NO. 91615-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

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

Appellants.

ATTORNEY GENERAL'S RESPONSE BRIEF

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I. INTRODUCTION

For as long as there have been laws prohibiting discrimination, people have sought to evade those laws by claiming a right to discriminate. Courts routinely reject these arguments because accepting them would allow discrimination of all kinds to flourish. Nonetheless, the Defendants here 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 decline.

Barronelle Stutzman and her company, Arlene's Flowers, (Defendants) refused to serve Robert Ingersoll when he sought flowers for his wedding to his same-sex partner, Curt Freed. In doing so, Defendants discriminated against Mr. Ingersoll and Mr. Freed based on their 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 independently in violation of the CPA.

Defendants assert several defenses in an effort to excuse their discrimination. All of them fail.

First, Defendants contend that the WLAD does not require them to provide wedding services to gay or lesbian customers. But that ignores the WLAD's text and history. Defendants make the related claim that their acts were not discriminatory because they reject only gay marriage, not gay clients generally. But that proves nothing. 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 at other times, it is sexual

orientation discrimination for her to refuse to serve a same-sex couple for their wedding, even if she served them at other times.

Defendants next argue that arranging flowers involves expression and that they therefore have a free speech right to refuse to provide wedding flowers to same-sex couples. But many types of conduct involve expression, and that does not exempt them from the law. Great cooking may be an art form, but that does not mean that a chef can evade health inspections or refuse to serve an interracial couple. Accepting Defendants' argument would mean exempting from government regulation any conduct that involves expression. That is not and cannot be the law.

Defendants also wrongly contend that their illegal discrimination must be excused because it is motivated by religion. That is incorrect. "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).

Ultimately, Defendants' violation of state law is clear, and every 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 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 affirming the superior court's thoughtful order.

II. STATEMENT OF THE CASE

A. Defendants Operate a Retail Business Marketing and Selling to the Public Goods and Services, Including Wedding Flowers

Defendant Arlene's Flowers, Inc. ("Arlene's Flowers") is a Washington for-profit corporation. CP 404. Defendant Barronelle Stutzman and her husband are the sole officers, with Ms. Stutzman as president and operator of the business, a retail store in Richland, Washington. CP 411, 435. The store advertises and sells flowers and other goods to the public, including flowers for weddings and other events. CP 407, 414. Its advertising methods include signs outside the retail store, newspaper advertisements, and the internet. CP 407, 414; *see also* http://www.arlenesflowers.net/; http://www.arlenesflowers.com. Weddings account for about three percent of the store's business. CP 2163-64.

B. Defendants Refused to Serve Mr. Ingersoll for His Wedding Based on His Sexual Orientation

Robert Ingersoll is a gay man who lived in Kennewick, Washington. CP 350. He has been in a committed romantic relationship with Curt Freed since 2004. CP 350. When same-sex marriage became legal in Washington in 2012, Mr. Freed asked Mr. Ingersoll to marry him, and they made plans to get married on their anniversary. CP 350.

Mr. Ingersoll and Mr. Freed had bought flowers from Defendants many times before and planned to use Defendants for their wedding. CP 350. On March 1, 2013, Mr. Ingersoll drove to Arlene's Flowers and met with Ms. Stutzman. *Id.* Ms. Stutzman was aware that Mr. Ingersoll is gay and in a relationship with Mr. Freed. CP 423-24. Mr. Ingersoll told Ms. Stutzman about his upcoming wedding to Mr. Freed and indicated that the couple wanted Defendants to provide flowers for the wedding. CP 350-51, 426. Ms. Stutzman told Mr. Ingersoll that she could not serve him because of her relationship with Jesus Christ. CP 350-51, 426.

