Interrogatories #36-38); Waggoner Decl. Ex. 21 (Curt's Answers to Interrogatory #27).

Although Barronelle faces the prospect of an injunction, damages, and attorney's fees against her business and her personally, neither she nor her business will participate in wedding ceremonies that run contrary to her religious beliefs. Stutzman Decl. ¶ 61.

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Barronelle will close her family business, or stop participating in weddings, before she violates her religious beliefs. Stutzman Decl. ¶ 62.

III. EVIDENCE RELIED UPON

Barronelle and Arlene's rely upon the arguments in this response, the declarations of Barronelle Stutzman, Kristen Waggoner, Dennis Burk, Jennifer Robbins, and Mark David Hall supporting this response, the exhibits attached to these declarations, and the other pleadings and papers filed in this action.

IV. STANDARD OF REVIEW

Summary judgment is proper if no genuine issue exists as to any material fact and the moving party deserves judgment as a matter of law. CR 56(c). To make this evaluation, this Court construes all facts and reasonable inferences from the facts in the light most favorable to the nonmoving parties—here, Barronelle Stutzman and Arlene's Flowers. *Ward v. Coldwell Banker/San Juan Props.*, 74 Wn. App. 157, 161 (1994). And the moving party bears the initial burden to prove no genuine issue of material fact exists. *LaPlante v. State*, 85 Wn.2d 154, 158 (1975).

V. ARGUMENT

A. Factual Disputes about Barronelle's March 1, 2013 conversation with Rob Preclude Summary Judgment

Though Plaintiffs accuse Barronelle of declining to serve Rob based on his sexual orientation during their March 1 conversation, critical facts about this conversation remain in dispute, namely, what Rob wanted and requested, what Barronelle declined to do, and why Barronelle referred him to another florist. Without knowing these facts, this

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Court cannot determine if Barronelle violated WLAD or the CPA and, if so, whether Barronelle has constitutional defenses to these statutes.

1. The parties disagree about what Rob wanted and requested during the March 1, 2013 conversation.

There is a factual dispute about what Rob wanted and requested Barronelle to do during their March 1, 2013 conversation. In their pleadings, the three Plaintiffs (Rob, Curt, and the State) do not even agree among themselves about what Rob wanted or requested. On one hand, the individual Plaintiffs say Rob wanted and requested Barronelle to "do" his flowers. Individual's Motion at 3. On the other hand, the State says Rob wanted and requested "floral services" without knowing what services he wanted. State's Motion at 4. But if the Plaintiffs do not know and cannot agree on what Rob requested, they cannot hold Barronelle liable for denying that request. Nor can this Court force Barronelle to satisfy Rob's request when the Court does not know what service Rob requested. The details matter. But Plaintiffs cannot nail down those details on summary judgment.

To add to the confusion, Rob's deposition testimony conflicts with Plaintiffs' summary judgment motions. While the State's motion says Rob did not know what he wanted, Rob at his deposition says he knew exactly what he wanted, something vastly different from every other elaborate order he previously placed with Barronelle: "Just some sticks or twigs in a vase and then we were going to do candles." Ingersoll Dep. 48:23-49:3; Freed Dep. 33:1-7. *See also* Ingersoll Dep. 49:3-4; Freed Dep. 33:3 (claiming after litigation began that they "wanted to be very simple and understated."); Ingersoll

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Dep. 49:18-22 (claiming after litigation began that they wanted to arrange the flowers themselves and did not want Barronelle to "create them," but to "source them."). With all these conflicting accounts, a genuine issue of material fact exists.

And even if Rob just wanted "sticks or twigs," Barronelle was and still is happy to provide these. Stutzman Dep. 80:15-19; 98:1-5; 105:21-106:15. Unfortunately, Rob didn't tell Barronelle that he wanted to buy some "sticks or twigs," much less convey anything that would lead Barronelle to conclude that he wanted anything different from his typical request (elaborate floral arrangements). Stutzman Dep. 79:17-24 (asking for "something simple"); Ingersoll Dep. 49:5-8 (never told Barronelle about sticks and twigs); Ingersoll Decl., ¶8 (asking Arlene's to "do" the flowers). Stutzman Dep. 74:18-75:13 (describing Rob's typical request). Thus, under Rob's sticks and twigs account, there is no real dispute in this case. Plaintiffs' entire case rests on a misunderstanding between Barronelle and Rob about what Rob requested on March 1. *See* Defendants' Motion for Summary Judgment For Lack of Standing. But a factual misunderstanding is no basis for a judicial controversy, much less a basis to grant summary judgment. In this respect, no matter which description this Court accepts, either no judicial controversy exists or this Court cannot know, for summary judgment purposes, precisely what Rob wanted and requested from Barronelle.

2. The parties disagree about what Barronelle declined to do during the March 1 conversation.

There is also a factual dispute about what Barronelle declined to do for Rob. Once again, the Plaintiffs themselves do not agree on what Barronelle declined. The State says

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Barronelle "refused to serve" Rob, and the individual Plaintiffs say Barronelle refused to "sell flowers" to Rob. *See* State's Motion at 1, 3, 7; Individuals' Motion at 1, 3, 4, 5, 7. But the record does not fit either characterization. Barronelle never said she wouldn't serve Rob or sell him flowers, and her past relationship with Rob defies those very allegations to their core. Barronelle is quite willing to sell Rob flowers for his same-sex ceremony and serve him. Barronelle merely told Rob she "couldn't do his wedding." Stutzman Dep. 79:17-24; Ingersoll Decl., ¶8.

In uttering these words, Barronelle declined to provide full wedding support for Rob's wedding, which would require Barronelle to custom design Rob's wedding flowers, deliver his flowers in Arlene's vans, attend his ceremony, greet guests at his ceremony, perhaps even encourage or counsel his wedding party. Stutzman Decl., ¶¶ 43, 53. *See also* Stutzman Dep. 80:3-11 ("I chose not to be a part of his event."). Barronelle could hardly think otherwise since she provides the same services to long-term customers like Rob, she already built a nine-year friendship with Rob, and she already created intricate, complex floral arrangements for Rob. Stutzman Decl., ¶¶ 39-40. With this background in mind, and taking all of the facts in Barronelle's favor, Barronelle neither declined to serve Rob or sell him flowers. Barronelle declined to perform a bundle of expressive activities that together would require her to intimately participate in Rob's wedding ceremony.

