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) GR 17 DECLARATION FOR PLAINTIFF STATE OF WASHINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND CONSTITUTIONAL DEFENSES
ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	

I, Teri Salo, declare as follows:

1. I have examined the preceding Plaintiff State of Washington's Motion for Partial Summary Judgment on Liability and Constitutional Defenses.
2. I have determined it consists of 13 pages including this declaration page.
3. This PDF document is complete and legible.

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4. This document was received for filing at email mailbox Teri.Salo@atg.wa.gov.

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

Dated this 21st day of November, 2014 at Kennewick, Washington.

TERI SALO
Administrative Assistant

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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.

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 13-2-00953-3)

PLAINTIFF STATE OF WASHINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND CONSTITUTIONAL DEFENSES

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I. INTRODUCTION AND RELIEF REQUESTED

For as long as there have been laws prohibiting discrimination, people have sought to evade them by claiming that their religious beliefs or free speech rights allowed them to discriminate. Courts have routinely and emphatically rejected these arguments because accepting them would allow pernicious discrimination of all kinds to flourish. Nonetheless, the defendants ask this Court to issue an unprecedented ruling exempting them from Washington's Consumer Protection Act (CPA) and allowing them to discriminate. The Court should reject their request.

Defendants Barronelle Stutzman and her company, Arlene's Flowers, admit they refused to serve Robert Ingersoll when he asked them to provide flowers for his wedding to his same-sex partner, Curt Freed. In doing so, Defendants discriminated against Mr. Ingersoll on the basis of his sexual orientation. This violated the Washington Law Against Discrimination (WLAD) and, as such, was a *per se* violation of the CPA. It was also an unfair act in violation of the CPA.

Defendants assert several arguments and defenses in an effort to justify and excuse their discrimination and violation of the CPA, all of which fail. First, Defendants contend that their acts were not discriminatory because they reject only gay marriage, not gay clients generally. Courts have decisively rejected such arguments, refusing "to distinguish between status and conduct in this context." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010). Just as it would be race discrimination for a florist to refuse to serve an interracial couple for their wedding, even if she would serve them for other occasions, it is sexual orientation discrimination for her to refuse to serve a same-sex couple for their wedding, even if she served them for other occasions.

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Defendants also wrongly contend that their illegal discrimination must be excused because it is motivated by religion. That is not the law. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982). Courts have consistently rejected Defendants' argument, because accepting it would "make the professed doctrines of religious belief superior to the law of the land, and in effect [ ] permit every citizen to become a law unto himself." *Reynolds v. United States,* 98 U.S. 145, 167, 25 L. Ed. 244 (1878).

In addition, Defendants argue that arranging flowers involves artistic elements such that they have a free speech right to discriminate against same-sex couples in providing wedding flowers. But many types of conduct involve expressive elements, and that does not render them free from government regulation. Great cooking may be an art form, but that does not mean a chef can evade health code inspections or refuse to serve an interracial couple. Accepting Defendants' arguments would effectively mean exempting from government regulation any conduct that involves expression. That is not and cannot be the law.

Ultimately, Defendants' violation of state law is clear, and every constitutional defense they raise fails. If religious beliefs or free speech rights justified ignoring anti-discrimination public accommodation laws, such laws would be left with little effect, and our state and country never would have made the enormous progress we have in eradicating such discrimination. The State asks that the Court find that Defendants violated the CPA, reject their constitutional defenses, and enforce the plain language and clear intent of state law by granting summary judgment to the State.

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II. STATEMENT OF FACTS

A. Defendants Operate a Retail Business Selling Goods and Services, Including Flowers for Weddings

Defendant Arlene's Flowers, Inc. d/b/a Arlene's Flowers and Gifts ("Arlene's Flowers") is a Washington for-profit corporation. *See* Gunning Decl., Ex. A (Certificate of Incorporation, produced as Arlene's Flowers RFP Resp. 001). The company operates a retail store in Richland, Washington that advertises and sells flowers and other goods to the public, including flowers for weddings and other events. *Id.*, Ex. B (Becker Dep.) at 16:3-15; *Id.*, Ex. C (Stutzman Dep.) at 27:9-13. Its advertising methods include signage outside the retail store, newspaper advertisements, and the internet. *Id.*; *see also* http://www.arlenesflowers.net/ (last visited November 12, 2014); http://www.arlenesflowers.com (last visited November 12, 2014).

Defendant Barronelle Stutzman is the president, owner, and operator of Arlene's Flowers. Gunning Decl., Exh. C (Stutzman Dep.) at 16:15-24. The company is a closely held corporation and Ms. Stutzman and her husband are the sole officers. *Id.*, Ex. D (January 2013 corporate minutes, produced as Arlene's Flowers RFP Resp. 029-030).

B. Defendants Refused to Serve Mr. Ingersoll Because He Was Marrying Another Man

Robert Ingersoll is a gay man who lives in Kennewick, Washington. Ingersoll Decl. in Support of Opposition to Defs' Mot. For Partial Summ. J. on CPA Claim (Dkt. #82), ("Ingersoll Decl."), ¶¶ 2-3. He has been in a committed romantic relationship with Curt Freed for nearly ten years. *Id.* In December 2012, after same-sex marriage became legal in Washington, Mr. Freed asked Mr. Ingersoll to marry him, and they made plans to get married on their anniversary in September 2013. *Id.* ¶ 4.

Mr. Ingersoll and Mr. Freed had purchased flowers from Ms. Stutzman and Arlene's Flowers many times before and planned to use Defendants for their wedding. Ingersoll Decl. at ¶ 5; Gunning Decl., Ex. E (Ingersoll Dep.) at 10:12 – 11:14. On March 1, 2013,

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Mr. Ingersoll drove to Arlene's Flowers and met with Ms. Stutzman. Ingersoll Decl. at ¶ 7. Ms.- Stutzman was aware before that time that Mr. Ingersoll is gay and in a relationship with Mr. Freed. Gunning Decl., Ex. C (Stutzman Dep.) at 70:8-71:13. Mr. Ingersoll told Ms. Stutzman about his upcoming wedding to Mr. Freed and indicated that the couple wanted the Defendants to provide floral services for the wedding. Ingersoll Decl. at 2-3, ¶ 8; Gunning Decl., Ex. C (Stutzman Dep.) at 79:19-24. Ms. Stutzman told Mr. Ingersoll that she could not serve him because of her relationship with Jesus Christ. *Id.*

Ms. Stutzman refused to serve Mr. Ingersoll before he had made any decision about what he wanted, *i.e.,* whether he intended to purchase unarranged flowers or other plants for the wedding or whether he wanted Ms. Stutzman or another Arlene's Flowers employee to create floral arrangements. Gunning Decl., Ex. F (Defs.' First Set of Requests for Admission to Robert Ingersoll and Responses Thereto, Responses to RFA Nos. 4-8); *see also* Gunning Decl., Ex. C (Stutzman Dep.) at 79:25, 80:1-11; 83:8-11. Mr. Ingersoll did not have the opportunity to discuss options for wedding flowers or any "particular floral arrangements" before Ms. Stutzman told him Arlene's Flowers would not serve him. *Id.*; *see also* Gunning Decl., Ex. F (Response to RFA No. 8); *id.*, Ex. C (Stutzman Dep.) at 80:11 ("I chose not to be a part of his event."); 82:1 ("I told him I could not do his wedding.").