Ms. Stutzman refused to serve Mr. Ingersoll before he could tell her what sort of flowers he wanted, i.e., whether he intended to purchase unarranged flowers or whether he wanted floral arrangements. CP 426-29, 444-46. As Ms. Stutzman put it, "[w]e didn't get into that." CP 426-427. Mr. Ingersoll never asked Ms. Stutzman to attend the wedding. *Id.*

Ms. Stutzman admits that Defendants turned Mr. Ingersoll away because of her religious belief "that marriage is a union of a man and a woman." CP 47. In support of this view, Defendants' expert Mark Hall testified that businesses should be allowed to refuse service on religious grounds, including, for example, to interracial couples. CP 2155-56.

Mr. Ingersoll was surprised and hurt by Defendants' refusal to serve him. CP 318-19. Before Defendants refused to do the flowers for their wedding, Mr. Ingersoll and Mr. Freed planned to have a big wedding at a large venue in Kennewick, and to invite over 100 guests. CP 322-24. After Defendants' refusal, Mr. Ingersoll and Mr. Freed pared back their

plans. CP 351. Shocked and saddened, they feared being denied service by other wedding vendors. CP 351. They ended up marrying in a small ceremony at their home, attended by 11 people. CP 352, 327.

C. After Defendants Refused to Serve Mr. Ingersoll, They Instituted a Policy Not to Arrange Flowers for Any Wedding or Commitment Ceremony Between Persons of the Same Sex

When Defendants refused to serve Mr. Ingersoll, they were aware that Washington law prohibits discrimination based on sexual orientation and that in 2012 Washington voters had affirmed the right to marry of gay and lesbian couples, as already approved by the legislature. CP 418-20. Despite this, after Defendants refused to serve Mr. Ingersoll, Ms. Stutzman created an unwritten policy that Arlene's Flowers would not provide arranged flowers for marriage or commitment ceremonies between members of the same sex. CP 421-22. Ms. Stutzman says that to "do[ ] the flowers for any same-sex wedding would give the impression that [she] endorsed same-sex marriage." CP 46. Yet Ms. Stutzman also testified that Defendants would sell flowers for heterosexual non-Christian weddings (e.g., atheist or Islamic weddings) and that doing so would not endorse atheism or other religions. CP 431-32.

After the State filed suit against Defendants, they made a policy of "not provid[ing] any floral wedding services or support for any customers besides [Ms. Stutzman's] immediate family until this case ends." CP 548.

D. Procedural History

After learning that Defendants refused to serve Mr. Ingersoll, and after review and investigation, the Attorney General's Office sent a letter

to Ms. Stutzman asking her to agree that in the future she and her business would not discriminate against customers based on their sexual orientation. CP 1325-29. The letter included an Assurance of Discontinuance reflecting such an agreement. *Id.*[1] The letter explained that if Ms. Stutzman signed and complied, the matter would be resolved and she would bear no costs. CP 1325. But if Ms. Stutzman did not respond or was unwilling to sign the Assurance, the Attorney General would pursue more formal options. CP 1326. Defendants declined to sign. CP 547-48.

On April 9, 2013, the State of Washington, through the Attorney General, filed this action under the CPA, RCW 19.86. The complaint alleged that 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. CP 3-4. There are two grounds for the State's CPA claim. *Id.* First, Defendants' refusal to sell flowers to Mr. Ingersoll is sexual orientation discrimination and thus an unfair practice under the WLAD, which prohibits such discrimination in public accommodation. CP 3; RCW 49.60.030(1), .215. This unfair practice is a per se violation of the CPA. CP 3-4; RCW 49.60.030(3). The complaint also includes a separate CPA claim, alleging that Defendants' conduct "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." CP 4.

[1] An Assurance of Discontinuance is a method of resolving consumer protection concerns and is authorized by RCW 19.86.100.

After the superior court granted summary judgment in favor of the State, the State submitted a proposed judgment to the court, including injunctive relief, civil penalties in an amount to be determined by the court under RCW 19.86.140, and one dollar in costs and attorneys' fees under RCW 19.86.080(1). CP 2413-16. Defendants objected to the requested penalties as well as the State's proposed injunctive relief, but not to the State's request for one dollar in costs and fees. CP 2378-87, 2390-97.

