THE HONORABLE ALEXANDER C. EKSTROM

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

ROBERT INGERSOLL AND CURT FREED,

Plaintiffs,

V.

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS; AND BARRONELLE STUTZMAN,

Defendants.

No. 13-2-00871-5

(Consolidated with No. 13-2-00953-3)

REPLY IN SUPPORT OF PLAINTIFFS INGERSOLL AND FREED'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF AUTHORITIES

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I. INTRODUCTION

There is no factual dispute in this case to preclude summary judgment. The relevant events are simple and well known, and are described consistently by Ms. Stutzman and Robert Ingersoll. The Court must decide only a basic legal issue: whether Ms. Stutzman could lawfully refuse to sell goods and services to Robert and Curt for their wedding. That issue has been ripe for summary judgment since nearly the day this case was filed.

This case also does not present a novel legal question. The right of same-sex couples to marry may be new, but anti-discrimination laws are not. For more than a century they have operated to prevent discrimination in places of public accommodation, and they have been upheld time and again by courts across the country. This case is no different from cases that have come before, where litigants have claimed their personal religious beliefs justify discrimination on bases ranging from race to religion to sex. Courts have consistently and rightly rejected those claims in favor of preventing discrimination in our public, commercial interactions with one another. The Court has no legal basis to rule differently here. Summary judgment should be entered for Plaintiffs on the issue of liability.

II. AUTHORITY AND ARGUMENT

Defendants argue that summary judgment is inappropriate because (a) key factual disputes exist; (b) Defendants did not discriminate "because of" sexual orientation; and (c) even if Defendants did discriminate because of sexual orientation, they were entitled to do so under the state and federal constitutions. Defs.' Resp. to Pls.' Two Motions for Partial Summ. J. on Liability ("Opp'n") at 1-61 (Dkt. No. 185). Defendants are mistaken. The facts plainly show that Defendants impermissibly discriminated against Robert Ingersoll and Curt Freed because of

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their sexual orientation. Defendants' discrimination cannot be justified under either the state or federal constitution. Defendants have therefore violated the WLAD and CPA, and the Court should enter summary judgment for Plaintiffs.

A. No Genuine Issue Exists as to Any Material Fact.

Summary judgment should be entered only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). A "material fact" is a fact "upon which the outcome of the litigation depends." *Rafel Law Grp. PLLC v. Defoor*, 176 Wn. App. 210, 218, 308 P.3d 767 (2013). Defendants claim three material factual disputes exist: (1) what Robert wanted and requested from Ms. Stutzman; (2) what Ms. Stutzman declined to do; and (3) why Ms. Stutzman referred Robert to another florist. Opp'n at 25. Defendants' claims are without foundation: no factual dispute exists.

Robert and Ms. Stutzman have remarkably similar memories of the key event. Ms. Stutzman remembers it this way:

> Q: Tell me what you remember about your conversation with Robert.
>
> A. He came in and we were just chitchatting and he said that he was going to get married. Wanted something really simple, khaki I believe he said. And I just 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.
>
> Q: Did you tell him that before he finished telling you what he wanted?
>
> A: He said it was going to be very simple.
>
> Q: Did he tell you what types of flowers he would want?
>
> A: We didn't get into that.

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Stutzman Dep. 79:17-80:4, Oct. 3, 2013.[1] Ms. Stutzman then gave Robert the names of other florists in town she thought might be able to assist him. Decl. of Barronelle Stutzman ("Stutzman Decl.") ¶ 52, Dec. 8, 2014.

Robert remembers their interaction the same way:

> I told Ms. Stutzman that Curt and I were getting married and that we would like Arlene's to do the flowers. Ms. Stutzman took may hand and said that she could not do the flowers because of her relationship with Jesus Christ. I was in complete and utter shock by what she said, but to be polite, I asked whether she knew any florists who would do our flowers. Ms. Stutzman gave me the names of three other florists in the area.

Ingersoll Decl. ¶ 8, Sept. 23, 2013.[2] When asked whether he told Ms. Stutzman precisely what he and Curt wanted for their wedding, he explained that Ms. Stutzman "never gave me the opportunity to discuss the flower arrangements." Ingersoll Dep. 49:1-8, Jan. 24, 2014.[3]

These factual accounts are identical in all material respects. Indeed, what happened at Arlene's Flowers on March 1, 2013 is not in dispute. The parties dispute only the legal consequences of those facts.

For example, Defendants contend that it matters whether Robert would have ordered only "sticks and twigs" had Ms. Stutzman allowed him to place an order. Opp'n at 27. This is not an example of a disputed material *fact*. The material fact is that Ms. Stutzman declined to "do his wedding" before Robert could order *anything*. That fact is undisputed. Speculation about what

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[1] Except where otherwise indicated, all cited portions of Ms. Stutzman's deposition are attached as Ex. A to the Declaration of Jake Ewart in Support of Plaintiffs Ingersoll and Freed's Motion for Partial Summary Judgment and Memorandum of Authorities ("Ewart Decl.") (Dkt No. 166).

[2] Attached as Ex. F to the Ewart Decl. (Dkt No. 166).

[3] All cited portions of Robert Ingersoll's deposition are attached as Ex. B to the Ewart Decl. (Dkt. No. 166).

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Robert *might have* ordered is not a factual question, and it is irrelevant and immaterial.[4]

Defendants also claim to identify a meaningful dispute about whether Ms. Stutzman refused to "do [Robert's] wedding" by performing "a bundle of expressive activities," or whether she merely refused to "sell Rob flowers for his same-sex ceremony." *Id.* at 28. Even if that distinction were significant (it is not), these are simply different characterizations of the same facts, not a factual dispute. The testimony of both Robert and Ms. Stutzman shows Robert did not have an opportunity to order *anything* before Ms. Stutzman refused to "do his wedding." Whether Ms. Stutzman's reasons for her refusal (*e.g.*, her desire not to sell Robert "a bundle of expressive activities") constitute a valid legal justification is a question of *law* ripe for summary judgment; it requires no resolution of a disputed *fact*.