This same conclusion applies to Arlene's policy on same-sex weddings. Contrary to the State's claim, Arlene's does not have a policy of refusing to sell flowers for same-sex

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wedding ceremonies. (State Motion, pp. 4-5). According to Arlene's unwritten policy — a policy in place until this lawsuit began — Arlene's does not "take same-sex weddings" (Stutzman Dep. 44:16-25), meaning Barronelle will refer requests for full wedding support for same-sex wedding ceremonies to other florists. Stutzman Decl., ¶ 56. That is the only same-sex wedding request she has actually denied before she instituted a policy of declining all wedding requests. How Barronelle would respond to requests for other services is pure speculation. And the State cannot manufacture hypothetical facts or a hypothetical policy to its liking and attack those facts and that policy. As Barronelle's conversation with Rob shows, Arlene's policy is to refer requests to participate in wedding ceremonies that conflict with Barronelle's beliefs—not to refuse to sell flowers for same-sex ceremonies in general. *See* Stutzman Decl., ¶¶ 56-58; Stutzman Dep. 80:15-19, 98:1-5, 105:21-106:15 (explaining that she would sell flowers for same-sex ceremonies).

And these details about what Barronelle declined affect this Court's analysis. On a practical level, this Court cannot enjoin Barronelle without knowing what services it would be enjoining. If the Court granted Plaintiffs' motion, would the Court require Barronelle just to sell "sticks or twigs" (what she has always been willing to do) or to attend and participate in all marriage ceremonies irrespective of how they may conflict with Barronelle's religious beliefs? Would it require Barronelle to sell pre-arranged floral arrangements (what she has always done and been willing to do) or to greet guests at same-sex wedding ceremonies? Plaintiffs answer none of these questions nor specify the

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services they want this Court to compel. Plaintiffs merely skip over these unknowns and hope this Court will fill in the factual gaps without convening a jury to settle these facts.

As explained herein, Barronelle has a constitutional right to decline requests for *some* things because Barronelle cannot be compelled to speak in any manner or otherwise violate her religious beliefs. But this right largely turns on the expressive and/or religious nature of the specific thing requested. For example, selling raw materials (sticks and twigs) arguably contains little to no expressive elements. But attending and participating in ceremonies that violate one's religious beliefs contains expressive elements and raises difficult compelled speech issues. And this Court can only analyze these constitutional questions if it knows the precise factual context for its analysis.

3. The parties disagree about why Barronelle declined to act during the March 1, 2013 conversation.

Finally, there is a factual dispute about why Barronelle declined to participate in Rob's wedding. This dispute matters because discrimination under WLAD "requires a finding of particularized treatment, consciously motivated by" a protected characteristic. *Turner v. City of Port Angeles*, No. 09-CV-5317, 2010 WL 4286239, at *10 (W.D. Wash. Oct. 26, 2010). *See also Scrivener v. Clark Coll.*, 334 P.3d 541, 545 (Wash. 2014) (en banc) (explaining that WLAD plaintiff must prove that protected characteristic was a "substantial factor" in defendant's action, and a substantial factor means "that the protected characteristic was a significant motivating factor bringing about the" defendant's decision); *McKinney v. City of Tukwila*, 103 Wash. App. 391, 410 (2000) ("[A]n action for discrimination under RCW 49.60.215 requires a showing that the

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unequal treatment was *motivated* by" the protected characteristic). For this reason, the presence of discrimination "is ultimately a factual issue," often left to juries. *Lewis v. Doll*, 53 Wash. App. 203, 206-07 (1989).

Whether Barronelle discriminated based on sexual orientation is no exception to this rule. Barronelle can only violate WLAD if she invidiously discriminated because of Rob's sexual orientation. *See* RCW 49.60.215 (prohibiting discrimination in any place of public accommodation "regardless of . . . sexual orientation."). But Rob's sexual orientation did not play any role in Barronelle's decision, directly or indirectly. Stutzman Decl., ¶ 50. Indeed, Barronelle knew Rob was gay and served him for nine years. Stutzman Decl., ¶¶ 39-40. Barronelle also hired homosexual employees. Stutzman Decl., ¶ 41. This pattern shows not only that Barronelle had no motive to discriminate against Rob because of his sexual orientation, but that her decision was motivated by something well beyond Rob's sexual orientation—her religious beliefs about marriage.

Barronelle's conversation with Rob confirms this conclusion. Barronelle explained to Rob why she could not participate in his ceremony: "*because* of her relationship with Jesus Christ." Ingersoll Dep. 17:8-16 (emphasis added). Specifically, her relationship with Jesus explains why Barronelle believes that marriage is only the union of a man and a woman. Stutzman Dep. 78:6-7; 81:15-82:5. It was "because of" her religious beliefs about marriage, not because of Rob's sexual orientation, that Barronelle did what she did. Stutzman Decl., ¶ 50. Ironically, while WLAD protects Barronelle's "right to be free from discrimination because of . . . creed," and her "right to engage in commerce free

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from any discriminatory boycotts or blacklists . . . on the basis of . . . religion," it is Barronelle's "creed" (religious beliefs) that the Plaintiffs seek to use against her, to blacklist her business, and to take her personal assets. RCW 49.60.30(1) and (1)(f).

The distinction between religious beliefs about marriage, on the one hand, and sexual orientation, on the other hand, is not difficult to draw. Contrary to Plaintiffs' assertion that "only gays and lesbians marry same-sex partners" (State's motion, p. 10), recent events show that not to be the case. Take for example, the recent same-sex wedding of "heterosexual best mates."[4] Even Hollywood made a movie about this type of union—I Now Pronounce You Chuck & Larry.[5] And regardless of how prominent this type of union may be, its existence clarifies the distinction that Barronelle made—that religious beliefs about marriage do not hinge on sexual orientation. In point of fact, not even Washington State's marriage laws hinge on sexual orientation. Nothing about Washington's marriage laws require a declaration of sexual orientation one way or another. Two heterosexual men can get a marriage license in the State of Washington. *See* RCW 26.04.010.

This distinction also explains why the state's analogy to interracial marriage falls flat. *See* State's Motion, p. 10. Unlike the state's hypothetical florist who will not provide wedding services to interracial couples, Barronelle is more than willing to provide wedding services to homosexuals or bisexuals if they intend to marry members of the

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[4] *See, e.g.*, Mates' marriage horrifies gay rights groups, The New Zealand Herald, available at http://www nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11322617 (last visited December 8, 2014).

[5] *See, e.g.*, I Now Pronounce You Chuck & Larry, described at http://www.imdb.com/title/tt0762107/ (last visited December 8, 2014).

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opposite sex. Thus, while the state's hypothetical florist objects to customers of different races marrying, Barronelle does not object to customers of the same (or different) sexual orientations marrying. Once again, there is a conceptual distinction between sexual orientation and marriage.