The judgment entered for the State awarded $1,000 in civil penalties and the uncontested one dollar in fees and costs. CP 2419. The superior court permanently enjoined and restrained Defendants from violating the CPA by discriminating against persons based on their sexual orientation, and it required that "[a]ll goods, merchandise and services offered or sold to opposite sex couples shall be offered or sold on the same terms to same-sex couples, including but not limited to goods, merchandise and services for weddings and commitment ceremonies." CP 2419-20.

III. COUNTERSTATEMENT OF THE ISSUES

1. Did Defendants violate the Consumer Protection Act when, in a place of public accommodation, they refused to serve a gay man for his wedding because of his sexual orientation?

2. Does the Free Speech Clause of the First Amendment require the State to allow Defendants to discriminate based on the sexual orientation of their customers?

3. Does the Free Exercise Clause of the Washington Constitution require the State to allow businesses to discriminate based on the sexual orientation of their customers?

4. Does the Free Exercise Clause of the First Amendment require the State to allow Defendants to discriminate based on the sexual orientation of their customers?

5. Does the Free Association Clause of the First Amendment require the State to allow Defendants to discriminate based on the sexual orientation of their customers?

6. Is Ms. Stutzman personally liable for violating the Consumer Protection Act because she participated in and approved discriminatory conduct?

IV. ARGUMENT

A. Defendants' Refusal to Serve Mr. Ingersoll 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 "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). To serve the CPA's purpose of "protect[ing] the public and foster[ing] fair and honest competition[,]" the legislature mandated that the statute "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920.

The State must prove three elements to establish a CPA violation: "(1) an unfair or deceptive act or practice (2) occurring in trade or commerce, and (3) 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 upon a per se violation of statute," such as the WLAD, "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). Though the State need prove only one type of CPA violation, it alleged both types here. CP 3-4.

Defendants assert that the State's "CPA claim hinges upon the existence of a violation of the WLAD." Op. Br. at 15 n.8. That is incorrect. As the superior court recognized, "the AG pled its CPA claim in the alternative: both as a per se CPA violation and as a generic CPA violation." CP 2343. And the superior court held that "[e]ven in the absence of the WLAD[,]" the State proved a CPA violation. CP 2344-46.

As detailed below, the superior court correctly granted summary judgment for the State on both the per se CPA violation, based on violation of the WLAD, and on what the superior court described as the "generic CPA violation," arising from "treating a customer differently because of their membership in a protected class," which the superior court held was "unfair as a matter of law[.]" CP 2343-46.

1. Defendants' discriminatory conduct is a per se Consumer Protection Act violation because it violates the Washington Law Against Discrimination

For over 50 years, the WLAD has prohibited businesses that offer goods and services to the public from discriminating. *See Marquis v. City of Spokane*, 130 Wn.2d 97, 105-06, 922 P.2d 43 (1996). Originally enacted in 1949 to eliminate discrimination in employment based on race, creed, color, or national origin, the WLAD was expanded 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.*; *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 267, 285 P.3d 854 (2012).

The WLAD's purposes are to eradicate discrimination (*Marquis*, 130 Wn.2d at 109) and protect "the public welfare, health, and peace of the people of this state." RCW 49.60.010. The legislature found that "practices of discrimination against any of [the State's] inhabitants," including because of sexual orientation, are "a matter of state concern, [and] 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. Courts must interpret the WLAD liberally (RCW 49.60.020), and "view with caution" any reading that would narrow its application. *Marquis*, 130 Wn.2d at 108.