Finally, Defendants claim there is a significant difference between a refusal motivated by "religious beliefs about marriage" and a refusal motivated by Robert's sexual orientation. Opp'n at 31. No disputed fact exists here, either. Defendants do not dispute that Ms. Stutzman refused to "do [Plaintiffs'] wedding" because it was a marriage of same-sex partners. The parties also agree that Ms. Stutzman had sold other products to Robert and Curt, knowing they were a gay couple, for years before their engagement. On those undisputed facts, whether Ms. Stutzman's refusal violated the WLAD is a question of law.

Defendants also suggest that the parties' terminology is somehow important. Opp'n at 26. For example, they claim a factual dispute exists over whether Ms. Stutzman refused to "do" Robert's flowers, or whether she refused to provide "floral services." *Id.* These are semantics. Ms. Stutzman claims she refused to "do" Robert and Curt's wedding. Stutzman Dep. 79:19-24.

[4] Robert's potential order is irrelevant for the reasons explained more fully in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment Based on Lack of Standing, filed December 8, 2014.

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Plaintiffs do not quarrel with that terminology.

There is also no relevant dispute about the scope of any injunction the Court might enter against Defendants. Opp'n at 29. The Court can only order Defendants to offer the same services to same-sex couples that they offer to opposite-sex couples, and that is all Plaintiffs request. Plaintiffs have no stake in what range of goods and services Defendants elect to make available for sale to their customers, and seek only to ensure that, going forward, the full range is available to all comers.

On summary judgment, the facts must be considered in the light most favorable to the non-moving party. *Malnar v. Carlson*, 128 Wn.2d 521, 524, 910 P.2d 455 (1996). Plaintiffs do not ask the Court to do anything different here. Ms. Stutzman's version of the facts is, in all material respects, identical to Robert's. Using Ms. Stutzman's version of the facts, Plaintiffs are entitled to summary judgment.

B. Arlene's Flowers and Ms. Stutzman Discriminated Against Robert and Curt Because of their Sexual Orientation.

Defendants argue they did not discriminate against Robert and Curt "because of" their sexual orientation. Opp'n at 31. Instead, Defendants argue they discriminated against Robert and Curt "because of" Ms. Stutzman's "religious beliefs about marriage." *Id.* Ms. Stutzman believes that "marriage is only the union of a man and a woman," and explains that she would be "more than willing to provide wedding services to homosexuals or bisexuals if they intend to marry members of the opposite sex." *Id.* at 32-33. Plaintiffs do not dispute that Ms. Stutzman holds these views, but these are not lawful distinctions.

As explained in Plaintiffs' Motion for Partial Summary Judgment, Courts have consistently rejected the argument Ms. Stutzman makes here. Pls.' Ingersoll and Freed's Mot. for Partial

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Summ. J. and Mem. of Authorities ("Mot.") at 7-10 (Dkt. No. 165). Ms. Stutzman's argument has been rejected in cases like this one, involving discrimination against gay couples seeking services for their commitment ceremonies;[5] and rejected in cases involving laws or policies against same-sex intimacy.[6] As the New Mexico Supreme Court held, "when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct [such as marriage] that is inextricably tied to sexual orientation." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013), *cert. denied*, __ U.S. __, 134 S. Ct. 1787, 188 L.Ed. 2d 757 (2014). Courts, including the U.S. Supreme Court, refuse "to distinguish between status and conduct" when assessing cases of sexual orientation discrimination. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010). Justice Scalia described the Court's reasoning most succinctly in a slightly different context: "A tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993).

Discrimination against *same-sex* couples is thus indistinguishable from discrimination against *gay* couples. Defendants' arguments otherwise cannot be taken seriously. A Google search revealing news of a New Zealand wedding between heterosexual friends does not pose any challenge to the logic. Opp'n at 32. Particularly not when the heterosexual friends got married in

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[5] *E.g.*, *Elane Photography*, 309 P.3d at 62; Initial Decision Granting Complainants' Mot. for Summ. J. & Denying Resp'ts' Mot. for Summ. J., Craig v. Masterpiece Cakeshop, No. P20130008X, at 5-6 (Colo. Civ. Rights Div. Dec. 6, 2013), *available at* https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf.

[6] *Christian Legal Soc'y*, 561 U.S. at 689; *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

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order to win a radio competition and a trip to the 2015 Rugby World Cup in England.[7] Nor is this logic undermined by the existence of a Hollywood comedy depicting a similar (fictional) union entered by two heterosexual friends for the purpose of receiving domestic partner benefits.[8] *Id.* These "counter examples" suggested by Defendants are insulting and irrelevant. Plaintiffs respect Ms. Stutzman's right to her religious views, but Defendants' suggestion that marriage between same-sex couples has nothing to do with sexual orientation reveals a cynical ignorance of reality not worthy of the Court's attention.[9]

Indeed, protections for gays and lesbians would be badly undermined if the Court were to endorse, as Ms. Stutzman urges, a meaningful legal distinction between sexual orientation and conduct associated with sexual orientation. If the WLAD protected only gays and lesbians who never engaged in sexual conduct, or who never engaged in any conduct (such as marriage) expressing their love for a person of the same sex, the WLAD would be of little use to them. That cannot have been the legislature's intention when it added sexual orientation to the WLAD. Discrimination against marriages for same-sex couples is thus, on its face, discrimination based on sexual orientation, and is prohibited by the WLAD.[10]

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[7] Shawn McAvinue, *Mates' marriage horrifies gay rights groups*, THE NEW ZEALAND HERALD, Sept. 11, 2014, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11322617 (last visited December 12, 2014).