Ms. Stutzman admits that the basis for Defendants' refusal to serve Mr. Ingersoll on March 1, 2013 is her personal belief "that marriage is a union of a man and a woman." Decl. of Barronelle Stutzman in Support of Mot. for Partial Summ. J. on Personal Capacity Claims (Dkt. #94), filed October 25, 2013 ("Stutzman Decl.") ¶ 16. She confirmed this at her deposition. Gunning Decl., Ex. C (Stutzman Dep.) at 44:22-25; 78:3-7.

C. Defendants Have Now Instituted a Policy That They Will Not Arrange Flowers for Any Wedding or Commitment Ceremony Between Persons of the Same Sex

Defendants are aware that Washington law prohibits discrimination based on sexual orientation and that in the 2012 election, Washington voters approved the legalization of same-

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sex marriage, as previously enacted by the Legislature. Gunning Decl., Ex. C (Stutzman Dep.) at 33:12-34:3, 39:3-6. Defendant Arlene's Flowers has a written anti-discrimination policy in its company handbook - written by Ms. Stutzman - that encompasses sexual orientation discrimination. *Id.* (Stutzman Dep.) at 30:22-32:20 (prohibiting discrimination on the basis of "'race, color, religion . . . or any other status protected by applicable law.'"). After Defendants' refusal to provide services to Mr. Ingersoll, though, Defendants created an unwritten policy that they would not provide arranged flowers for same-sex marriage or commitment ceremonies. *Id.* at 44:16-25; 69:5-15.

Ms. Stutzman's position is that to "do[ ] the flowers for any same-sex wedding would give the impression that [she] endorsed same-sex marriage." Stutzman Decl. (Dkt. #94) ¶ 11. However, Ms. Stutzman also testified that the Defendants would sell flowers for heterosexual non-Christian weddings (e.g., atheist or Islamic weddings) and that doing so would not be an endorsement of atheism or those other religions. Gunning Decl., Ex. C (Stutzman Dep.) at 108:12-23; 111:13-16.

D. The State's CPA Claim and Defendants' Constitutional Defenses

The State of Washington, through the Attorney General, filed this action pursuant to the Consumer Protection Act, RCW 19.86. *See* Complaint ¶¶ 1.1-1.2. The State alleges Defendants violated the CPA when they engaged in sexual orientation discrimination in public accommodation by refusing to sell Mr. Ingersoll flowers for his wedding to another man, Mr. Freed. *Id.* ¶¶ 5.7-5.8.

There are two grounds for the State's CPA claim. First, as detailed below, Defendants' refusal to sell flowers to Mr. Ingersoll is sexual orientation discrimination and therefore is an unfair practice under Washington's Law Against Discrimination, RCW 49.60 (WLAD), which prohibits such discrimination in public accommodation. Complaint ¶ 5.7; RCW 49.60.030(1); RCW 49.60.215. This unfair practice is a *per se* violation of the CPA. RCW 49.60.030(3)

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(providing that any unfair practice prohibited by the WLAD that occurs in trade or commerce violates the CPA).

In addition, the Complaint also includes a non-*per se* CPA claim. Complaint ¶ 5.8. Defendants' conduct, as alleged in the complaint, "constitutes an unfair practice in trade or commerce and an unfair method of competition that is contrary to the public interest and therefore violates RCW 19.86.020." *Id.*

Defendants have alleged several constitutional affirmative defenses. These defenses are: (1) "As applied preemption under the First Amendment to the United States Constitution"; (2) "As applied violation of Article I Section 11 of the Washington State Constitution"; (3) "Selective Enforcement in Violation of the Fourteenth Amendment to the United States Constitution"; and (4) "Justification." Answer ¶¶6.6-6.9.

III. STATEMENT OF ISSUES

1. Whether, as a matter of law, Defendants violated the Consumer Protection Act by refusing to serve customers in a place of public accommodation based on their sexual orientation?
2. Whether, as a matter of law, Defendants' right to free speech entitles them to discriminate based on sexual orientation in a place of public accommodation?
3. Whether, as a matter of law, the State must allow Defendants' discriminatory conduct because it is motivated by religious belief?
4. Whether, as a matter of law, Defendants can prove that the State is selectively enforcing the law against them in violation of equal protection?
5. Whether, as a matter of law, Defendants can rely on the defense of "justification" where this is not a criminal case?

IV. EVIDENCE RELIED UPON

The State relies upon the argument and authorities herein, the Declaration of Kimberlee Gunning in Support of Plaintiff State of Washington's Motion for Partial Summary Judgment

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on Liability and Constitutional Defenses and the exhibits attached thereto and the balance of pleadings and papers on file in this action.

V. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c), (e). Here, applying the correct legal standard to the undisputed facts demonstrates that there are no genuine issues of material fact for trial. Defendants admit they refused service to Mr. Ingersoll for his wedding to Mr. Freed. Defendants admit they now have a policy that they will refuse to sell arranged flowers to consumers for same-sex weddings. As detailed below, Defendants' constitutional defenses fail as a matter of law. Accordingly, the Court should grant the State's motion for summary judgment.

B. Defendants Violated the Consumer Protection Act

The CPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. It was enacted by the Legislature "to protect the public and foster fair and honest competition." RCW 19.86.920. To achieve this goal, the Legislature directed that the CPA "shall be liberally construed that its beneficial purposes may be served." *Id.* Liberal construction requires courts to broadly interpret the CPA's scope and coverage. *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). The CPA encompasses "within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (emphasis in original).

To establish a CPA violation, the Attorney General must prove: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; and (3) that has a public interest impact. *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). Unlike private litigants, the State is not required to prove causation or injury. *Id.* A CPA claim "may be predicated

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upon a *per se* violation of statute . . . or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem v. Washington Mut. Bank*, 176 Wn.2d 771; 787, 295 P.3d 1179 (2013) (emphasis added). Both apply here.

As detailed below, Defendants violated the CPA *per se* because their discriminatory acts and practices are prohibited by the WLAD. RCW 49.60.030(3). Defendants' discriminatory conduct also violates the CPA because it is an "unfair" act or practice "in violation of [the] public interest." *See Klem*, 176 Wn.2d at 787. While the State can easily satisfy the elements of both CPA claims (as detailed below), it need only prove one or the other to prevail on summary judgment. *Id.* at 787.

1. Defendants' Discriminatory Conduct Is A *Per Se* CPA Violation Because it Violates the WLAD.

As noted above, the Attorney General must prove three elements to show a CPA violation: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; and (3) that has a public interest impact. *Kaiser*, 161 Wn. App. at 719. All three elements are met *per se* when a defendant violates the WLAD in the course of trade or commerce because a WLAD violation "committed in the course of trade or commerce . . . is, for the purpose of [the CPA], a matter affecting the public interest . . . and is an unfair or deceptive act." RCW 49.60.030(3). It is undisputed that Defendants' conduct occurred in the course of trade or commerce. *See* RCW 19.96.010(2) (defining "trade" and "commerce" as "includ[ing] the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington"). Therefore, if Defendants violated the WLAD, they committed a *per se* CPA violation.