The WLAD is clear: 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). Thus, a WLAD violation that occurs in trade or commerce establishes all three elements the State must prove to show a CPA violation. *See Kaiser*, 161 Wn. App. at 719 (elements State must prove are "(1) an unfair or deceptive act or practice (2) occurring in trade or commerce, and (3) public interest impact"). It is undisputed that Defendants' conduct occurred in trade or commerce. *See* RCW 19.86.010(2) (defining "trade" and "commerce"). Therefore, if Defendants violated the WLAD, they committed a per se CPA violation.

Defendants violated the WLAD. Under the WLAD, any distinction or discrimination against a person belonging to a protected class 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 have "[t]he right to the full enjoyment" of the public accommodation. *See* RCW 49.60.030(1), (1)(b). "Full enjoyment" "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) (emphases added); *see also* RCW 49.60.215.

There is no dispute that Mr. Ingersoll and Mr. Freed are gay men, and therefore members of a protected class under the WLAD. CP 304. There is also no dispute that Arlene's Flowers is a place of public accommodation. CP 404, 407. Defendants admit that Ms. Stutzman refused to serve Mr. Ingersoll solely because he was a gay man planning to marry another man. CP 46-47, 426-27. Defendants admit that they will refuse to serve *all* gay and lesbian consumers who want to purchase arranged flowers for a wedding or commitment ceremony to a same-sex partner. CP 421-22. This is sexual orientation discrimination in violation of the WLAD. RCW 49.60.030, .040, .215.

Defendants make several arguments in an effort to get around the

WLAD's plain language. All fail.

a. Refusing to serve same-sex couples for their weddings *is* sexual orientation discrimination

Defendants' overarching contention is that they discriminate only against same-sex weddings, not against gay and lesbian people generally. That is irrelevant, and courts have routinely rejected such arguments.

To refuse to serve weddings of same-sex couples is to refuse to serve gay and lesbian customers for their weddings, because only gay and lesbian people marry same-sex partners. While Defendants quibbled with this point below based on a fictional movie starring Adam Sandler, CP 500, they have now abandoned that absurd argument. Instead, their claim here is that they serve gay and lesbian people for other purposes, so their refusal to serve them for weddings should be excused. That is not the law.

Discrimination is discrimination, whether it is complete or partial. An employer cannot say: "I hire women, but because of my religious belief that women should be subservient to men, I will not hire women to supervise men." Similarly, it is irrelevant whether Defendants generally serve gay and lesbian customers; their refusal to serve the weddings of gay and lesbian customers is still prohibited discrimination. As the New Mexico Supreme Court explained in a case much like this one, "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." *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013).

Moreover, courts have universally rejected a false distinction

between status and conduct when the 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); *see also, e.g.*, *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 349-51, 172 P.3d 688 (2007) (employee alleging that employer refused to hire her because she was pregnant could bring a claim for sex discrimination under the WLAD). 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 Chapter of the Univ. of Calif., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (rejecting student group's argument that it did not discriminate based on sexual orientation, but rather based on "unrepentant homosexual conduct"); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, 192 L. Ed. 2d 609 (2015) (equating denial of the right to marry with discrimination based on sexual orientation: "[I]mposition of this disability on gays and lesbians serves to disrespect and subordinate them.").[2]

Even if it were possible to distinguish between homosexual status and the conduct of marrying a same-sex partner, the WLAD provides that even acts that "*indirectly* result[] in any distinction, restriction, or

[2] *See also Lawrence v. Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (striking down law criminalizing certain same-sex sexual conduct, holding: "When 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"(emphases added)); *Romer v. Evans*, 517 U.S. 620, 641, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) ("After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal").

discrimination" in public accommodation based on the consumer's sexual orientation are unlawful. RCW 49.60.215(1) (emphasis added); *see also* RCW 49.60.040(14). Thus, 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, as a matter of common sense, binding precedent, and the WLAD's text, to discriminate against weddings of people of the same sex is to discriminate based on sexual orientation.

b. The WLAD does not exempt weddings of same-sex couples from its protection

Defendants assert, for the first time on appeal, that because same-sex marriage was not yet legal in 2006 when the legislature amended the WLAD to prohibit sexual orientation discrimination, the WLAD necessarily excludes from its protections any services related to weddings of same-sex couples. Op. Br. at 15-17. That argument flies in the face of common sense as well as the WLAD's text and history.