[8] "I Now Pronounce You Chuck & Larry," described at http://www.imdb.com/title/tt0762107/?ref_=nv_sr_1 (last visited December 12, 2014).

[9] These very arguments were also made and rejected in cases addressing the constitutionality of state laws limiting marriage to one man and one woman. *See, e.g.*, *In re Marriage Cases*, 43 Cal.4th 757, 840, 183 P.3d 384, 441, 76 Cal.Rptr.3d 683 (Cal. 2008) ("A statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation. In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation.").

[10] As also explained in Plaintiffs' Motion for Partial Summary Judgment, it does not matter that Ms. Stutzman, outside the context of marriage, serves gay customers or hires gay employees. Mot. at 9. Defendants must

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C. Arlene's Flowers and Ms. Stutzman Have No Constitutional Right to Discriminate On the Basis of Sexual Orientation

Defendants claim Ms. Stutzman was compelled to discriminate against Robert and Curt because of her religious views, and that she was entitled to act on those views pursuant to the state and federal constitutions. Opp'n at 37-44, 51-60. Defendants also claim Ms. Stutzman was entitled to act on her religious views because Arlene's Flowers is engaged in expressive activity protected by the state and federal constitutions. *Id.* at 44-51. No matter how sincere or strongly held her religious views, Ms. Stutzman was not entitled to act on those views to discriminate against Robert and Curt in the sphere of public commerce, in violation of the WLAD.[11]

1. *The WLAD is a neutral law of general applicability that does not violate First Amendment free exercise rights*

Defendants claim the WLAD conflicts with Defendants' religious views and cannot be applied here without violating the First Amendment to the U.S. Constitution. Opp'n at 52-56. Defendants are wrong.

Anti-discrimination laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-American Gay, Lesbian and Bisexual Gr. of Boston*, 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (describing Massachusetts statute prohibiting discrimination based on sexual orientation in public accommodations). Anti-discrimination statutes are permissible and enforceable under the First

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comply with the WLAD in all respects, and compliance with some aspects of the WLAD does not inoculate Defendants from non-compliance with other aspects. *E.g.*, *Elane Photography*, 309 P.3d at 62 ("if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women even if it will serve them appetizers").

[11] Plaintiffs focus on the WLAD in this brief, but the arguments relating to the WLAD are equally applicable to the CPA. *See*, *e.g.*, RCW 49.60.030(3) (making a WLAD violation a CPA violation where the WLAD violation causes injury to business or property).

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Amendment because they are neutral laws of general applicability. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

In *Employment Division v. Smith*, the leading U.S. Supreme Court case on this issue, the Court approved Oregon's denial of unemployment benefits to two people who were fired from their jobs after ingesting peyote for religious purposes. *Id.* at 874. The employees' religious use of peyote violated Oregon law, and made them ineligible for unemployment benefits. *Id.* In upholding the constitutionality of Oregon's statutes as applied to the religious employees, the Court explained that its "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (citations and quotations omitted). To hold otherwise, the Court explained, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 879 (citations and quotations omitted). Thus, a generally applicable, neutral law is constitutional even where its application incidentally affects religious practices.

A law is neutral unless "the object of the law is to infringe upon or restrict practices *because of their religious motivation*." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (emphasis added). A law is generally applicable unless it, "in a selective manner," imposes "burdens *only on conduct motivated by religious belief*." *Id.* at 543 (emphasis added). In other words, a law is neutral and generally applicable as long as it does not target religion. The WLAD is just such a neutral law of general applicability that satisfies the First Amendment.

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The WLAD's plain statutory language prohibits discrimination in places of public accommodation regardless of whether the discrimination is motivated by religion, culture, personal animus, or some other source. RCW 49.60.040(2) & (19), 49.60.215. On its face, it does not single out a particular religion or religious people for compliance.

Defendants instead complain that the WLAD is neither neutral nor generally applicable because they claim it is "riddled with exceptions." Opp'n at 52. This is untrue, and irrelevant. The WLAD does exempt certain religious institutions from the definition of "public accommodation," RCW 49.60.040(2), but that exemption does not invalidate the rest of the statute. Such exemptions reflect the legislature's respect for free exercise rights, and do not make the law any less neutral or generally applicable for purposes of a First Amendment analysis. *Elane Photography*, 309 P.3d at 74-75 (New Mexico anti-discrimination statute neutral and generally applicable even though it contains certain religious and secular exemptions). The same is true of the exemption in the marriage statute for licensed or ordained ministers (and similar officials) or religious organizations that might not want to perform any particular marriage. RCW 26.04.010(4)-(6). These exemptions are intended to *accommodate* religious views, and are evidence of (not against) the law's neutrality. *Elane Photography*, 309 P.3d at 74-75; *see generally Corp. of Presiding Bishop of Church of Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-38, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (discussing purposes and effects of religious exemptions to anti-discrimination laws).

The cases Defendants cite involve instances where the government favored one religion over another, *e.g.*, *Booth v. Maryland*, 327 F.3d 377, 381 (4th Cir. 2003) (exception to grooming policy made for Jewish employee, but not Rastafarian employee), or targeted a religion for

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particular sanction, *e.g.*, *Lukumi*, 508 U.S. at 542 (local ordinances intended to suppress only Santeria religious practices). The laws at issue in those cases did not apply equally to "similarly situated" actors. *Booth*, 327 F.3d at 381. That is not the case here. A public accommodation, such as a for-profit flower shop, is not similarly situated to a bona fide private or religious organization exempt from the WLAD. *See* Opp'n at 52-54 (suggesting the WLAD is not neutral or generally applicable because of exemptions for clergy and private organizations). Indeed, it is the public nature of *public accommodations* that makes their regulation by the WLAD so important. RCW 49.60.040(2). Exemptions for other entities—even exemptions touching on religion—do not offend the constitution. *E.g.*, *United States v. Lee*, 455 U.S. 252, 260-61, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (requiring Amish employer to pay social security taxes even though a statutory exemption would have applied to a self-employed Amish person).