Defendants violated the WLAD. The WLAD has for over fifty years prohibited discrimination by businesses that offer goods and services to the public. *See Marquis v. City of Spokane*, 130 Wn.2d 97, 105-106, 922 P.2d 43 (1996). Originally enacted in 1949 to prevent and eliminate discrimination in employment based on race, creed, color, or national origin, the

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WLAD's scope has been expanded several times: in 1957 to prohibit discrimination in public accommodation; in 1973 to add sex, marital status, age, and disability as protected classes; and again in 2006 to add sexual orientation as a protected class. *See id.* (listing history of WLAD amendments through 1973); *Loeffelholz v. University of Wash.*, 175 Wn.2d 264, 267, 285 P.3d 854 (2012) (describing 2006 WLAD amendment). The WLAD "shall be construed liberally" to advance its remedial purpose. *See* RCW 49.60.020.

The WLAD provides that any distinction or discrimination in a place of public accommodation is an "unfair practice." RCW 49.60.215. A "place of public accommodation" includes any place, like Arlene's Flowers, where goods or services are sold. RCW 49.60.040(2). When visiting places of public accommodation, gay and lesbian people, as members of a protected class, have "[t]he right to the full enjoyment" of the accommodation. *See* RCW 49.60.030(1), (1)(b). "Full enjoyment" of a place of public accommodation "includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public...without acts directly or indirectly causing persons of any particular race, creed, color, [or] sexual orientation . . . to be treated as not welcome, accepted, desired, or solicited." RCW 49.60.040(14) (emphasis added); *see also* RCW 49.60.215.

Here, Defendants admit that the only reason they treated Mr. Ingersoll differently from a heterosexual man or woman seeking floral services for a wedding was that he planned to marry another man. Stutzman Decl. ¶ 16 (Dkt #94); Gunning Decl., Ex. C (Stutzman Dep.) at 44:22-25. Indeed, Defendants admit that they will refuse to serve all consumers who want to purchase arranged flowers for their weddings or commitment ceremonies to a same-sex partner. *Id.* (Stutzman Dep.) at 44:16-25, 69:5-15.

Defendants claim that they discriminate only against same-sex weddings, not against gay and lesbian individuals generally. *See* Stutzman Decl. (Dkt. #94) ¶ 16. But courts have universally rejected that distinction, and this Court should as well.

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As an initial matter, refusing to serve gay and lesbian customers for their weddings is discrimination based on sexual orientation, even if Defendants would serve gay and lesbian customers for other events. Just as Defendants could not say, "We will provide flowers to interracial couples, but not if they want to get married," they also cannot say, "We will serve gay customers, but not if they want to get married." This is discrimination, pure and simple. Indeed, Washington law prohibits public accommodations from making any distinction in services offered to consumers based on sexual orientation. *See* RCW 49.60.215(1).

More broadly, in evaluating discrimination claims, both the United States and the Washington Supreme Courts have refused to distinguish between a person's status and his or her conduct when such conduct is "engaged in exclusively or predominately by a particular class of people[.]" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993).[1] The Supreme Court has extended this principle to sexual orientation discrimination, repeatedly refusing "to distinguish between status and conduct in this context." *Christian Legal Soc'y* 561 U.S. at 689 (rejecting student group's argument that it did not discriminate based on sexual orientation, but rather based on "unrepentant homosexual conduct").[2] Of course, only gays and lesbians marry same-sex partners. Thus, as a matter of common sense and binding precedent, to discriminate against weddings of people of the same sex is to discriminate based on sexual orientation.

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[1] *See, e.g., Hegwine v. Longview Fibre Co.,* 162 Wn.2d 340, 349-51, 172 P.3d 688 (2007) (holding that a female employee alleging that an employer refused to hire her because she was pregnant could bring a claim for sex discrimination pursuant to WLAD); *Xieng v. Peoples Nat'l Bank of Wash.*, 63 Wn. App. 572, 577-78, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993) (holding that bank discriminated against employee based on national origin in refusing to promote him "because he could not speak 'American.'").

[2] *See also Lawrence v. Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (striking down law that criminalized certain same-sex sexual conduct, and holding that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres"); *Romer v. Evans*, 517 U.S. 620, 641, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (noting that "[a]fter all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal").

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The New Mexico Supreme Court reached this conclusion in holding that a photographer who refused to provide services to a same-sex couple for their commitment ceremony had violated the state's anti-discrimination law. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied* . . . . (No. 13-585). As that court explained, "when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation." *Id.* at 62.

If all of this were not enough to doom Defendants' argument, their claim would still fail because Washington law provides that acts that "indirectly result[ ] in any distinction, restriction, or discrimination" in public accommodation based on the consumer's sexual orientation are unfair and unlawful practices. *See* RCW 49.60.215 (emphasis added); *see also* RCW 49.60.040(14). Even if Defendants' refusal to sell flowers to Mr. Ingersoll for his wedding was not directly because he is gay – and the State does not so concede – it is beyond dispute that the refusal at the very least indirectly resulted in discrimination based on sexual orientation.

In short, Defendants refused to serve Mr. Ingersoll based on his sexual orientation. In doing so they violated the WLAD in trade or commerce, which is a *per se* violation of the CPA. RCW 49.60.030(3).

2. Defendants' Discriminatory Acts and Practices Are Also Unfair Practices Contrary to the Public Interest, Violating the CPA

Even if Defendants' conduct were not a *per se* violation of the CPA based on a violation of the WLAD, it would still violate the CPA. As explained above, the Attorney General must prove three elements to show a CPA violation: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; and (3) that has a public interest impact. *Kaiser*, 161 Wn. App. at 719. Proving a WLAD violation in trade or commerce establishes all of these elements, but the Attorney General may also prove them separate from the WLAD. There is no dispute that Defendants' acts occurred in trade or commerce, so under this

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approach the only questions are whether the acts were unfair and had a public interest impact. Both requirements are satisfied.

a. Defendants' Discriminatory Acts Are Unfair Acts or Practices

Whether an act or practice is unfair under the CPA is a question of law. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). The Legislature did not specifically define "unfair" acts or practices prohibited by the CPA because "[t]here is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *Id.* at 48 (internal citation omitted). Instead, courts may interpret the CPA "'to arrive at the statute's meaning by the same 'gradual process of judicial inclusion and exclusion' used by the federal courts[.]'" *State v. Schwab*, 103 Wn.2d 542, 546, 693 P.2d 108 (1985) (quoting *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972)).

Washington courts have found "unfairness" under the CPA where the defendant's conduct:

> "[O]ffends public policy, as it has been established by statutes, the common law, or otherwise[,] is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury to consumers . . . ."

Blake v. Federal Way Cycle Ctr., 40 Wn. App. 302, 310, 698 P.2d 578 (1985) (quoting *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1973)).