Defendants' reasoning would lead to the absurd conclusion that the most long-standing WLAD protections in public accommodations (those that prohibit race, creed, color, and national origin discrimination) are the weakest because the range of goods and services in the marketplace in 1957 was far narrower than today. For example, under Defendants' theory, because grocery stores could not sell liquor in 1957, they could today refuse to sell liquor to a person of color, a woman, or a gay or lesbian

person. *See* Laws of 2012, ch. 2 (Init. 1183). Similarly, Defendants' rule would allow marijuana retailers to discriminate with abandon since they did not exist when any WLAD protection was adopted. *See* Laws of 2013, ch. 3 (Init. 502). Certainly that is not the law.

Defendants rely on *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 953 P.2d 88 (1998), for the notion that the WLAD offers no protection for conduct that was not allowed when the WLAD protection at issue was adopted. But in that case the Court found that the WLAD's "plain and unambiguous language" offered no protection to cohabiting couples. *Id.* at 752-54. The Court looked to the history of the WLAD's amendments simply to "confirm" that "plain meaning." *Id.* at 754.

Here, by contrast, the WLAD's plain language prohibits sexual-orientation discrimination in public accommodations, as detailed above. And here, the legislative history confirms this plain meaning. Specifically, when the 2012 Legislature approved marriage equality, it plainly understood that the WLAD would apply to wedding-related services. The 2012 Legislature specifically provided that "religious organizations"—defined as "entities whose principal purpose is the study, practice, or advancement of religion" (RCW 26.04.007)—are immune from the WLAD for refusal to provide accommodations, services, or goods related to a wedding. RCW 26.04.010(6); Laws of 2012, ch. 3, § 1. Had the legislature believed the WLAD already contained a marriage exception or otherwise would not apply in the context of same-sex weddings, it would not have needed to create this specific immunity for religious

organizations. And had the legislature intended to exempt entities (like Defendants) that are not "religious organizations," it certainly would have said so. Instead, in both 2012 and 2013 the legislature *rejected* amendments that would have created a broader exception to the WLAD to allow others with religious objections to refuse services related to a wedding.[3] The legislature's actions in 2012 and 2013 thus plainly reflect an understanding that the WLAD applies to wedding-related services, absent express immunity.

c. Prohibiting Defendants from discriminating does not "endorse any specific belief, practice, behavior, or orientation"

Defendants next contend, again for the first time on appeal, that the 2006 Legislature created a "safe harbor" from the WLAD for people who object to weddings of same-sex couples on religious grounds, relying on the legislature's statement that "[t]his chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation." Op. Br. at 17-19 (alterations in source); RCW 49.60.020. Defendants read this language to mean that places of public accommodation can avoid application of the WLAD whenever they claim that serving a person in a protected class would "endorse" a position they disagree with. But Defendants ignore what the statute actually says, as well as the legislative history described above.

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[3] *See* SSB 6239 (2012), 6239-S AMS SWEC S4405.1, 6239-S.E AMH SHEA TANG 201; http://app.leg.wa.gov/dlr/billsummary/default.aspx?year=2011&bill=6239; SB 5927 (2013), http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Bills/5927.pdf.

The WLAD says that "[*t*]*his chapter*," meaning the WLAD itself, should not be construed to endorse any belief, practice, behavior, or orientation. RCW 49.60.020 (emphasis added). It does not say that the statute exempts from the WLAD any action that might be perceived to endorse a certain belief or practice. Reading it that way would lead to obvious, absurd results. Could a business refuse to serve people of color to avoid "endorsing" belief in racial equality? The notion that the WLAD would excuse the very behavior it is intended to prohibit is untenable.

d. This case involves discrimination based on sexual orientation, not marital status

Defendants also assert that this case is really about discrimination based on marital status, a category not listed in the public accommodation section of the WLAD. Op. Br. at 19-21. But Defendants did not refuse to serve Mr. Ingersoll because he was single when he sought to purchase flowers, they refused to serve him because he is a gay man who sought to marry his same-sex partner. CP 421-22.