Nor is the WLAD defective because it contains other practical exemptions for separate men's and women's restrooms, RCW 49.60.180(3), separate men's and women's dormitory facilities at public schools, RCW 49.60.222(3), or instances where a person's disability would prevent them from doing a particular job, RCW 49.60.180(1). Secular exemptions do not "automatically create[] a claim for a religious exemption." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006). If they did, either the exemptions would swallow the law, or legislatures would have to eliminate exemptions altogether. The Constitution does not require that result.

The WLAD's practical exemptions also do not focus the WLAD so narrowly that it applies only to religious actors, as was true in the *Lukumi* decision relied on by Defendants. *Lukumi*, 508 U.S. at 542-46 (ordinances effectively prohibited only certain practices by the Santeria

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religion). Public accommodations of all kinds are subject to the WLAD, and they cannot discriminate for religious reasons or any other.

In short, the WLAD does not selectively burden any religion or religious belief. Ms. Stutzman must simply comply with the same anti-discrimination policies that apply to all other public accommodations in Washington. The WLAD is therefore neutral and generally applicable, and is constitutional as applied here.[12] *Accord Elane Photography*, 309 P.3d at 72-75 (upholding state anti-discrimination statute); *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 44 Cal. 4th 1145, 189 P.3d 959 (2008) (same); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

2. *Washington's constitution does not permit Defendants to exercise their religious views in violation of the WLAD*

Washington's constitution is different from the federal constitution, but the outcome on the issue in this case is the same. Under Washington law, a statute "is presumed to be constitutional, and a party challenging its constitutionality bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt." *State v. Leatherman*, 100 Wash. App. 318, 321, 997 P.2d 929 (2000). To challenge a statute on free exercise grounds, a litigant must show (a) that the statute is not a reasonable police power regulation, Wash. Const. art. 1, sec. 11, and (b) that the statute impermissibly burdens the practice of one's religion, *Munns v. Martin*, 131 Wn.2d 192, 199-200, 930 P.2d 318 (1997). The Defendants make no such showing here.

[12] Defendants also claim strict scrutiny applies here because they have asserted a so-called "hybrid" claim, where a free exercise claim is made along with other constitutional claims. *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999). Strict scrutiny applies to a hybrid claim only where the additional constitutional claim has a "fair probability" or "likelihood" of success on the merits. *Id.* (citations and quotations omitted). For the reasons discussed below, Defendants' other constitutional defenses are meritless.

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a. Religious exercise does not trump legislation, such as the WLAD, that protects peace and safety.

Defendants cite only a portion of Washington's free exercise provision to suggest it is broader than it is. Opp'n at 37-38. Article 1, section 11 of Washington's constitution guarantees "[a]bsolute freedom of conscience in all matters of religious sentiment, belief, and worship," but explicitly provides that the "liberty of conscience" secured by that section "***shall not be so construed as to . . . justify practices inconsistent with the peace and safety of the state***." (Emphasis added.) The freedom to believe is thus absolute, but the freedom to act on one's beliefs is not. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 224, 840 P.2d 174 (1992); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 864, 239 P.2d 545 (1952). Therefore, as the Washington Supreme Court recently reiterated in a free exercise case, "the government may require compliance with reasonable police power regulation." *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642 n.3, 211 P.3d 406 (2009) (involving free exercise challenge to city suspension of permitting process); *accord Open Door Baptist Church v. Clark Cnty.*, 140 Wn.2d 143, 167, 995 P.2d 33 (2000) (upholding zoning ordinance against free exercise challenge, and holding that "[t]he necessity or validity of zoning as an exercise of *police power* . . . cannot be in serious question").

Here, the WLAD is, by its own terms, an "exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights." RCW 49.60.010. The WLAD's purpose, "to deter and eradicate discrimination in Washington," is, according to the Washington Supreme Court, "a policy of the highest order." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.3d 655

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(2002). A WLAD violation therefore cannot be justified under article 1, section 11, which explicitly limits the freedom of religious exercise to conduct that is *not inconsistent* with reasonable police power regulations. Ms. Stutzman is free to hold her religious beliefs about marriage, but she is not entitled to invoke them to discriminate in a place of public accommodation.

b. The WLAD does not burden free exercise.

The WLAD also does not impermissibly burden Defendants' free exercise rights, as Defendants contend. Opp'n at 37-43. Government action burdens religious exercise "if the coercive effect of an enactment operates against a party in the practice of his religion." *Woodinville*, 166 Wn.2d at 642-43 (citations and quotations omitted). But "[t]his does not mean any slight burden is invalid":

> If the constitution forbade all government actions that worked *some* burden by minimally affecting sentiment, belief or worship, then any church actions argued to be part of religious exercise would be totally free from government regulation. Our constitution expressly provides to the contrary. The argued burden on religious exercise must be more, it must be substantial.

Id. at 643 (emphasis in original, citations and quotations omitted). Accordingly, where a litigant does not show "anything more than an incidental burden upon the free exercise of religion," Washington's free exercise provision is not implicated. *Open Door Baptist Church*, 140 Wn.2d at 166-67 (church could not show more than incidental burden on religion, and therefore could not support a free exercise challenge to zoning restriction).