Courts in Washington and elsewhere have specifically held that a retail store treating consumers differently because they belong to a protected class is unfair. *See Demelash v. Ross*, 105 Wn. App. 508, 523-24, 20 P.3d 447 (2001) (reversing order granting summary judgment for defendant on CPA claim in case where plaintiff, an Ethiopian immigrant, alleged retail store discriminated against him on the basis of his race and national origin); Carolyn L. Carter & Jonathan Sheldon, *Unfair and Deceptive Acts and Practices* § 4.3.10 (National

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Consumer Law Center, 8th ed. 2012) (collecting cases and explaining that "[u]nlawful discrimination" is an "unfair business practice[ ]" under state unfair and deceptive acts and practices laws).[3]

This Court should similarly hold as a matter of law that Defendants' refusal to sell Mr. Ingersoll the same products and services they would sell customers who were planning an opposite-sex wedding is unfair. Such discrimination clearly offends public policy under Washington law. *Cf. Blake*, 40 Wn. App. at 310. Washington statutes and case law make clear that the State has a well-established and robust policy of promoting equality for all Washington residents, gay or otherwise, in a variety of contexts, including marriage; the prohibition of discrimination in public accommodation, employment, insurance, credit and real estate transactions; protection from malicious harassment; and equal treatment with respect to parentage and child custody and visitation rights.[4] For these reasons, the Court should hold

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[3] *See also Ellis v. Safety Ins. Co.*, 672 N.E.2d 979, 986 (Mass. App. Ct. 1996) (holding that "[r]acial harassment in the course of doing business is conduct fairly described as immoral, unethical, or oppressive for the purposes of [Massachusetts' CPA, Mass. Gen. Laws. Ch. 93A, § 2]" and thus "may well constitute an unfair business practice giving rise to a [CPA] violation"); *People ex rel. City of Santa Monica*, 112 Cal. Rptr.3d 574, 578-79 (Cal. Ct. App. 2010) (rejecting argument that landlord's sexual harassment involved only personal conduct and thus could not be a business practice actionable under California's unfair competition statute, Cal. Bus. & Prof. Code § 17200; explaining that the statute "prohibits as unfair competition 'any unlawful, unfair or fraudulent business act or practice'" and noting that the harassment "was made possible by the parties' commercial relationship and occurred only during business-related encounters"); *Robinson v. Paragon Foods, Inc.*, No. CIVA1:04CV2940-JEC, 2006 WL 2661110, at *11 (N.D. Ga. Sept. 15, 2006) (permitting plaintiffs who alleged restaurant's "no-dining in" policy during certain hours was race discrimination in public accommodation to proceed with claim under Georgia's Fair Business Practices Act, Ga. Code. § 10-1-390).

[4] *See, e.g.*, RCW 26.04.010(1) (definition of marriage does not exclude same-sex couples); RCW 26.04.010(3) (Washington's marriage statute provides that "[w]here necessary to implement the rights and responsibilities of spouses under the law, gender specific terms such as husband and wife used in any statute, rule, or other law must be construed to be gender neutral and applicable to spouses of the same sex"); *Gormley v. Robertson*, 120 Wn. App. 31, 38, 83 P.3d 1042 (2004) (extending meritricious relationship doctrine to same-sex couples); RCW 49.60.010 (stating state policy against sexual orientation discrimination); RCW 9A.36.078 (Washington's malicious harassment statute includes finding that "[t]he legislature finds that crimes and threats against persons because of their...sexual orientation are serious and increasing[,]: that "the state interest in preventing crimes and threats motivated by bigotry and bias goes beyond the state interest in preventing other felonies and misdemeanors" that "are not motivated by hatred, bigotry, and bias" and that "[t]herefore, the legislature finds that protection of those citizens from threats of harm due to bias and bigotry is a compelling interest"); RCW 26.26.051(2) (Uniform Parentage Act (UPA) does not distinguish based on sexual orientation when determining parentage; UPA applies to "persons of the same sex who have children together to the same extent they apply to persons of the opposite sex who have children together"); *In re Parentage of L.B.*, 155 Wn.2d 679, 682-83, 122 P.3d 161 (2005) (recognizing the common law "de facto parentage" doctrine and holding that a

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that Defendants' refusal to serve gay and lesbian customers for their weddings is an unfair act or practice as a matter of law.

b. Defendants' Unfair and Discriminatory Acts Have Impacted the Public Interest

"The Attorney General's responsibility in bringing [CPA] cases . . . is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals." *Lightfoot v. MacDonald*, 86 Wn.2d 331, 334, 544 P.2d 88 (1976) (internal quotation marks omitted). Thus, where the Attorney General brings a CPA action, there is a strong presumption that the action is to remedy practices affecting the public interest. *See, e.g., id.* at 335 (if a practice "would be vulnerable to a complaint by the Attorney General under the [CPA]," then it is the sort of practice that affects the public interest and as to "which a private individual may complain"). That presumption plainly applies here, where the Attorney General is acting to end ongoing discrimination prohibited by state law.

Even if the State were required to prove public interest impact using the standard for private CPA plaintiffs (and it is not), it can easily do so here. Private CPA plaintiffs must show that the unfair or deceptive act or practice "(1) [v]iolates a statute that incorporates [the CPA]; (2) [v]iolates a statute that contains a specific legislative declaration of public interest impact; or (3)(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." RCW 19.86.093. Even setting aside the WLAD, which establishes public interest impact through both of the first two approaches, *see* RCW 49.60.030(3) (incorporating the CPA and declaring public interest impact), the Attorney General can establish public interest impact through the third approach. At the very least, Defendants' policy of refusing to serve same-sex couples for their weddings obviously "has the

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court cannot deny visitation rights to a person who is not a biological parent of a child solely because of that person's sexual orientation).

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capacity to injure"[5] many consumers in the future if Defendants are not enjoined from engaging in this unfair and discriminatory practice. It is beyond dispute that Defendants' discriminatory conduct has a public interest impact.

3. Ms. Stutzman Is Personally Liable for Violations of the CPA Because She Participated In and Approved of Arlene's Flowers' Discriminatory Refusal to Serve Mr. Ingersoll and Enacted the Store's Discriminatory Policies[6]

The Attorney General may bring suit against "any person" to enforce the CPA. *See* RCW 19.86.080. The CPA's language makes clear that liability is not limited to corporations and other business entities, but also encompasses "natural persons." *See* RCW 19.86.010(1). Accordingly, individual plaintiffs, including corporate officers, may be personally liable for conduct that violates the CPA if they "participate[d] in" or "with knowledge approve[d] of" the practice that violates the CPA. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976) (emphasis added) (holding corporate officer liable for CPA violations because he "was personally responsible for many of the unlawful acts and practices" of the defendant, a car dealership); *see also Grayson v. Nordic Constr. Co.*, 29 Wn.2d 548, 554, 599 P.2d 1271 (1979) (holding that "personal liability" for CPA violations was "properly imposed" on corporate officer who personally directed mailing of deceptive advertising"; explaining that a corporate officer is liable under the CPA if he or she "participates in wrongful conduct or with knowledge approves of the conduct").

The State's CPA claim against Ms. Stutzman rests on conduct in which Ms. Stutzman personally engaged, a fact she readily admits. *See* Complaint ¶¶ 4.3-4.6 (describing Ms. Stutzman's response to Mr. Ingersoll when he informed her he wanted her to provide

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[5] As noted above, however, the State is not required to prove injury as an element of a CPA claim. *Kaiser*, 161 Wn. App. at 719.