Defendants' willingness to serve Mr. Ingersoll at other times again makes no difference. 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, and it is not based on marital status. *See Elane Photography*, 309 P.3d at 62-63.

e. Prohibiting Defendants' discrimination does not violate their rights under the WLAD

Finally, Defendants assert that enforcing the WLAD against them

here violates their own right to protection against religious discrimination under the WLAD. But the WLAD does not grant business owners any right to refuse service on religious grounds, and it draws no distinction based on religion. The statute treats all places of public accommodation equally by requiring the same of each: if a business chooses to sell a good or service in the Washington marketplace, it must do so equally, without discrimination against a protected class. RCW 49.60.215.[4] A business can always choose not to serve weddings at all, an avenue Defendants have chosen since the beginning of this lawsuit. CP 548.

In sum, Defendants cannot rewrite the WLAD. The WLAD's plain language prohibits Defendants from refusing to offer goods and services to gay and lesbian customers that they offer to other customers. By refusing to serve Mr. Ingersoll for his wedding, Defendants violated the WLAD.

2. Defendants' discriminatory conduct independently violates the Consumer Protection Act because it is an unfair practice contrary to the public interest

As explained above, the State 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 three elements (RCW 49.60.030(3)), but the State may also prove them separate from the WLAD. There is no dispute that Defendants' acts occurred in trade or commerce. The other elements are also satisfied.

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[4] To the extent Defendants argue that a constitutional principle trumps the WLAD, those arguments are addressed below.

Whether an act or practice is unfair under the CPA is a question of law. *Panag v. Farmers Ins. Co.*, 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 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.3d 108 (1985)). 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." *Schwab*, 103 Wn.2d at 546 (quoting *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972)). This Court has not established a specific legal standard for "unfairness" (*see Klem*, 176 Wn.2d at 788), but Washington courts have found an act or practice "unfair" under the CPA where the defendant's conduct "offends public policy, as it has been established by statutes, the common law, or otherwise" or is "immoral, unethical, oppressive, or unscrupulous . . . ." *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 310, 698 P.2d 578 (1985) (quoting *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)).

Courts in Washington and elsewhere have held that a retail store treating consumers differently because they belong to a protected class is unfair. *See Demelash v. Ross Store Inc.*, 105 Wn. App. 508, 523-24, 20 P.3d 447 (2001) (reversing order granting summary judgment for defendant on CPA claim where plaintiff, an Ethiopian immigrant, alleged

retail store discriminated against him on the basis of his race and national origin); Carolyn L. Carter et al., *Unfair and Deceptive Acts and Practices* § 4.3.9 (Nat'l Consumer Law Ctr., 8th ed. 2012) (collecting cases and explaining that "[u]nlawful discrimination" is an "unfair business practice[ ]" under state consumer protection laws).

This Court should similarly affirm the superior court's summary judgment order and hold as a matter of law that Defendants' refusal to sell Mr. Ingersoll the same products and services they would sell heterosexual customers is an unfair practice under the CPA. There can be no dispute that such discrimination offends public policy. *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 its 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.[5] For these reasons, the Court should hold

[5] *See, e.g.*, RCW 26.04.010(1) (definition of marriage does not exclude same-sex couples); RCW 26.04.010(3) (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 committed intimate relationship doctrine to same-sex couples); RCW 49.60.010 (stating state policy against sexual orientation discrimination); RCW 9A.36.078 (malicious harassment statute includes finding 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

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

The public interest element of a CPA claim is also met here. 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.*, *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335, 544 P.2d 88 (1976). "'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.'" *Id.* at 334 (quoting *Seaboard Sur. Co. v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 746, 504 P.2d 1139 (1973)). Here, the State is acting to enjoin discriminatory business practices prohibited by state law, and the presumption clearly applies.