No "substantial burden" exists here. Washington courts have found substantial burdens on religious exercise when, for example, a historical landmark designation would have reduced the

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value of church property by half, *First United Methodist Church v. Hearing Examiner*, 129 Wn.2d 238, 249, 916 P.2d 374 (1996), or when a city's moratorium on permit applications prevented a church from even asking city approval to undertake certain religious activities, *Woodinville*, 166 Wn.2d at 644-45. In those cases, governmental regulations would have substantially impacted a church's religious work. *First United*, 129 Wn.2d at 252; *Woodinville*, 166 Wn.2d at 645. And, in those cases, the asserted religious rights did not conflict with other individuals' rights, and the religious institutions had no way to avoid the conflict between government regulation and their religious activities. *See id*. This case is very different, and no court has ever found a substantial burden on facts like the ones presented here.

In this case, Ms. Stutzman voluntarily owns and operates a place of public accommodation for profit, and, in that narrow context, must simply comply with a neutral and general anti-discrimination law that applies to all business owners in her position. The WLAD's requirements relating to Ms. Stutzman's business operations therefore do not impose a substantial burden on Ms. Stutzman "in the practice of [her] religion." *Woodinville*, 166 Wn.2d at 642-43; *accord id.* at 644 ("Housing the homeless may be part of religious belief or practice, but it is different from prayer or services, for example, which are at the core of protected worship.")

Even if Ms. Stutzman believes her work has a religious component, only three percent of her business comes from selling goods and services for weddings. Stutzman Dep. 18:24-19:9. Ms. Stutzman has stopped selling wedding services altogether since this lawsuit was filed. Stutzman Decl. ¶¶ 63-64. She is thus neither financially nor religiously compelled to provide wedding services to the general public. Even if the financial impact on her business were greater, Washington law considers whether it remains *possible* for her to observe her religious tenets, not

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whether there is a financial consequence to observing her religious tenets. *State v. Motherwell*, 14 Wn.2d 353, 363, 788 P.2d 1066 (1990) (citing cases and noting that financial hardship does not create a free exercise violation). Ms. Stutzman plainly is not "substantially burdened" by the WLAD's requirements.

Indeed, any asserted burden "must be evaluated in the context in which it arises," *Woodinville*, 166 Wn.2d at 644, and, to the extent the WLAD burdens Ms. Stutzman's religious exercise, she has chosen to submit herself to that burden. As courts across jurisdictions have consistently held, when religious people "enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[13] *United States v. Lee*, 455 U.S. at 261; *accord Backlund v. Bd. of Comm'rs of King Cnty. Hosp. Dist. No. 2*, 106 Wn.2d 632, 648, 724 P.2d 981 (1986) (upholding policy requiring religious physician to purchase insurance, and explaining that the physician "freely chose to enter into the profession of medicine" and therefore voluntarily faced "regulation as to [his] own conduct," binding on others in his profession, that could not be overridden by his own "personal limitations"); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (rejecting free exercise challenge to anti-discrimination law and holding that "[v]oluntary commercial activity does not receive the

[13] Defendants cite *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), and *Thomas v. Review Board of Indiana Emp't Sec. Div.*, 450 U.S. 707, 717-18, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), for the proposition that a government regulation cannot permissibly force a person to choose between a financial benefit and observing a religious tenet. Opp'n at 42. *Sherbert* and *Thomas* were cases involving receipt of unemployment benefits, and in a later case involving unemployment benefits, *Smith*, the U.S. Supreme Court clarified that *Sherbert* and *Thomas* involved statutes that required individualized inquiries, not, as was the case in *Smith* (and is the case here), "an across-the-board . . . prohibition on a particular form of conduct." *Smith*, 494 U.S. at 884. Moreover, neither *Sherbert* nor *Thomas* involved a situation where the religious rights at issue conflicted with the rights of other individuals. *E.g.*, *Sherbert*, 374 U.S. at 409 ("the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties"). Those cases do not endorse discrimination by a public accommodation against its customers.

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same status accorded to directly religious activity"); *McClure v. Sports & Health Club, Inc.*, 370 N.W. 2d 844, 853 (Minn. 1985) ("when appellants entered into the economic arena and began trafficking in the market place, they . . . subjected themselves to the standards the legislature has prescribed . . . for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination").

Defendants argue that "no court has allowed the government to compel participation in a religious ceremony, like a wedding, under the substantial burden standard." Opp'n at 41. But that is not what Plaintiffs are requesting here. Plaintiffs ask only that Defendants provide the same goods and services to all customers. Ms. Stutzman has chosen to own and operate a floral business as a public accommodation, and, until this lawsuit, has chosen to sell flowers for weddings as part of her business. Because she has made those choices, she must, under the WLAD, offer same-sex couples the same goods and services she offers to opposite-sex couples. Her right to religious exercise does not, in the operation of her public accommodation, trump her customers' rights to be free from discrimination. Ms. Stutzman is free to choose not to sell goods or services for weddings, as she has recently done, but she is not free to sell goods and services in a discriminatory manner. This does not substantially burden Ms. Stutzman in the practice of her religion.

3. *The WLAD serves a compelling government interest.*

Even if a statute substantially burdens religious exercise, and even if that statute is not neutral and generally applicable, it is constitutional under both state and federal law if it furthers a compelling state interest and uses narrow means to do so. *Lukumi*, 508 U.S. at 546; *Woodinville*, 166 Wn.2d at 642. The WLAD meets this standard.