[6] Defendants have filed a motion for summary judgment on the State's CPA claim against Ms. Stutzman in her personal capacity and the State filed a response to that motion that fully addresses Defendants' arguments. The State does not reiterate all those arguments here in detail but respectfully refers the Court to its Response to Defendants' Motion for Partial Summary Judgment on Plaintiffs' Claims Against Barronelle Stutzman in Her Personal Capacity (Dkt. #112).

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services for his wedding and her refusal to do so because of her personal "relationship with Jesus Christ"); *see also* Stutzman Decl. (Dkt. #94) ¶¶ 12-13, 14-16 (admitting that it was her personal belief that prompted her to refuse to sell flowers for same-sex weddings and claiming that to do so "would violate my conscience and my deeply held religious beliefs") (emphasis added). There can thus be no dispute that she is personally liable for Defendants' conduct.

C. Prohibiting Defendants' Discrimination Violates No Constitutional Provisions

1. Defendants Have No Free Speech Right to Discriminate Based on Sexual Orientation

Defendants argue that arranging flowers involves an artistic element, and that they therefore have a free speech right under the First Amendment to the United States Constitution to discriminate against same-sex couples in providing wedding flowers. Answer ¶ 6.6. That is not and cannot be the law, because it would undo decades of precedent recognizing government's extensive power to combat discrimination.

Many types of conduct involve expressive elements, but that does not render such conduct free of government regulation or subject every such regulation to strict scrutiny. As the U.S. Supreme Court has held, "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct'" includes elements of speech. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62, 126 S. Ct. 1297 164 L. Ed. 2d 156 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L.Ed. 834 (1949)). For example, many consider cooking an art form, but that does not mean that every health code regulation applied to restaurants is subject to strict scrutiny. And it certainly does not mean that a chef opposed to interracial marriage can decline to serve an interracial couple. Similarly, interior design obviously reflects individual expression. But if a hotel owner claimed that he had designed his hotel rooms specifically for white people, no one would think for a second that his right to free speech allowed him to refuse service to others.

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It is true, of course, that the government cannot generally compel people to speak a particular message. *Rumsfeld*, 547 U.S. at 61. But that is not what the CPA and WLAD do here. The State does not require Defendants to arrange flowers at all, much less to arrange them in any particular way. Instead, the State simply requires that if the Defendants want to sell flowers to the public, they do so on an equal basis. The Supreme Court has repeatedly upheld such requirements of equal treatment. *See, e.g., id.* (holding that the federal government could require universities to accept military recruiters on campus, even though the "recruiting assistance provided by the schools often includes elements of speech," because the government "does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters").

Moreover, anti-discrimination laws routinely require such equal treatment, even if doing so involves some expression. For example, a business owner who belonged to the Ku Klux Klan could not refuse to interview black or Jewish applicants on the ground that the interview process forces him to speak with these individuals, or that hiring them sends a message with which he disagrees. *See, e.g.*, *Rumsfeld*, 547 U.S. at 62 ("Congress . . . can prohibit employers from discriminating in hiring on the basis of race," even though this will restrict what those employers can and cannot say); *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.").

In short, the right to free speech does not include the right to refuse service to customers in a place of public accommodation. Holding to the contrary would undo decades of progress in combatting discrimination and return us to a world in which business owners could refuse service on the basis of race, religion, or any other basis they claimed forced them to interact with people they would prefer to avoid.

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2. Barring Discrimination Based on Sexual Orientation is Consistent with Both the Federal and State Free Exercise Clauses

a. The Federal Free Exercise Clause

Defendants claim that application of the CPA and WLAD violates Ms. Stutzman's First Amendment right to freely exercise her religion and that strict scrutiny applies to these state laws. Answer ¶¶12.1 to 12.7. Neither argument holds water.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const., amend. I. The right to freely exercise one's religion, however, "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)." *Employment 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) (internal quotation marks omitted). Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

The CPA and WLAD are neutral laws of generally applicability, so this Court should apply rational basis review, which both laws easily survive. But even if the Court applied strict scrutiny, there is no constitutional violation here because the statutes are narrowly tailored to further the compelling government interest in eradicating discrimination.

(1) The CPA and the WLAD are neutral and generally applicable

"[I]f the object of a law is to infringe upon or restrict practices *because of* their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533 (emphasis added). "A law is not generally applicable when the government, 'in a selective manner, imposes burdens only on conduct motivated by religious belief.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (quoting *Lukumi*, 508 U.S. at 543). Neither test is met here.

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The CPA does not restrict religious belief or target religious practice in any respect. The purpose of the CPA is "to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.020. The CPA's prohibitions apply whether a person's conduct is motivated by religion, greed, personal opinion, or simple malice. There is no plausible argument that the law was intended to restrict religious conduct or that its burdens fall solely on those with religious motivations.

Similarly, the WLAD does not regulate belief at all; it prohibits discriminatory conduct. The WLAD does not target religious practice, evince hostility to religion, or selectively impose burdens on religiously motivated conduct. The statute prohibits discriminatory conduct regardless of whether the conduct is motivated by religion, tradition, custom, prejudice, or personal distaste. RCW 49.60.010. Indeed, since its initial passage in 1949, one purpose of the WLAD has been "to prevent and eradicate discrimination on the basis of . . . creed." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 237, 59 P.3d 655 (2002). To say that a law passed to prevent religious discrimination is actually aimed at implementing such discrimination turns the law on its head.

Defendants may claim that, although the WLAD does not explicitly target religion, its prohibition on discrimination based on sexual orientation effectively targets religious people. As a factual matter, that argument falsely assumes that only religious people discriminate on the basis of sexual orientation; in reality, of course, many people discriminate against gays and lesbians for reasons having nothing to do with religion (indeed, many communist countries that prohibited religious practice also prohibited homosexuality). As a legal matter,

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countless federal courts have held that the Free Exercise Clause is not violated simply because people motivated by religion may be more likely to engage in the proscribed conduct.[7]

Because the WLAD and CPA are neutral laws of general applicability, they are subject to rational basis review, which they easily withstand. But even if strict scrutiny did apply, the WLAD and CPA would survive because they are narrowly tailored to further the government's compelling interest in eradicating discrimination. *See* pages 30-36.

b. Article I, section 11 of the Washington Constitution does not require the State to allow businesses to discriminate based on a customer's sexual orientation

As a matter of law, the Washington Constitution's religious freedom clause does not permit a place of public accommodation to refuse service to a member of a protected class. Like the U. S. Supreme Court, the Washington Supreme Court has long recognized that religious freedom embraces both the freedom to believe and the freedom to act. The first is absolute, but the second cannot be. *State ex rel. Holcomb v. Armstrong,* 39 Wn.2d 860, 864, 239 P.2d 545 (1952) (*quoting Cantwell v. State of Conn.* 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). Where the Legislature has prohibited certain conduct under its police