Because this distinction is so clear, Plaintiffs try to blur it by asserting that same-sex marriage is "engaged in exclusively or predominately by a particular class of people," i.e. homosexuals. State's motion, p. 10 (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010), and *Lawrence v. Texas*, 539 U.S. 558 (2003)). But Plaintiffs do not sustain this assertion. With the growing number of sexual orientations — asexuality, bisexuality, homosexuality, heterosexuality, pansexuality, polysexuality — Plaintiffs cannot hope to equate a single sexual orientation with marriage.[6] The "heterosexual best mates" example already belies the distinction upon which Plaintiffs rely, and many more will do so in the future.

Moreover, same-sex marriage does not define the class of homosexuals in the same way that homosexual sexual acts, for example, define the class of homosexuals. The connection between homosexual sexual acts and homosexuality is much closer than the connection between same-sex marriage and homosexuality. Therefore, while the Supreme Court has refused to distinguish between status and conduct in the context of homosexual sexual acts (*Martinez* and *Lawrence*), the Court has never addressed the

[6] For a discussion explaining different sexual orientations, see http://en.wikipedia.org/wiki/Sexual_orientations.

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status/conduct distinction in the marriage context. In fact, recent federal appellate decisions have refused to invalidate one-man-one-woman marriage laws because so many reasons exist to define marriage in a particular way apart from beliefs about homosexual behavior. *See, e.g.*, *DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990, at *13-15 (6th Cir. Nov. 6, 2014); *Bishop v. Smith*, 760 F.3d 1070, 1109 (10th Cir. 2014) (Holmes, J., concurring). And if legislatures can distinguish between marriage and sexual orientation, so can Barronelle.

B. Barronelle and Arlene's did not violate WLAD or the CPA by declining to participate in wedding ceremonies contrary to their religious beliefs.

Barronelle and Arlene's did not violate the law once the facts are taken in their favor. Specifically, Barronelle and Arlene's did not violate WLAD because Barronelle was never motivated by Rob's sexual orientation. And Barronelle and Arlene's did not violate the CPA because declining to participate in a same-sex wedding ceremony is not an unfair act in violation of public policy.

1. Barronelle and Arlene's did not violate WLAD because they did not discriminate because of sexual orientation.

Taking the facts in Defendants' favor, Barronelle and Arlene's declined to participate in Rob's same-sex wedding ceremony because of Barronelle's religious beliefs about marriage, not because of Rob's sexual orientation. *See supra* § A.3. Because WLAD only prohibits discrimination "*because of*" a protected classification, RCW 49.60.010 (emphasis added), Plaintiffs' efforts at summary judgment must fail. *See also Bono Film & Video, Inc. v. Arlington Cnty. Human Rights Comm'n*, 72 Va. Cir. 256, *1-2 (2006)

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(noting that human rights commission in Virginia allowed audio-video company to decline to create video entitled "Gay and Proud" because the owners disagreed with video's message and because the public-accommodations law "protects individuals from discrimination based on their sexual orientation, [yet] does not prohibit content based discrimination.").

2. Barronelle and Arlene's did not violate the CPA because they did not violate WLAD or commit an unfair act in violation of public policy.

Just as Barronelle and Arlene's did not violate WLAD once the facts are taken in their favor, they did not violate the CPA either. A CPA violation can at most occur in two ways 1) a per se violation of WLAD or 2) an unfair commercial act in violation of public policy.[7] Barronelle and Arlene's obviously cannot violate the CPA through a per se violation of WLAD because Barronelle and Arlene's have not violated WLAD. *See supra* §B.1.

Nor can Barronelle and Arlene's violate the CPA through an unfair act in violation of public policy because they have not committed such an act. Barronelle and Arlene's have merely declined to intimately participate in a same-sex wedding ceremony in violation of their religious beliefs. This participation cannot be framed merely as the refusal to sell products or services. *See* State's Motion, p.13. Taking the facts in Defendants favor, Barronelle and Arlene's declined to participate, not merely to sell and serve. *See supra*

[7] Although Defendants will not repeat their arguments made at the December 5, 2014 summary judgment hearing, Defendants believe that the State's *per se* CPA claim is co-extensive with their "unfair act" CPA claim.

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§A.2. Thus, the proper question is whether requiring intimate participation in a same-sex wedding violates public policy.

Declining to intimately participate in same-sex weddings for religious reasons cannot be labeled as "unfair" since Washington law already protects religious believers regarding same-sex marriage. *See* RCW 26.04.010(4-6) (allowing ministers and religious organizations to provide accommodations without recognizing same-sex marriages). This extra, though ultimately unnecessary, statutory protection for ministers and religious organizations emanates from the same First Amendment and Washington constitutional provisions that also apply to Barronelle. Arguably, RCW 26.04.010(4) applies to Arlene's Flowers as well, as it defines religious organizations broadly to include any entity whose principal purpose is the study, practice, or advancement of religion. Barronelle has been clear that the inspiration she receives for her business, and why she does what she does, comes from God. Stutzman Decl., ¶ 9. And for-profit corporations can advance religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2766-68.

Even if Arlene's does not fit within RCW 26.04.010, the statute's mere existence belies the Plaintiffs' contention that Barronelle's religiously-motivated decision is "unfair" as a matter of law. Between Barronelle and the ministers discussed in RCW 26.04.010, the religious beliefs are the same. For the Attorney General to call the same beliefs "fair" for a minister and "unfair" for Barronelle strains credibility and interprets the intent of the legislature beyond rationality.

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C. The Washington and U.S. Constitutions Protect Barronelle's and Arlene's right to Participate in Wedding Ceremonies Consistent with their Religious Beliefs.

Even if WLAD or CPA require Barronelle and Arlene's to participate in same-sex ceremonies, the Federal and Washington Constitutions have the last say on the matter. And these documents speak with one voice: the state cannot force citizens to participate in religious ceremonies against their religious beliefs unless doing so satisfies strict scrutiny—a burden the State cannot meet.

1. Forcing Barronelle and Arlene's to participate in same-sex wedding ceremonies is subject to strict scrutiny.

When the government violates a constitutional right, like the right to free speech or the right to freely exercise religion, the government must overcome strict scrutiny to justify this violation. *See, e.g., Munns v. Martin*, 131 Wn. 2d 192, 199 (1997) (applying strict scrutiny to Art. I, § 11 violation); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny to First Amendment free exercise violation); *Wooley v. Maynard*, 430 U.S. 705, 705 (1977) (applying strict scrutiny to compelled speech violation). So Plaintiffs must overcome strict scrutiny here because forcing Barronelle and Arlene's to participate in same-sex ceremonies violates a) Wash. Const. Art. I, § 11's right to free religious exercise; b) the First Amendment's right to free speech; and c) the First Amendment's right to free religious exercise.

a. Forcing Barronelle and Arlene's to participate in same-sex wedding ceremonies violates Wash. Const. Art. I, § 11.