Even if the State were required to prove public interest impact using the statutory standard for private CPA plaintiffs (and it is not), it can easily do so here. RCW 19.86.093 requires plaintiffs in a "private action" to 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

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due to bias and bigotry is a compelling interest"); RCW 26.26.051(2) (Uniform Parentage Act 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, 122 P.3d 161 (2005) (recognizing the common law "de facto parentage" doctrine and holding that a court could not deny visitation rights to a former same-sex partner of the biological mother, who was not a biological parent to the child).

capacity to injure other persons." Even setting aside the WLAD, which establishes public interest impact through both of the first two approaches (RCW 49.60.030(3)), the State 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 capacity to injure" many consumers in the future. It is thus beyond dispute that Defendants' discriminatory conduct has a public interest impact.

Defendants never seriously address the State's independent CPA claim. They only offer a conclusory statement in a footnote that the Court should not "hold that Mrs. Stutzman committed an unfair commercial act in violation of public policy" for the same reasons that the Court should hold there is no per se CPA violation. Op. Br. at 24, n.15. As the superior court correctly held, however, the State satisfied the three elements of its independent CPA claim "[e]ven in the absence of the WLAD's declaration[.]" CP 2344-46.

B. Defendants Have No Free Speech Right to Discriminate

Defendants argue that arranging flowers is artistic expression and that requiring them to provide the same services to gay and lesbian customers that they provide to heterosexual customers unconstitutionally "compels" their speech. Op. Br. at 24-31. That is not the law.

It is true, of course, that the government cannot generally compel people to speak a particular message. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). But that is not what the State seeks here. Neither state law nor the superior

court's order requires Defendants to arrange flowers at all, much less to arrange them in any particular way. They simply require that *if* the Defendants sell flowers to the public, they do so on an equal basis.

The U.S. Supreme Court has repeatedly upheld such equal-treatment requirements. For example, in *Rumsfeld* the Court held that the federal government could require universities to allow 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." *Rumsfeld*, 547 U.S. at 61, 62. Similarly, the Court has made very clear that government can require employers to treat job applicants equally, even if that forces them to engage in speech they would rather avoid. For example, a racist business owner cannot refuse to interview Hispanic applicants on the ground that the interview process forces him to speak with them. *See, e.g., id.* at 62 ("Congress . . . can prohibit employers from discriminating in hiring on the basis of race," even though this will restrict what those employers can say.); *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984) ("[D]iscrimination 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.").

Defendants protest that if they are required to serve same-sex couples who wish to marry, it will send a message that they "endorse"

such weddings. Op. Br. at 17-19. This argument fails as a matter of law. Everyone understands that businesses sometimes do things with which they disagree because of legal requirements. Even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so[.]" *Rumsfeld*, 547 U.S. at 65. Defendants' endorsement argument also ignores their own testimony. They testified that when they serve an atheist couple for their wedding, they do not endorse atheism. CP 431. When they serve a Muslim couple, they do not endorse Islam. *Id.* And if Defendants' willingness to sell "pre-arranged flowers" to a same-sex couple planning to marry conveys no message of endorsement, it is unclear why creating floral arrangements would. In any event, accepting Defendants' "endorsement" argument would mean that any business could say: "I decline to serve this type of customer because doing so would send the message that I approve of their kind, when I do not." That is untenable.

Defendants cannot avoid these fundamental rules simply because their business involves expressive elements. Many businesses involve expression, but that does not give them a right to discriminate. Orchestras, ballets, and theatres plainly engage in expression, but that does not mean that they can refuse to admit persons of certain races, religions, or sexual orientations. To the contrary, the U.S. Supreme Court has held that where a law is aimed at regulating discriminatory conduct, an incidental impact on speech raises no First Amendment concern.