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[7] *See, e.g., American Life League, Inc. v. Reno,* 47 F.3d 642, 651, 654 (4th Cir. 1995) (holding that a federal law establishing criminal penalties and civil remedies for certain conduct intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services did not violate the Free Exercise Clause even though it was enacted in response to antiabortion protests, because it "punishes conduct for the harm it causes, not because the conduct is religiously motivated"), *cert. denied,* 516 U.S. 809 (1995); *Smith,* 494 U.S. at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 451, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988)); *Reynolds,* 98 U.S. at 166–67 (upholding a polygamy ban though the practice was followed primarily by members of the Mormon church); *Stormans,* 586 F.3d at 1131 (regulations requiring pharmacies to deliver legally prescribed FDA-approved medicines to patients were neutral even through pharmacists with religious objections to certain medicines may disproportionately require accommodation); *Parker v. Hurley,* 514 F.3d 87, 96 (1st Cir. 2008) ("The fact that a school promotes tolerance of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting" of the religious groups), *cert denied,* 555 U.S. 815 (2008); *Vision Church v. Village of Long Grove,* 468 F.3d 975, 999 (7th Cir. 2006) (even if a zoning ordinance had "targeted" a proposed plan for a new church, it did not target religion or a religious group in violation of the Free Exercise Clause because the village planning commission was concerned about the nonreligious effect of the church on the community, concerns that were "separate and independent from the religious affiliation"), *cert. denied,* 552 U.S. 940 (2007).

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power to protect Washington citizens from harm and to promote public health and welfare, Washington courts have regularly rejected challenges based on Article I, section 11. *See, e.g., State v. Balzer,* 91 Wn. App. 44, 60-61, 66, 91 P.2d 931 (1998).

Article I, section 11 provides: "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state." Under Article I, section 11, a party challenging a government action must show that her belief is sincere and that the government action substantially burdens her exercise of religion. *City of Woodinville v. Northshore United Church of Christ,* 166 Wn.2d 633, 642-43, 211 P.3d 406 (2009). If the challenger can show a substantial burden, then the government must show that its action is a narrow means for achieving a compelling goal. *Id.*

The State does not contest that Ms. Stutzman has a sincerely held religious belief that prompts her to oppose marriage between people of the same sex. But forbidding her from discriminating based on sexual orientation in the operation of her business does not substantially burden her exercise of religion. Neither engaging in business activities generally, nor arranging flowers for weddings in particular, implicates core protected worship or involves the practice of religion. Even if the court were to find a substantial burden, Washington has a compelling interest in eradicating discrimination in places of public accommodation. Discrimination seriously impacts its victims, and the state laws at issue here are narrowly tailored to serve their purposes. Thus, Defendants' affirmative defense based on Article I, section 11 fails as a matter of law.

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(1) Serving gay and straight customers equally would not substantially burden Ms. Stutzman's religious practice.

A state law burdens free exercise under the Washington Constitution if it has a coercive effect on the practice of religion, for example, by compelling violation of a tenet of religious belief. *City of Woodinville,* 166 Wn.2d at 642-43. "This does not mean that any slight burden is invalid, however." *City of Woodinville,* 166 Wn.2d at 643. "If the constitution forbade all government actions that worked some burden by minimally affecting 'sentiment, belief [or] worship,' then any . . . actions argued to be part of religious exercise would be totally free from government regulation," while the Washington Constitution's plain language provides to the contrary. *Id.* (*quoting* Wash. Const. Art.1, sec. 11). The asserted burden or coercive effect on the practice of religion must be substantial. *Id.*

Any asserted burden must be evaluated in the context in which it arises. *Id.* at 644. For example, the Washington Supreme Court has considered whether the challenged government regulation affects worship or religious services directly, as well as the degree to which the asserted religious practice affects others in the community. *Id.* This balanced approach is reflected in the language of the constitutional provision itself, which does not "'justify practices inconsistent with the peace and safety of the state.'" *Id.* (*quoting* Wash. Const. Art.1, sec. 11). In conducting this balancing, Washington courts have weighed whether a challenged law was enacted for the "health, morals, safety, and general welfare of the people of the state." *Balzer,* 91 Wn. App. at 66.

In practice, Washington Courts have found a significant burden where a government regulation restricts a church or religious institution or a practice central to a person's religious worship. *City of Woodinville,* 166 Wn.2d at 644-45 (City applied moratorium on homeless tent cities against a church); *Munns v. Martin,* 131 Wn.2d 192, 206, 930 P.2d 318 (1997) (land use ordinance applied against church); *First United Methodist Church v. Seattle Landmarks Preservation Bd.,* 129 Wn.2d 238, 252, 916 P.2d 374 (1995) (same); *Balzer,* 91 Wn. App. at

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54-55 (use of marijuana in the practice of the Rainbow Tribe and Rastafarian faiths burdened by criminal marijuana laws). But Washington courts have also considered whether the church or person claiming violation of Article I, section 11 had alternatives for complying both with religious tenets and the applicable law. *City of Woodinville,* 166 Wn.2d at 645 ("[The City] gave the Church no alternatives."); *State v. Motherwell,* 114 Wn.2d 353, 362-63, 788 P.2d 1066 (1990) (no significant burden where church counselors could practice their religion by counselling parishioners even after reporting suspected child abuse). Indeed, in *Motherwell,* the Washington Supreme Court noted that "the key question is not whether a religious practice is inhibited, but whether a religious tenet can still be observed." 114 Wn.2d at 363. Thus, determining whether there has been a significant burden on religious exercise requires consideration of whether alternatives would have allowed both compliance with the law and the asserted religious practice.

Here, requiring the owner of a flower shop, a place of public accommodation, to avoid discrimination does not infringe on a religious institution or impact core religious practice or worship. When a person obtains a business license and operates a business in Washington, he or she voluntarily undertakes both the benefits and burdens of operating in the Washington marketplace. They "necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity," even where they claim a religious objection. *Backlund v. Board of Com'rs of King County Hosp. Dist. 2,* 106 Wash.2d 632, 648, 724 P.2d 981 (1986); *see also Lee,* 455 U.S. at 261; *In re Marriage of Didier,* 134 Wn. App. 490, 499, 140 P.3d 607 (2006). Ms. Stutzman should not be permitted to claim a substantial burden where she freely chose to enter the Washington marketplace, with all of its related regulations.

Moreover, Ms. Stutzman refused to consider practical alternatives that would have allowed compliance with state law without requiring her to violate her religious beliefs. Arlene's Flowers employed, on average, about ten people, including up to four people that

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design flower arrangements. Gunning Decl., Ex. C (Stutzman Dep.) at 20:25; 21:1-25. Yet Ms. Stutzman would not consider allowing another staff member to design flowers for Mr. Ingersoll's wedding. *Id.* (Stutzman Dep.) at 83:19-25; 84:1-2.

While Ms. Stutzman may argue that Arlene's Flowers as a business should not be forced to serve same-sex weddings, she cannot point to a case where Article I, section 11's religious freedom clause has been applied to protect the rights of a for-profit business that is not itself a church or religious institution. Indeed the plain language of Article I, section 11 guarantees its protections to "every individual," making no mention of protection for businesses or corporations. Wash. Const. Article 1, section 11.