Washington's State Constitution protects the "[a]bsolute freedom of conscience in all

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matters of religious sentiment, belief and worship…" Wash. Const. art. I, § 11. This protection extends even further than the Federal Free Exercise Clause. While the U.S. Constitution subjects neutral and generally applicable laws to rational basis review, Art. I, § 11 subjects all laws to strict scrutiny if they substantially burden a sincerely held religious belief. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn. 2d 633, 642 (2009).

Here, the State wisely concedes the sincerity of Barronelle's belief in one-man-one-woman marriage, State Motion, p.21, and there is no reason to doubt the sincerity of these beliefs. The only remaining question is whether forcing Barronelle and Arlene's to participate in wedding ceremonies contrary to Barronelle's conscience, all under the threat of fines and injunctions, substantially burdens Barronelle's or Arlene's religious beliefs. Clearly, it does.

Plaintiffs' proposed application of WLAD and the CPA burdens Barronelle's beliefs by forcing her to communicate and participate in a religious ceremony she finds objectionable. And the participatory element here is quite significant since Barronelle intimately participates in the weddings she does—by creating floral arrangements, attending the ceremony, greeting guests, encouraging the wedding party, and even sometimes counseling the couple. Because Barronelle intimately participates in her customers' wedding ceremonies in these ways, Plaintiffs are asking this Court to compel Barronelle to intimately participate in wedding ceremonies that violate her conscience *in the same ways*. Stutzman Decl., ¶¶ 33-37.

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Moreover, weddings are a religious ceremony and worship service for Barronelle. Stutzman Decl., ¶ 23. Compelling Barronelle to participate in a symbolic activity/ceremony unquestionably implicates core worship activities central to Barronelle's faith and, therefore, both compels her speech and substantially burdens her religion. *See, e.g., W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33, and n.13 (1943) (explaining that compelled participation in pledge of allegiance ceremony violates religious beliefs by requiring "the individual to communicate by word and sign his acceptance" of certain beliefs just as "[e]arly Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority."); *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (noting that "compelled attendance and participation in an explicit religious exercise" harms religious freedom).[8]

But regulations need not restrict "core" religious practices/worship or churches to burden religion. *Contra* State's Motion, pp.22-23. The standard argued by the State is both novel and unworkable, and the Plaintiffs offer no clear test by which this Court can determine which religious practices are "core" or periphery. No such test can exist since courts should not sit in theological judgment over someone's religious beliefs, thereby violating fundamental church/state divisions. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well

[8] Because Washington courts adopt the substantial burden test and rely on federal cases to define substantial burden, Defendants will rely on these federal substantial burden cases as well. *See, e.g., First Covenant Church of Seattle, Wash. v. City of Seattle*, 114 Wn. 2d 392, 401 (1990).

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established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."); *Munns v. Martin*, 131 Wn. 2d at 199 ("The court will not inquire further into the truth or reasonableness of the individual's convictions.").[9]

Moreover, there is no legal basis for any hypothetical church/core worship standard. Washington courts have repeatedly applied Art. I, § 11 to individuals, not just churches. *See, e.g., In re Marriage of Jensen-Branch*, 78 Wn. App. 482 (1995) (applying Art. I, § 11 to father who objected to x-wife's parenting plan that restricted child's religious teaching). And Washington courts have never limited religious burdens to "core" religious practices or worship. Rather, they identify religious burdens by asking whether the "coercive effect of [an] enactment operates against a party in the practice of his religion." *Munns*, 131 Wash. 2d at 200. This standard even applies to regulations that "indirectly burden[] the exercise of religion." *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 226 (1992).

The proffered application of WLAD and CPA to this case coercively requires Barronelle to communicate and participate in same-sex weddings in numerous ways — floral arrangement, attendance, counseling, delivery, encouragement, etc. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (compelling school attendance with $5 fine

[9] Although litigants sometimes need to prove that the Washington Constitution differs from the federal constitution under *State v. Gunwall*, 106 Wn.2d 54 (1986) for Washington courts to apply a different standard, Defendants do no need to prove Art. I, § 11 extends greater protection than the First Amendment because Plaintiffs concede this point. *See* State's Motion, p. 21 (applying substantial burden test). A *Gunwell* analysis is also unnecessary because the Washington Supreme Court has already determined that Art. I, § 11 extends greater protection than the First Amendment's Free Exercise Clause. *See Woodinville*, 166 Wn. 2d at 641.

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created substantial burden on religion). *See also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (forcing believers to lose unemployment benefits or work on Saturdays burdened religious beliefs). Indeed, no court has allowed the government to compel participation in a religious ceremony, like a wedding, under the substantial burden standard.[10]

Because Barronelle is personally involved in all that Arlene's Flowers does, especially regarding weddings, Plaintiffs' "referral" proposals suffer the same legal fate. The State contends that Barronelle could just refer all same-sex wedding requests to her co-workers without burdening her religion. State Motion, p. 23. But alternatives only remove a burden when those alternatives do not themselves burden religious beliefs. *See, e.g., State v. Motherwell*, 114 Wn. 2d 353, 362 (1990) (requiring religious counselors to report child abusers because reporting the abusers did not hinder the counselor's religious belief to counsel church members). Barronelle violates her conscience when she personally participates in wedding ceremonies contrary to her religious beliefs *or* when *she* makes decisions that require *her* business to do so. Stutzman Decl., ¶ __. Barronelle's only alternative is to respectfully refer customers to other floral businesses, as she did here.

Ironically, Plaintiffs do not even offer Barronelle the alternative they suggest she has. By suing Barronelle in her individual capacity and seeking to hold her personally liable, she can neither refer requests like Rob's nor make inter-office accommodations. Even if some form of accommodation system was theoretically possible, no such system is

[10] Although Plaintiffs can cite cases requiring businesses to participate in same-sex weddings, none of these cases applied a substantial burden analysis. *See* Individuals Motion, pp.19-20 (citing *Craig v. Masterpiece Cakeshop*, *McCarthy v. Liberty Ridge Farm*, and *Elane Photography, LLC v. Willock*).