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The WLAD exists specifically to protect compelling state interests. Compelling interests "are based in the necessities of national or community life such as threats to public health, peace, and welfare." *Munns*, 131 Wn.2d at 200. As the legislature explains in the text of the WLAD itself, it passed the WLAD to protect the public health, peace, and welfare:

> This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. The compelling interests served by the WLAD thus include (a) protection of the public welfare, health, and peace; (b) fulfillment of state constitutional provisions concerning civil rights; (c) protection of the rights and proper privileges of the State's inhabitants; and (d) protection of the State's democratic foundations. *Id.*

The state legislature also had specific compelling interests in mind when it added sexual orientation to the WLAD in 2006. Before amending the WLAD to include sexual orientation, the legislature heard testimony from a wide variety of groups supporting the addition, including the United Methodist Church. *E.g.*, Wash. State Legis., Substitute House Bill Report, Engrossed S.B. 2661 (2006 Reg. Sess.) at 3-6.[14] The prevalence of discrimination against gays and lesbians in the state supported adding sexual orientation to the WLAD. *See id.* at 3. For example, the

[14] Attached as Ex. A to the Declaration of Michael R. Scott in Support of Plaintiffs Ingersoll and Freed's Motion for Partial Summary Judgment and Memorandum of Authorities ("Scott Decl."), filed with this reply.

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legislature learned that approximately ten percent of discrimination complaints filed in Spokane were based on sexual orientation. *Id.* That number was five percent in Seattle. *Id.* Even in recent memory in Washington, gays and lesbians could be fired from public employment solely because of their sexual orientation. *E.g.*, *Gaylord v. Tacoma Sch. Dist. No. 10*, 88 Wn.2d 286, 559 P.2d 1340 (1977) (teacher fired for "immorality" only because he acknowledged being gay).

Discrimination on the basis of sexual orientation still exists, as the incident giving rise to this litigation shows. Just months ago, the Ninth Circuit Court of Appeals acknowledged that "[e]mpirical research . . . show[s] that discriminatory attitudes toward gays and lesbians persist," and that "for most of the history of this country, being openly gay resulted in significant discrimination." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485, 487 (9th Cir. 2014). Even more recently, the Seventh Circuit Court of Appeals explained that "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) (Posner, J.).

Washington courts have confirmed that the WLAD advances compelling state interests. The Washington State Supreme Court has explained that the "purpose of the WLAD—to deter and eradicate discrimination in Washington—is a policy of the highest order." *Fraternal Order of Eagles*, 148 Wn.2d at 246. The state Court of Appeals, in a case involving a free exercise challenge to the WLAD, also determined that the legislature had "a compelling interest" in passing the WLAD. *Niemann v. Vaughn Community Church*, 118 Wn. App. 824, 831 n.2, 77 P.3d 1208 (2003) (citing RCW 49.60.010 and finding that "the State has a compelling interest in eradicating discriminatory property ownership").

Indeed, courts have long acknowledged that compelling interests underlie anti-

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discrimination laws. Over decades, the U.S. Supreme Court has repeatedly held that anti-discrimination laws, such as the WLAD, serve compelling governmental interests. *E.g.*, *New York State Club Ass'n v. New York City*, 487 U.S. 1, 14 n.5, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (U.S. Supreme Court has "recognized the State's 'compelling interest' in combating invidious discrimination"); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) (government has "compelling interest in eliminating discrimination against women"); *Roberts v. Unites States Jaycees*, 468 U.S. 609, 624, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (Minnesota's law barring discrimination in public accommodation "plainly serves compelling state interests of the highest order"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (government has a "compelling . . . fundamental, overriding interest in eradicating racial discrimination in education"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-61, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (upholding Civil Rights Act of 1964 and confirming legality of ages-old "common-law innkeeper rule[s]" prohibiting discrimination in public accommodations).

Courts do not reach different conclusions when sexual orientation is at issue. *E.g.*, *N. Coast Women's Care Med. Gr., Inc. v. San Diego Cnty. Superior Court*, 44 Cal. 4th 1145, 1158, 189 P.3d 959 (2008) (anti-discrimination act "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation and there are no less restrictive means for the state to achieve that goal"); *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (government has compelling interest in "eradicating sexual orientation discrimination").

Anti-discrimination laws also serve compelling governmental interests by the narrowest

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means possible. In fact, the only way to prohibit discrimination by public accommodations is to prohibit discrimination by public accommodations. A narrower law would be ineffective. At the same time, the WLAD is not so broad that it covers conduct unrelated to its compelling goals. For example, the WLAD does not presume to prevent Ms. Stutzman from holding the personal belief that marriage is an institution reserved for a man and a woman. Nor does it presume to prevent Ms. Stutzman from participating in private or religious organizations that share her views. The WLAD forbids Ms. Stutzman only from acting on her personal belief to discriminate in the operation of her public accommodation. That prohibition is constitutional. *E.g.*, *Roberts*, 468 U.S. at 628-29 (finding that Minnesota's anti-discrimination statute's "effect is no greater than is necessary to accomplish the State's legitimate purposes" . . . and that the statute "abridges no more . . . freedom than is necessary to accomplish that purpose.").

Defendants argue that the issue should be framed more narrowly, and suggest "The question is whether exempting *religious florists* from participating in same-sex weddings would undermine the State's ability to contest discrimination and ensure equal access to the wide *market of floral services*." Opp'n. at 57 (emphasis added). Even under that formulation, the government plainly has a compelling interest in "contest[ing] discrimination and ensur[ing] equal access" to any market for goods and services, including the market for floral services. But the implications of this case stretch beyond floral services. An exception made in this case could not logically be denied any other religious business owner who wanted to discriminate based on sexual orientation, race, religion, or any other protected characteristic.