In sum, prohibiting Arlene's Flowers—a place of public accommodation—from discriminating does not significantly burden Ms. Stutzman's religious practices. Arlene's Flowers is not a church or religious institution, Ms. Stutzman voluntarily entered the Washington marketplace, and there were options—like having another employee design wedding flowers for gay and lesbian couples—that would allow Ms. Stutzman to observe her own religious views. Thus, this court should hold that state law does not substantially burden Ms. Stutzman's religious practice, and Arlene's Flowers as a business is not an individual or religious institution entitled to protection under Article I, section 11.

(2) State law is narrowly tailored to support the compelling interest in eradicating discrimination against Washington's gay and lesbian citizens in places of public accommodation.

Even if this court were to find a substantial burden, state law is narrowly tailored to support a compelling interest. Courts have routinely recognized the compelling government interest in eradicating discrimination, a societal problem that impacts the peace, health, and welfare of the state. The state laws at issue here are narrowly tailored to achieve that compelling goal.

The Washington Constitution gives the Legislature broad authority to adopt laws to promote peace, health, safety, and welfare. Wash. Const. Art. I, sec. 1. The Legislature has

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broad discretion "'to determine what the public interest demands under particular circumstances, and what measures are necessary to secure and protect the same.'" *State v. Ward,* 123 Wn.2d 488, 508-09, 869 P.2d 1062 (1994) (*quoting State v. Brayman,* 110 Wn.2d 183, 193, 751 P.2d 294 (1988)); *see also Balzer,* 91 Wn. App. at 56.

"'Compelling interests' are those governmental objectives based upon the necessities of national or community life such as threats to public health, peace, and welfare." *Balzer,* 91 Wn. App. at 56 (*citing Munns,* 131 Wn.2d at 200). The United States Supreme Court repeatedly has recognized a compelling state interest in eradicating discrimination. *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 14 n.5, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) ("the Court has recognized the State's 'compelling interest' in combating invidious discrimination."); *Bob Jones Univ. v. U.S.,* 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (firm national policy exists to prohibit racial segregation and discrimination in public education). Public accommodation laws in particular "serve compelling interests of the highest order." *Board of Dir. of Rotary Int'l. v. Rotary Club of Duarte,* 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) (internal quotations and citations omitted).

In *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623-24, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984), the Court emphasized the states' "strong historical commitment to eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." *Id.* The U.S. Jaycees sought to enforce their national policy of excluding women, but the Court upheld Minnesota's public accommodation law in the face of the Jaycees' First Amendment associational freedom challenge. *Id.* at 614-15. The Court explained the societal importance of public accommodation laws. Such laws protect "the State's citizenry from a number of serious social and personal harms." *Id.* at 625. The Court characterized the resulting injury as "stigmatizing." *Id.* "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." *Id.* at 628. Thus, the central goal underlying public accommodation

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laws—eradication of discrimination—"plainly serves compelling interests of the highest order." *Id.*

Even where the discrimination at issue has been based on sexual orientation, rather than race or gender, the U.S. Supreme Court has found public accommodation laws to be no less compelling. In *Romer v. Evans,* 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), the United States Supreme Court invalidated a Colorado constitutional amendment intended to prohibit any law designed to protect a person from discrimination based on sexual orientation. In this context, the *Romer* Court reasoned: "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 630. The Court ultimately concluded there could be no rational basis for requiring sexual orientation to be excluded from public accommodation protections. *Id.* at 635.

Like the federal courts, Washington courts have held the purpose of the WLAD—to eradicate and deter discrimination—to be equally compelling. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie Fraternal Order of Eagles,* 148 Wn.2d 224, 246, 59 P.3d 655 (2002) ("This court has held that the purpose of the WLAD—to deter and eradicate discrimination in Washington—is a policy of the highest order."); *see also Ramm v. City of Seattle*, 66 Wn. App. 15, 830 P.2d 395 (1992) (recognizing personal privacy rights are subordinated to "those state interests which can be shown to be compelling, such as the eradication of discrimination."); *Voris v. State Human Rights Comm'n,* 41 Wn. App. 283, 704 P.2d 632 (1985) ("Few state interests are more compelling than those surrounding the eradication of social disparity created by racial discrimination.").

In deeming the eradication of discrimination a compelling state interest, courts have routinely concluded that discrimination causes serious psychological and health consequences for the individuals being discriminated against. *See, e.g., Brown v. Board of Education,* 347

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U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (separating children from others of a similar age and qualification based solely on their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."); *Roberts,* 468 U.S. at 625 (discrimination causes "a number of serious social and personal harms," "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life"); *id.* (recognizing the "'deprivation of personal dignity that surely accompanies denials of equal access to public establishments'" (*quoting Heart of Atlanta Motel v. U.S.,* 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964)). Discrimination, by stigmatizing members of a disfavored group as "'innately inferior' and therefore less worthy participants in the political community can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews,* 465 U.S. 728, 739-40, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984).

In addition to extensive case law making clear the State's compelling interest in eradicating discrimination, the facts on the ground confirm such an interest. Gay and lesbian citizens have long suffered discrimination in a wide range of forms, from hate crimes[8] to job discrimination[9] to exclusion from places of public accommodation.[10] Such discrimination impacts the health and welfare of Washington's gay and lesbian citizens. The American Psychological Association has concluded: "Although many lesbians and gay men learn to cope

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[8] Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics 2 (2012) , *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/tables-and-data-declarations/1tabledatadecpdf/table_1_incidents_offenses_victims_and_known_offenders_by_bias_motivation_2012.xls (last visited November 20, 2014); *Id.* at Table 13, Washington Hate Crime Incidents (2012) (recording 52 sexual orientation hate crimes in Washington in 2012), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/tables-and-data-declarations/13tabledatadecpdf/table-13-state-cuts/table_13_hate_crime_incidents_per_bias_motivation_and_quarter_by_washington_and_agency_2012.xls (last visited November 20, 2014).

[9] George Chauncey, Why Marriage? The History Shaping Today's Debate Over Gay Equality 6-7 (2004) (describing history of employment discrimination against gays and lesbians).

[10] *Id.* (many states made it illegal to serve gays and lesbians in bars and restaurants in the early 1930s).

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with the social stigma against homosexuality, this pattern of prejudice can have serious negative effects on health and well-being."[11] According to the U.S. Department of Health and Human Services, lesbian and gay individuals face health disparities linked to societal stigma, discrimination, and denial of their civil rights.[12] Discrimination against lesbian and gay people has been linked to higher rates of psychiatric disorders, substance abuse, and suicide.[13] Significantly, lesbian, gay, and bisexual people who live in states without protective laws (e.g., laws the prohibit job discrimination and hate crimes) demonstrate higher levels of mental health problems compared to those living in states with laws that provide protection.[14]

In response to the ongoing problem of sexual orientation discrimination, the Washington Legislature incorporated sexual orientation into the WLAD. RCW 49.60.010. The law's stated purpose is to "protect the public welfare, health, and peace of the people of this state." *Id.* The Legislature declared that discrimination, including discrimination based on sexual orientation, is a matter of state concern because it "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. Thus, the Legislature found that the WLAD was necessary to protect the health and peace of the state.