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practically workable. Customers regularly seek out Barronelle because of her unique expressive skills. In this very case, Rob wanted Barronelle, not another Arlene's employee, to "do" his wedding because of Barronelle's "amazing work." Ingersoll Dep. 21:11-13.

And yet the State claims it can never burden the religious beliefs of individuals who engage in business and/or "enter the Washington marketplace…" State Mot. p. 23. But with this argument, the State seeks to force Barronelle to forfeit her business as a prerequisite to exercising her religious beliefs. Far from demonstrating the absence of a burden, this argument establishes one. For the government burdens Barronelle's religion not only by compelling her to violate her faith, but also by conditioning a benefit or right on faith-violating conduct. *See, e.g.*, *Sherbert*, 374 U.S. at 404; *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). By forcing Barronelle to choose between "her religion and forfeiting [her business], on the one hand, and abandoning one of the precepts of her religion in order to [maintain her business], on the other hand," the State's attempted enforcement of the WLAD and CPA herein creates a substantial burden. *Sherbert*, 374 U.S. at 404.

But individuals do not lose Free Exercise protections when they enter the commercial marketplace. The marketplace is not a constitution-free zone. To the contrary, courts have repeatedly applied the substantial burden analysis to laws regulating religious adherents that enter the marketplace. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2769-73 (summarizing Free Exercise caselaw on this point); *Attorney General v. Desilets*, 636 N.E.2d 233, 238

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(Mass. 1994) ("The fact that the defendants' free exercise of religion claim arises in a commercial context . . . does not mean that their constitutional rights are not substantially burdened"). Unless the law strips journalists, musicians, painters, writers, magazine editors, and other expressive profit seekers of their constitutional rights, the exercise of those rights cannot be conditioned upon entry into the marketplace.

Moreover, Barronelle does not seek to run unregulated through the marketplace. Many regulations justifiably burden religious beliefs in the marketplace because they satisfy strict scrutiny. But the regulations themselves still burden religion. Thus, the very cases that the State cites prove the very point they claim does not exist—that burdens upon religion can exist in the marketplace. *See* State Motion, p. 23; *United States v. Lee*, 455 U.S. 252, 257 (1982) (recognizing that "compulsory participation in the social security system interferes with [Amish employers'] free exercise rights"). Thus, the very cases the State cites completely undermine its argument.

Finally, the State claims it can substantially burden Arlene's religion because Arlene's is a corporation that lacks Free Exercise rights under Art. I, § 11. State's Motion, p. 24. But this argument accomplishes nothing because Barronelle has rights under Art. I, § 11, Barronelle is a Defendant, and Barronelle personally provides her services at Arlene's. Thus, the State's proffered enforcement of the WLAD and CPA burden Barronelle by forcing her to operate her business and act in ways that violate her religious beliefs at Arlene's. *See Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013) (explaining that business owners can raise their

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own Free Exercise rights if their business cannot raise its Free Exercise rights), *overturned on other grounds*, 134 S.Ct. 2902 (2014).

And even if Barronelle lacked personal involvement in Arlene's operations, Arlene's could still assert Free Exercise rights on behalf of its owner, Barronelle. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (explaining that a corporation has standing to assert owner's Free Exercise rights). Indeed, a corporation like Arlene's is merely the extension of the owner's beliefs. *Id*. Arlene's operates pursuant to the owner's beliefs, and so Arlene's should be able to invoke those beliefs. Nothing in Art. I, § 11 excludes for-profit businesses. Art. I, § 11 does not expressly mention "corporations," but it also does not reference churches or religious organizations—entities that Art. I, § 11 surely protects. *See State ex rel. Lumber and Sawmill Workers v. Superior Court for Pierce County*, 24 Wn.2d 314, 326 (1945) ("The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity.") (citation omitted). Arlene's and Barronelle can both assert constitutional rights.

b. Forcing Barronelle and Arlene's to participate in expressive ceremonies violates the First Amendment's Free Speech Clause.

The First Amendment protects the right to speak and the right to refrain from speaking. *Wooley*, 430 U.S. at 714. Thus, the government may not compel citizens to speak against their wishes. *Id*. Although this principle has limits, this principle protects Barronelle and Arlene's because the application of both the WLAD and CPA compel Barronelle and Arlene's to speak in a way that affects their central artistic mission.

i. WLAD and the CPA compel Barronelle and Arlene's to speak by forcing them to participate in same-sex wedding

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ceremonies.

By forcing Barronelle and Arlene's to participate in same-sex wedding ceremonies, WLAD and the CPA force Barronelle and Arlene's to speak. Indeed, Barronelle and Arlene's speak in multiple ways when they participate in weddings.

For example, Barronelle and Arlene's speak at weddings when Barronelle counsels and encourages the wedding party. *See, e.g., Holder v. Humanitarian Law Project,* 561 U.S. 1, 26-28 (2010) (explaining that counseling was speech not conduct). They also speak when Barronelle attends an inherently expressive event like a wedding and participates in typical wedding rituals, *e.g.*, singing, standing for the bride, clapping to celebrate the marriage, etc. *See, e.g., Barnette*¸ 319 U.S. at 632 (participating in pledge of allegiance ceremony was speech); *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) (explaining that wedding ceremonies are protected expression). Likewise, Barronelle and Arlene's speak when they deliver flowers to weddings in Arlene's vans containing Arlene's name and logo. *See Pagan v. Fruchey,* 492 F.3d 766, 772 (6th Cir. 2007) (finding sign on car to be speech); *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 96 (2d Cir. 1998) (noting that logos and slogans are protected speech). In all these ways, Barronelle and Arlene's speak at, associate with, show approval for, and endorse a wedding through their services.

Finally, Barronelle and Arlene's speak when they creates floral arrangements for weddings. Although many floral arrangements do not communicate particularized messages, floral arrangements for weddings do. Wedding flowers often compliment or

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follow the color themes for the wedding. *See* Stutzman Dep. 40:23-42:19. The bouquet for the bride and boutonnières for the groom and groomsmen are no exception. The arrangements and flowers for a wedding help communicate the wedding's theme or matters particularly important to the marrying couple. Rob's desire for "sticks or twigs" was specifically designed to communicate their "simple and understated" wedding theme. Ingersoll Dep. 49.

Even if flowers do not communicate a particularized message, protected speech does not have to convey a particular message. *Hurley*, 515 U.S. at 569 (explaining that speech like Jackson Pollock painting do not need to convey a particularized message). Numerous forms of art constitute speech without conveying a particular message.[11] *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) ("It goes without saying that artistic expression lies within . . . First Amendment protection."). Floral design is no exception. Indeed, if nude dancing conveys a message and constitutes speech, so does artistic floral design. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-34 (1975) (finding nude dancing to be protected speech).