Defendants' own purported expert, Dr. Mark David Hall, admits there is no logical distinction between religiously based discrimination against a same-sex couple, and religiously

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based discrimination against an interracial couple:

> Q: So if they were of a different race, then there should be no religious accommodation. But because they happen to be – instead of an interracial couple they happen to be a gay couple, that now their civil rights should not be protected to the same degree? That's your opinion?
>
> A: What I think I would say is this. That the state has an interest in varying weights in prohibiting different sorts of discrimination. And I can see that it's being greater in the case of – of interracial marriage than in the case of same-sex marriage.
>
> But I suppose, when push comes to shove, I'm a pretty doggone powerful advocate of religious liberty. And so I would, in fact, argue for religious accommodation in this case – particularly in the case of an interracial marriage, particularly if there are plenty of alternatives available to that couple.

Hall Dep. 90:1-18, Dec. 1, 2014.[15]

If Defendants were permitted a religious exemption here, there is no logical reason they, or any other public accommodation, would not be permitted to discriminate in other ways based on their religious beliefs. The State unquestionably has a compelling interest in prohibiting such discrimination in places of public accommodation.

4. *Public accommodations cannot, under the guise of free speech, discriminate on the basis of sexual orientation*

Defendants also claim the WLAD violates their rights to free speech under the First Amendment. Opp'n at 44-51. Defendants' free speech rights are not violated here. The WLAD regulates Defendants' conduct, not Defendants' speech. And although Defendants unquestionably exercise creativity in their work, their fulfillment of client orders conveys no message of their own entitled to constitutional protection.

[15] Attached as Ex. B to the Scott Decl.

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a. The WLAD regulates Defendants' conduct, not Defendants' speech.

On many occasions, courts have explained that anti-discrimination laws permissibly regulate *conduct*, not *speech*. For example, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), the U.S. Supreme Court explained that a law requiring law schools to admit military recruiters regulates conduct because it "affects what law schools must *do* . . . not what they may or may not *say*." (Emphasis in original.) To illustrate that distinction, the Court noted that Congress "can prohibit employers from discriminating in hiring on the basis of race," and that such a prohibition relates to conduct even though it would "require an employer to take down a sign reading 'White Applicants Only.'" *Id.* at 62.

The Court made the same point in *Hurley*, 515 U.S. at 572. In *Hurley*, the Court explained that the Massachusetts anti-discrimination statute at issue did not "target speech or discriminate on the basis of its content" because its focal point was, instead, "on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." 515 U.S. at 572.

Here, the WLAD is similarly focused on discrimination in the provision of publicly available goods and services. If goods and services are made available to a straight couple, they must also be available to a gay couple, whether the couple is paying for bulk flowers, arranged flowers, delivery services, or some service entailing attendance at the ceremony.[16] The WLAD is thus focused on Defendants' business conduct, not on Defendants' speech. Even if Defendants

[16] It is doubtful that couples are actually paying for some of the "services" Defendants describe in their briefing, such as counseling and encouraging a wedding party, or singing, standing, or clapping at a ceremony. Opp'n at 45. To the extent those are voluntary, gratuitous "services" offered by Ms. Stutzman, they are irrelevant here. If those "services" are truly a component of her paid services, she must offer them equally under the WLAD or not offer them at all. *E.g.*, RCW 49.60.030(1)(b) (Washingtonians are entitled to the "full enjoyment" of the goods and services offered by a public accommodation).

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were required to "speak" as part of complying with the WLAD (by, for example, communicating with same-sex couples about their wedding plans), "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld*, 547 U.S. at 62 (quotations and citations omitted).

b. Defendants' conduct is not subject to First Amendment protection.

Conduct is entitled to First Amendment protection only when it "is inherently expressive." *Rumsfeld*, 547 U.S. at 66. Here, Defendants argue their discriminatory conduct is entitled to First Amendment protection because Defendants were asked by Robert and Curt to, as Defendants phrase it, "participate" in and "create floral arrangements" for their wedding. Opp'n at 45. That is not the law.

First, when arranging flowers for paying customers, Defendants do not express any views of their own. Defendants sell their services to the general public and, to the extent any views are expressed through Defendants' flower arrangements, they are the customers' views. As Ms. Stutzman readily acknowledges, her customers have final sign-off, and ultimate creative control, over any flower arrangements they purchase. Stutzman Dep. 58:10-21[17] (customers have final approval over all floral arrangements). Defendants do not, therefore, express any views of their own subject to constitutional protection, no matter how much passion or creativity goes in to Defendants' work.

Defendants' conduct is therefore significantly different from the speech at issue in *Hurley* and *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000). In

[17] Attached as Ex. C to the Scott Decl.

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those cases, cited by Defendants, states tried to apply public accommodation laws to expressive associations that were conveying their own protected messages. *Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 568-70. In *Hurley*, private parade organizers produced a parade to express celebration of Irish heritage, 515 U.S. at 560, 568-70, and in *Dale*, the Boy Scouts at that time did not allow gay members and existed to "transmit . . . a system of values . . . in expressive activity," 530 U.S. at 561. In each case, the First Amendment prevented the government from requiring those organizations to alter their own messages to accommodate alternative messages. *Dale*, 530 U.S. at 661; *Hurley*, 515 U.S. at 581. That is not a problem here. By selling goods and services for weddings, Defendants are conveying only those messages approved by Defendants' customers (if any messages are conveyed at all). Stutzman Dep. 58:10-21[18] (customers have final approval over all floral arrangements). Defendants are not in the business of expressing views of their own subject to First Amendment protection.[19]

Second, the WLAD and other anti-discrimination laws apply to creative professions just like they apply to other businesses. *E.g.*, RCW 49.60.040(2) (defining public accommodation). In *Elane Photography*, the New Mexico Supreme Court explained that none of the cases it surveyed exempted "creative and expressive profession[s]," like photography or floral arranging, from anti-discrimination laws. 309 P.3d at 71. To the contrary, the U.S. Supreme Court has

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[18] Attached as Ex. C to the Scott Decl.