In light of the facts, case law, and express legislative findings, it is clear that eliminating discrimination based on sexual orientation is a compelling state interest necessary

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[11] *American Psychological Association, Answers to your questions: For a better understanding of sexual orientation and homosexuality* (2008), available at http://www.apa.org/topics/lgbt/orientation.aspx, last visited November 20, 2014.

[12] U.S. Dep't of Health and Human Services, *Healthy People 2020, Lesbian, Gay, and Transgender Health*, available at https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health, last visited November 20, 2014.

[13] *Id.* (citing K. A. McLaughlin, M.L. Hatzenbuehler, & K. M. Keyes, *Responses to discrimination and psychiatric disorders among black, Hispanic, female, and lesbian, gay, and bisexual individuals*, 100 Am. J. Public Health 1477-84 (2010); G.M. Herek & L.D. Garnets. *Sexual orientation and mental health*, 3 Ann. Rev. Clin. Psych. 353-75 (2007); G. Remafedi et al., *The relationship between suicide risk and sexual orientation: Results of a population-based study*, 88 Am. J. Public Health 57-60 (1998).)

[14] Mark L. Hatzenbuehler, Katherine M. Keyes, and Deborah S. Hasin, "State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations," Am. J. Public Health 2009 December 99 (12): 2275-2281.

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for the health, peace, and safety of Washington's citizens. For these reasons, the law must survive a free exercise challenge under the express language of the Washington Constitution. Wash. Const., Article I, sec. 11 ("the liberty of conscience hereby secured shall not be so construed to . . . justify practices inconsistent with the peace and safety of the state"). The precedent outlined above requires the same result, as courts have declared that eradicating discrimination is a compelling state interest and that public accommodation laws play an important role in protecting the health and welfare of minority citizens. Such a holding would follow a long line of Washington cases recognizing compelling state interests in protecting residents' safety and welfare. *See, e.g., Backlund,* 106 Wn.2d at 648 (doctor's religious objection cannot overcome hospital's requirement that he maintain malpractice insurance), *State v. Meacham*, 93 Wn. 2d 735, 612 P. 2d 735 (1980) (putative fathers' religious objections cannot prevent blood test to determine paternity); *Holcomb,* 39 Wn.2d at 864 (religious objection cannot overcome requirement that students take a tuberculosis test before registering at the University of Washington); *State v. Verbon,* 167 Wash. 140, 148-49, 8 P.2d 1083 (1932) (requirement that doctors be licensed); *Balzer,* 91 Wn. App. at 66 (criminal provisions regulating marijuana use and distribution); *State v. Clifford,* 57 Wn. App. 127, 133-34, 787 P.2d 571 (1990) (driver's license requirement); *State v. Norman,* 61 Wn. App. 16, 24, 808 P.2d 1159 (1991) (conviction for refusing to provide medical care to an ill child).

Finally, application of the CPA and WLAD is narrowly tailored to serve the state's compelling interest in eliminating discrimination. "[T]here is no realistic or sensible less restrictive means to" end discrimination in public accommodations than to prohibit such discrimination. *Balzer*, 91 Wn. App. at 65. The WLAD contains certain exemptions designed to minimize its impact on religious belief and practice, including a provision that excludes from the definition of employer any nonprofit religious or sectarian organization. RCW 49.60.040(11). Similarly, a place of public accommodation does not include any place of accommodation that by its very nature is distinctly private. RCW 49.60.040(2). These

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exemptions help minimize conflict between the WLAD and religious belief. The State is not required to eliminate such conflict altogether, for to do so would require giving up on the goal of eliminating discrimination.

In sum, state law does not significantly burden Ms. Stutzman's beliefs. She freely chose to enter the Washington marketplace, with all of the benefits and burdens of doing business here. Moreover, she had reasonable alternatives, like asking another staff member to prepare the flowers for Mr. Ingersoll's wedding. In any event, even if she did face a significant burden, the United States Supreme Court and Washington courts have recognized a compelling state interest in preventing discrimination, including sexual orientation discrimination. Discrimination causes gay and lesbian citizens serious harms, and, as the Legislature found, undermines the general welfare and health of our state. The WLAD and CPA are narrowly tailored to achieve this compelling interest in eradicating discrimination. Thus, Defendants' religious objections cannot justify their discriminatory practices under Article I, section 11.

3. Selective Enforcement

Defendants have also raised selective enforcement as a defense. Defts' Answer at 6 (¶ 6.8). To prove this defense, Defendants must establish both a discriminatory effect—i.e., that the State is treating them differently from similarly situated individuals—and a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *State v. Terrovonia*, 64 Wn. App. 417, 422, 824 P.2d 537 (1992). This standard "is a demanding one." *Armstrong*, 517 U.S. at 463. Defendants cannot meet it.

Government officials charged with enforcing particular laws – including the Attorney General's obligation under RCW 19.86.080(1) to enforce the CPA – are presumed to have properly exercised their authority and courts accord them broad discretion to do so. *Armstrong*, 517 U.S. at 464; *Somer v. Woodhouse*, 28 Wn. App. 262, 267, 623 P.2d 1164 (1981) (party bears "heavy burden" to overcome presumption that public officials have

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properly executed their duties). Only clear evidence to the contrary will overcome the presumption the government has properly exercised its authority. *Armstrong*, 517 U.S. at 465.

Defendants can present no evidence, much less clear evidence, of selective enforcement in this matter. They cannot show a discriminatory effect because there is no evidence that they have been treated differently from similarly situated persons. Nor can Defendants prove discriminatory intent. This element requires the Defendants to show the State is pursuing this action "based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Terrovonia*, 64 Wn.App. 417, 422 (quoting *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)). Defendants have no evidence of such discriminatory intent here. Instead, the evidence shows that the State has pursued this case because the Defendants have admitted refusing to serve Mr. Ingersoll because of his sexual orientation, in violation of the CPA.

4. The Defense of Justification Is Available Only in Criminal Cases

Defendants also raise the defense of "justification." Defts' Answer at 6 (¶ 6.9). The defense of justification encompasses several defenses applicable in the criminal context, including self-defense, duress, and necessity. *See e.g.*, *State v. Turner*, 167 Wn. App. 871, 881, 275 P.3d 356 (2012) (self-defense); *State v. Healy*, 157 Wn. App. 502, 513, 237 P.3d 360 (2010) (duress); *State v. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (1994) (necessity). None of these defenses is available here because this is not a criminal case.

VI. CONCLUSION

When Defendants learned that Mr. Ingersoll was seeking flowers for his wedding to his same-sex partner, they refused to serve him. This was discrimination based on sexual orientation, pure and simple. This discriminatory refusal violated the CPA *per se* because it violated the WLAD, and separate from the WLAD because it is an unfair practice in trade or commerce contrary to the public interest.

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Neither the U.S. nor the Washington Constitution requires the State to allow such discrimination. Free speech and free exercise rights do not prohibit states from outlawing discriminatory conduct in business. If they did, discrimination of all kinds would flourish, and our country never would have made the enormous progress that we have.

For these reasons, the State respectfully asks that the Court grant summary judgment finding that Defendants violated the CPA and that their constitutional defenses fail.

DATED this 21st day of November, 2014.

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