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[11] *Brown v. Ent. Merchants* Ass'n, 131 S. Ct. 2729, 2733 (2011) (video games); *Hurley*, 515 U.S. at 568 (parades with or without words, and noting First Amendment protection for music, painting, and poetry without a discernible message); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (dance); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (theatre); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (tattoos); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (paintings without any particular message); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (holding paintings, photographs, prints and sculptures were always protected speech); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628-32 (7th Cir.1985) (stained glass windows that were "art for art's sake," and did not communicate a particular message); *see also Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.");

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Barronelle's practices exemplify the artistic and expressive nature of floral design. Barronelle uses her creative skill and imagination to capture harmony, unity, and proportion to create visual forms that others appreciate for their beauty. Robbins Decl. ¶¶ 20-23 (explaining how floral art and Barronelle's work constitute art and convey messages). Barronelle especially deploys these skills for weddings because her wedding floral arrangements capture a particular mood and communicate the right message for each wedding. Stutzman Dep. 40:23-42:21; Stutzman Decl., 9, 31; Robbins Decl. ¶24. In so doing, Barronelle and Arlene's create art which necessarily conveys messages. Robbins Decl. ¶¶ 24-26.

So, with their floral art and their other services, Barronelle and Arlene's "speak" when they participate in weddings. They endorse those weddings and promote them. As a result, when the State's enforces WLAD and CPA to compel Barronelle and Arlene's to participate in same-sex weddings, WLAD and CPA compel Barronelle and Arlene's to speak at and promote those same-sex weddings. This compulsion is not slight either. WLAD and the CPA require participation through $2000 fines and injunctions. Courts have found compelled speech from far less. *See Wooley*, 430 U.S. at 708 ($50 fine enough to compel speech).

ii. WLAD and the CPA cannot compel artists like Barronelle and Arlene's to speak because their speech is central to their artistic mission.

Although the government can sometimes compel businesses that use speech, Plaintiffs explain this principle for all the wrong reasons. In reality, while the government

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can sometimes compel non-artistic businesses to speak in ways incidental to conduct, the government cannot force artistic businesses like Arlene's to speak in ways affecting their central artistic mission.

The State, however, glosses over this significant difference by claiming that public accommodation laws never compel speech but merely require equal treatment. State Motion, p.17. But this theory ignores both *Hurley* and *Dale,* which invalidated two public accommodation laws for compelling speech. *See Hurley*, 515 U.S. at 572-73; *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000). Indeed, the public accommodation law in *Hurley* did not require the parade organizers to hold a parade—something that was a public accommodation under Massachusetts law. Nor did the public accommodation law in *Dale* require the Boy Scouts to create Boy Scout troupes. They supposedly only required "equal treatment." Yet these alleged "equal treatment" laws still violated the First Amendment when applied to entities engaging in speech. *See also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204-10 (3d Cir. 2001) (explaining that federal anti-discrimination laws are subject to First Amendment).

Hurley and *Dale*'s logic cannot be limited to non-profit organizations either. Neither the corporate form nor a for-profit motive matters to the compelled speech doctrine. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 801 (1988) (invalidating a compelled-speech regulation applicable to professional fundraisers); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (explaining that state agency cannot require a utility company to include a third-party newsletter in its billing

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envelope); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (invalidating right-of-reply statute that prevented newspaper company from controlling the content of its newspapers). *See also Citizens United v. FEC*, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations").

Unable to circumvent *Hurley* and *Dale*, the State cites various examples of discrimination the State claims involve speech. *See* State's Motion, pp. 16-17. But these situations either do not involve speech or merely involve speech "incidental" to the "regulation of conduct." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 48, 62 (2006). In other words, the essence or central mission of the businesses in these examples is not expressive, and compelling speech in these examples does not affect the expressive essence or central mission of those businesses.[12]

In contrast, Arlene's central mission is expressive and artistic. Robbins Dep. 65:13-69:19, 71:11-19; Robbins. Decl. ¶¶ 21-24. Arlene's exists to create floral artwork. Barronelle's primary function in her business is to create floral art. And compelling Barronelle and Arlene's to participate in weddings controls how, when, and for what they create their art. This compulsion affects the very essence of Barronelle's and Arlene's work, an essence which is indisputably artistic and expressive, by even the admission of the individual Plaintiffs—the very reason they wanted Barronelle and not just any florist.

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[12] This language of "essence" and "central mission" come from the jurisprudence interpreting Title VII's bona fide occupational qualification (BFOQ) exemption. *See United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991). Title VII allows businesses to discriminate in employment based on religion, sex, or national origin for bona fide occupational qualifications reasonably necessary to the normal operation of that particular business or enterprise. 42 U.S.C.A. § 2000e-2. And the Equal Employment Opportunity Commission explicitly acknowledges that employers have a BFOQ exemption when selecting an actor or actress. 29 C.F.R. §1604.2(a)(2).

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And the limited number of expressive businesses, especially in a wedding context, also destroys the State's fear about allowing extensive discrimination. Beyond the fact that Washington State has successfully administered a state with same-sex marriage for nearly two years with this isolated incident, the number of businesses with an expressive essence or central mission is exceedingly small. But these expressive businesses do exist. Television studios, for example, cannot be forced to hire certain actors for the sake of anti-discrimination laws. *Claybrooks v. Am. Broad. Companies, Inc.*, 898 F. Supp. 2d 986, 993-94 (M.D. Tenn. 2012). *See also Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980) ("A business necessity exception [to anti-discrimination laws] may also be appropriate in the selection of actors to play certain roles. For example, it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr.").

Orchestras cannot be forced perform music for the sake of contract law or hire performers for the sake of anti-discrimination laws. *See Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 904-906 & n.17 (1st Cir. 1988) (doubting that "liability should attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests" because "[p]rotection for free expression in the arts should be particularly strong when asserted against a state effort to compel expression…We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression."). And newspapers cannot be forced to hire editorial staff for the sake of labor laws. *McDermott v.*

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Ampersand Publ'g, LLC, 593 F.3d 950, 962 (9th Cir. 2010). In each of these examples, the First Amendment limits the scope of "equal treatment" laws when those laws affect the expressive essence of an expressive business. Barronelle and Arlene's merely ask for the application of that same narrow, well established rule here.