[19] The other cases cited by Defendants on this topic also involve entities (which may not be "public accommodations") engaging in their own self-directed expression. *E.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) (relating to speech of professional fundraisers); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (relating to the placement of third-party speech in utility's own mailings); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) (newspaper); *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950 (9th Cir. 2010) (same); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 904-906 & n.17 (1st Cir. 1988) (discussing performing groups); *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980) (discussing the casting of actors); *Claybrooks v. Am. Broad. Companies, Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (television studios).

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applied anti-discrimination laws to the practices of a law firm, even though "[l]egal work unquestionably involves creative and expressive skill and art." *Id.* (discussing *Hishon v. King & Spalding*, 467 U.S. 69-71-73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). A business cannot avoid anti-discrimination laws simply because some aspect of the business's work requires creativity. *Cf. O'Brien v. United States*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.")

Moreover, as the New Mexico Supreme Court noted, "Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Elane Photography*, 309 P.3d at 71. A wide range of businesses covered by the WLAD could plausibly claim to use artistic or creative talents on a routine basis (*e.g.*, bakers, caterers, hair dressers, tailors, architects, software developers, house painters), and anti-discrimination laws would be badly undermined if such businesses were exempt from compliance.

Third, the WLAD does not force Defendants to *endorse* any particular message. Opp'n at 45 (claiming the WLAD forces Defendants to endorse a wedding). The U.S. Supreme Court has consistently rejected arguments made by litigants who contend their compliance with the law can be interpreted as an endorsement of the law or the law's effects. *Rumsfeld*, 547 U.S. at 64-65 (citing cases). In *Rumsfeld*, the Court rejected the law schools' contention that their compliance with military recruitment laws would be interpreted as an endorsement of the military's policies. *Id.* at 65. The Court had previously held that "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," and explained that students surely "have not lost that ability by the time they get to law

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school." *Id.*

Likewise, here, the public knows very well that the law prohibits discrimination by places of public accommodation. The public thus has no basis to assume that every business selling goods or services endorses the uses that are ultimately made of those goods and services. *Cf. Elane Photography*, 309 P.3d at 69-70 ("It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom."). Even Ms. Stutzman agrees she is not endorsing a wedding or its participants when she sells flowers for a wedding. Stutzman Dep. 108:12-23.[20] The WLAD thus does not unconstitutionally require Defendants to endorse speech they do not wish to endorse.

c. Even if Defendants' conduct were expressive, the First Amendment would permit application of the WLAD to Defendants' conduct.

Even if Defendants were engaged in conduct protected by the First Amendment, an incidental burden on free speech is permissible under the First Amendment "if a neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (citations and quotations omitted). As explained above, the WLAD serves a compelling governmental interest and is narrowly tailored to serve that interest.

[20] Q: When you sell flowers for the wedding of two atheists are you endorsing atheism?
A: I don't ask if they're atheist.
Q: Well, if you happened to know, regardless of whether you asked, you're selling flowers to people who are nonbelievers are you endorsing nonbelief?
A: No.
Q: If you sell flowers for the wedding of a Muslim couple, are you endorsing Muslim as a religion?
A: No.
Q: Islam as a religion?
A: No.
Attached as Ex. C to the Scott Decl.

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Because the WLAD meets that higher standard of scrutiny, it is constitutional under the lower level of scrutiny that would apply here.

D. Anti-Discrimination Laws Would be Badly Undermined if Individual Religious Exemptions Were Permitted

This is a consequential case. A religious exception made here could have far reaching implications for all of anti-discrimination law. Litigants have claimed a religious right to discriminate based on race, *Bob Jones Univ.*, 461 U.S. 574; sex, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); marital status, *McClure*, 370 N.W.2d 844; and religious beliefs different from their own, *Pines v. Tomson*, 206 Cal. Rptr. 866 (Cal. Ct. App. 1984). Protection on all those bases, and others, would be at risk if the Court allowed a religious exemption here. Indeed, the WLAD does not only protect people like Robert and Curt from discrimination based on their sexual orientation, it also protects Ms. Stutzman from discrimination on the basis of her religious views. This is as it should be.

This is also how it has been for most of our nation's history. Courts have approved anti-discrimination laws for well more than a century—since at least the "the Civil Rights Cases themselves, where Mr. Justice Bradley for the [U.S. Supreme Court] inferentially found that innkeepers, 'by the laws of all the States . . . are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.'" *Heart of Atlanta Motel*, 379 U.S. at 260 (quoting *Civil Rights Cases*, 109 U.S. 3, 25, 3 S. Ct. 18, 27 L. Ed. 835 (1883)). The Court has no basis to depart from this abiding tradition now.

Nor should the Court embrace any suggestion that discrimination is acceptable as long as a customer is referred to another business willing to supply the goods or services requested. Opp'n at 60. Such a regime would sound the death of public accommodations law. Under such a

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regime, customers could have no confidence any business would serve them. They would spend time and energy finding businesses that welcomed them, and would suffer the indignity of being turned away by businesses that do not. One can even imagine a world where businesses would post signs (not unlike signs prevalent in the South several decades ago), announcing their preferences for certain customers, and distaste for others. That is not a world we want to live in, and it is not a world permitted by the WLAD and other longstanding anti-discrimination laws.

III. CONCLUSION

This case presents no dispute of material fact, and does not raise any novel question of law. Courts have for many years clearly and consistently enforced anti-discrimination statutes in the face of religious challenges like the ones presented here. Robert and Curt do not dispute Ms. Stutzman's right to her religious views. They respect that right. But Ms. Stutzman is not entitled to act on her religious views to discriminate in the operation of her public accommodation. The Court should grant summary judgment for Plaintiffs on liability.

DATED this 15th day of December, 2014.

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