Of course, not everyone agrees with this rule. Two administrative agencies and one state court have required expressive businesses to serve same-sex wedding ceremonies. *See* Individuals' Motion, pp.19-20 (citing *Craig v. Masterpiece Cakeshop*, *McCarthy v. Liberty Ridge Farm*, and *Elane Photography, LLC v. Willock*). But the employers in these cases arguably did not face the same level of intimate participation Barronelle and Arlene's face here. Because what is being asked of Barronelle is to intimately participate in a same-sex wedding in numerous ways, the burden on Barronelle's artistic expression is especially great. Nor can Plaintiffs mitigate this burden by framing Barronelle's participation as merely selling widgets or operating a restaurant—where the food is the same regardless of who orders. The facts must be taken in Barronelle's favor, and these facts show that Barronelle faces the threat of intimate participation in a ceremony that conflicts with her religious beliefs.

Moreover, the decisions Plaintiffs cite, two of which are still in litigation, are simply not persuasive. They directly conflict with Supreme Court precedents like *Hurley* and *Dale*. Far better for this Court to ignore non-final, non-binding, unpersuasive rulings and follow binding, persuasive ones, especially when the binding cases effectively balance the expressive rights of artists and the government's interests in equal treatment.

iii. Forcing Barronelle and Arlene's to participate in same-sex

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wedding ceremonies violates the First Amendment's Free Exercise Clause.

While Washington's Free Exercise clause applies strict scrutiny to any laws that substantially burden religion, the Federal Free Exercise Clause only applies strict scrutiny to certain types of laws, such as laws that are not neutral, laws that are not generally applicable, or laws that violates a hybrid of constitutional rights. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294-97 (10th Cir. 2004) (summarizing Free Exercise jurisprudence).

But the WLAD and CPA are not neutral because they are "riddled with exceptions." *Lukumi*, 508 U.S. at 536. The primary exception is RCW 26.04.010, which exempts religious organizations and ministers who operate public accommodations from complying with WLAD. *See* RCW 26.04.010(4-6). Thus, while Washington exempts some religious believers from complying with WLAD in public accommodations, Washington requires other religious believers to comply with WLAD in public accommodations. *See also* RCW 49.60.040 (exempting educational facilities, columbariums, crematories, mausoleums, and cemeteries from WLAD if are they operated by a bona fide religious or sectarian institution).

But exempting some religious individuals and not others is "evidence that the legitimate secular purposes underlying the [regulation] have been abandoned" since the regulation's exemptions "favor[s] [some] religions over [others]." *Booth v. Maryland*, 327 F.3d 377, 381 (4th Cir. 2003). Indeed, if a law selectively exempts some believers, and not others, "its refusal to extend an exemption to an instance of religious hardship

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suggests a discriminatory intent." *Bowen v. Roy*, 476 U.S. 693, 708. And "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. Yet this is exactly what Plaintiffs ask this Court to do here — require Barronelle and Arlene's to participate in same-sex ceremonies despite their religious beliefs, yet allow a host of other religious believers to avoid this participation because of their religious beliefs. Courts have often condemned laws that, exempting some religious believers and not others. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (invalidating registration and reporting requirements that exempted only "well-established" churches); *Lukumi*, 508 U.S. at 536 (suggesting that city's decision to exempt kosher slaughterhouses from law regulating ritual animal slaughter, but not other religious slaughterhouses, is not neutral and may constitute "an independent constitutional violation").

Second, the WLAD and CPA are not generally applicable because they contain numerous categorical exemptions that undermine the statutes' stated purpose of alleviating discrimination. *See Lukumi*, 508 U.S. at 542-43. A law is not generally applicable "if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). See also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170

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F.3d 359, 365 (3d Cir. 1999) (exempting beards for medical, but not religious purposes improper); Ward v. Polite, 667 F.3d 727, 738-40 (6th Cir. 2012) (allowing many types of referrals, but not religious referrals improper).

WLAD fails this standard because it exempts a host of non-religious conduct that permits discrimination. For example, WLAD categorically permits any institute, bona fide club, place of public accommodation, or fraternal organization to discriminate if it is private. RCW 49.60.040. The statute also allows employers with less than eight employees, as well as non-profit organizations, to discriminate. RCW 49.60.040(11). And WLAD simultaneously excludes from its definition of "[e]mployee . . . any individual employed by his or her parents, spouse, or child, or in the domestic service of any person." RCW 49.60.040(10); *see also* RCW 49.60.040(5) (listing several exemptions for multifamily dwellings). So WLAD allows these employers to discriminate as well.

The CPA also contains numerous categorical exemptions. The CPA allows employers to discriminate on the basis of disability and sex in certain instances. RCW 49.60.180(1) (disability); RCW 49.60.180(3) (sex). The CPA also contains broad-scale exceptions for real-estate transactions, facilities, and services. *See, e.g.*, RCW 49.60.222(2)(c) (exempting single-family houses under certain conditions); 49.60.222(3) (exempting educational facilities from sex discrimination); 49.60.222(5) (exempting public establishments from familial status discrimination when they discriminate against families with children); 49.60.222(6) (exempting establishments that provide housing for

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"older persons" from familial status discrimination when they discriminate against families with children); 49.60.222(7) (exempting real-estate transactions involving units that are occupied by the owner).

Through all these exemptions, the WLAD and CPA permit various forms of discrimination, which squarely undermines the alleged anti-discrimination purpose of these laws. In light of all their exemptions, these laws lack general application when applied to Barronelle and Arlene's. *See Lukumi*, 508 U.S. at 543 (noting a lack of general applicability when a regulation "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree"). The government cannot simultaneously seek to hold Barronelle liable under the law, while permitting a host of other individuals and groups to avoid that same liability.

Third, the WLAD and CPA violate what is known as a hybrid (more than one) of constitutional rights. When a neutral law violates a hybrid of constitutional rights, strict scrutiny applies. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d at 182; *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). The hybrid rights doctrine applies when a party makes "a colorable claim that a companion right has been violated—that is, a fair probability or a likelihood, but not a certitude, of success on the merits." *San Jose Christian College*, 360 F.3d at 1032.

Barronelle and Arlene's satisfy this standard because they have shown a likelihood of winning their compelled speech claim which is thoroughly grounded in Barronelle's religious beliefs. *See supra* §III.C.1.b. Indeed, the hybrid rights doctrine often applies in

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this precise scenario, when litigants raise free exercise and compelled speech claims. *See Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990) (citing *Wooley* and *Barnette* as hybrid rights situations).

2. Forcing Barronelle and Arlene's to participate in same-sex weddings fails strict scrutiny.

Because the WLAD and CPA violate constitutional rights, these statutes must satisfy strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). And to satisfy strict scrutiny, Plaintiffs must show that compelling Barronelle and Arlene's to participate in same-sex weddings furthers a compelling governmental interest in the least restrictive way possible. *Id*. *See also City of Summer v. First Baptist Church*, 639 P.2d 1358, 1366 (Wa. 1982) (Utter, J., concurring) (explaining strict scrutiny under state constitution). Plaintiffs cannot meet this difficult burden.

a. The WLAD and CPA do not serve a compelling state interest by requiring Barronelle and Arlene's to participate in same-sex weddings.

While Plaintiffs cite the need to combat discrimination as the basis for regulating Barronelle and Arlene's, strict scrutiny does not allow Plaintiffs to frame the interest this way. "[B]roadly formulated interests" do not satisfy strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). Rather, Plaintiffs must demonstrate that applying the challenged law to "the particular claimant whose sincere exercise of religion is being substantially burdened" serves a compelling interest. *Id*. at 419-20. For this reason, the question is not whether the WLAD and CPA combat

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discrimination generally. The question is whether exempting religious florists from participating in same-sex weddings would undermine the State's ability to contest discrimination and generally ensure equal access to the wide market of floral services. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779 (inquiring whether exemption from contraceptive requirement for religious business would undermine women's access to contraceptives); *Hurley*, 515 U.S. at 578 (asking whether public accommodation law should be applied to parade organizations, not whether law prevented discrimination); *Gonzales*, 546 U.S. at 432 (asking whether exempting sacramental use of drug undermined anti-drug law generally).

The answer to this question is obviously no. The Plaintiffs do not provide evidence that any florist in Washington objects to participating in same-sex weddings besides Barronelle. Nor do Plaintiffs provide evidence of any homosexual customer who failed to receive floral services in Washington. This evidentiary silence alone undermines the alleged need to compel Barronelle. The record only seals this point. For Rob and Curt easily obtained another florist for their wedding. They were even flooded with offers from florists, many offering their services at cost or for free. Thus, the record suggests that Washington can easily exempt Barronelle and Arlene's without hindering homosexuals' access to floral services or permitting wide-spread discrimination.

In fact, Washington has already provided this exact exemption to ministers and religious organizations without creating any problems. *See infra* §B.2. Add this exemption to the many other exemptions in WLAD and the CPA, and Washington should

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have no trouble exempting Barronelle. *See infra* §B.2. Indeed, the government cannot preach the dire need to promote a goal when it allows exceptions undermining its goal. *See Gonzales*, 546 U.S. at 432-33 (allowing sacramental use of one drug undermined interest to prevent same use for another drug); *Lukumi*, 508 U.S. at 547 ("a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quotation and citation omitted).

Ironically, Plaintiffs do not merely fail to justify a need to compel Barronelle. They cannot even prove that public accommodations currently discriminate against gays and lesbians generally in Washington. On the one hand, the Attorney General never felt the need to use the CPA to prevent discrimination prohibited by WLAD before this case. *See State's Response to Defendants' First Motion for Summary Judgment* at 2 (admitting that this is the first time the Attorney General has attempted to bring "a CPA claim based on a WLAD violation").

On the other hand, the Washington Human Rights Commission — the organization responsible for enforcing WLAD and preventing discrimination — has received only 70 *complaints* of sexual orientation discrimination by public accommodations between 2006 and the end of 2013. Waggoner Decl. Ex. 23. None of these complaints involved a florist or other wedding service provider. *Id*. And the Commission *never* found probable cause for any of these complaints. *Id*. If there is not a *single, verifiable case* of sexual orientation discrimination by a public accommodation, the State has no interest, let alone a compelling interest, in refusing to accommodate Barronelle.

b. The WLAD and CPA do not advance the state's interest in the

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least restrictive way by requiring Barronelle and Arlene's to participate in same-sex weddings.

Just as Plaintiffs cannot identify a compelling reason to require Barronelle and Arlene's to participate in same-sex weddings, they cannot prove that compelling Barronelle and Arlene's is the only way to achieve their goals. Plaintiffs have many alternatives open to them.

First and foremost, Washington could accommodate religious florists from participating in same-sex weddings just as it accommodate ministers and religious organizations already. *See infra* §B.2. Washington can easily fit Barronelle and Arlene's into this already existing accommodation. And this already existing accommodations proves easy alternatives are available to Washington. *See Hobby Lobby*, 134 S. Ct. at 2782 (noting that government could achieve interest by accommodating for-profit entities because government already accommodated non-profit entities from contraceptive mandate).

Nor would this proposed accommodation lead to significant discrimination by for-profit businesses. As several courts have recognized, market forces strongly incentivize for-profit businesses to accept all paying customers. *See Smith v. Fair Emp't & Hous. Comm'n*, 12 Cal. 4th 1143, 1244-45 (Cal. 1994) (Baxter, J., concurring and dissenting) (allowing a religious exemption does "not raise the specter of floodgates opened to a myriad of exemptions from the state antidiscrimination law . . . In fact, the economic interests of landlords as a class would counsel otherwise.") (citation omitted); *Attorney General v. Desilets*, 418 Mass. 316, 329 (Mass. 1994) ("Market forces often tend to

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discourage owners from restricting the class of people to whom they would rent.").

Even historically, exemptions do not create problems. Government entities have consistently accommodated religious actors throughout American history without detracting "from the ability of the nation and states to meet important policy goals." Expert Report of Dr. Hall at 59. Indeed, the "historical record demonstrates that even in areas of utmost significance, accommodations of religious citizens have not prevented the nation or individual states from meeting important policy goals." Expert Report of Dr. Hall at 6.

Second, Washington could require florists who cannot conscientiously participate in same-sex weddings to refer customers to other florists who will participate in same-sex weddings. This is exactly what Barronelle did for Rob, and he used that referral. Not only did Rob easily obtain flowers for his wedding, he used one of the florists Barronelle referred him to. In light of easy alternatives like this, Washington need not compel Barronelle and Arlene's to participate in same-sex weddings to accomplish its goals.

VI. CONCLUSION

Although the parties disagree on much, they agree that this case raises vitally important interests and constitutional issues. This Court should not rush to decide these important and difficult issues without knowing all the facts. Because these facts are disputed, this Court should deny summary judgment. Alternatively, this Court should deny summary judgment because artists and religious believers have the right to participate in rituals they choose, not rituals the state chooses for them. To protect this

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right does not permit discrimination. It merely assures the "individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *Barnette*, 319 U.S. at 637.

RESPECTFULLY SUBMITTED this 8th day of December 2014.

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