For example, the Supreme Court held that Minnesota's public

accommodation law could require an organization to admit female members, even though that could impact the group's speech. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). The Court said that discrimination "cause[s] unique evils that government has a compelling interest to prevent—*wholly apart from the point of view such conduct may transmit.* Accordingly, like . . . other types of potentially expressive activities that produce special harms distinct from their communicative impact, *such practices are entitled to no constitutional protection.*" *Id.* at 628 (emphases added); *see also Rumsfeld*, 547 U.S. at 62 (" 'it has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct' " includes speech) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)).

Hoping to get around these clear rules, Defendants invoke two cases. Neither supports them.

Defendants first cite *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). There, the Court held that a state could not force parade organizers to include in the parade a gay-rights organization whose message the organizers opposed. But the point of *Hurley* was not, as Defendants argue, that if an activity is expressive, the government cannot regulate it at all. For example, it was undisputed in *Hurley* that the state could force the parade organizers to allow gay and lesbian people to march in the parade, even though the parade was expressive. *Id.*, 515 U.S. at 572.

Rather, *Hurley*'s central holding "boils down to the choice of a speaker not to propound a particular point of view[.]" *Id.* at 575. That choice is not at stake here. As explained above, requiring Defendants to serve customers equally does not compel them "to propound a particular point of view."

Defendants next rely on *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988) (en banc). That case is inapposite. The issue there was not whether the Orchestra could refuse to serve a member of a protected class, as it is here. Rather, there the Orchestra canceled a contract with Vanessa Redgrave after she made controversial political comments, and Redgrave argued that the cancelation violated the Massachusetts Civil Rights Act by interfering with her free speech rights. *Id.* at 891. The Court ultimately held as a matter of statutory interpretation that the Orchestra's actions did not violate the Act, specifically declining to reach any First Amendment issue. *Id.* at 911 ("we see no need to discuss the existence or content of a First Amendment right not to perform an artistic endeavor"). The case provides no support for Defendant's position that a business engaged in expression can refuse to serve a protected class.

In short, there is simply no support for the idea that the First Amendment gives businesses a right to refuse service to customers because of the "message" that serving them might convey. But even if Defendants could show that requiring them to serve customers equally infringes on their free speech rights, the Court would still need to ask whether that infringement satisfies strict scrutiny. *See, e.g.*, *Wooley v.*

Maynard, 430 U.S. 705, 715-16, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). Here, strict scrutiny is satisfied, as detailed below in Part IV.C.1.b.

C. Barring Sexual-Orientation Discrimination Is Consistent with Both the State and Federal Free Exercise Clauses

1. Article I, section 11 of the Washington Constitution does not require the State to allow businesses to discriminate based on sexual orientation

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 as to* excuse acts of licentiousness or *justify practices inconsistent with the peace and safety of the state*." (Emphases added.) A party challenging a government action under article I, section 11 must show that her belief is sincere and that the government action substantially burdens her exercise of religion. *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.*

While the State does not dispute that Ms. Stutzman's religious beliefs are sincerely held, article I, section 11 does not provide absolute freedom to act based on one's beliefs—it explicitly allows the State to secure "the peace and safety" of its citizens. Consistent with this language, Washington courts have repeatedly held that the "freedom to believe"

what one wishes is absolute, but the "freedom to act" cannot be. *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 864, 239 P.2d 545 (1952). In particular, "conduct motivated by religious beliefs may be subject to regulation if that conduct conflicts with the exercise of the interests of third parties," such as the strong interest in eliminating discrimination. *Backlund v. Bd. of Comm'rs of King County Hosp. Dist. 2*, 106 Wn.2d 632, 641, 724 P.2d 981 (1986). The legislature adopted the WLAD under the State's police power "for the protection of the public welfare, health, and peace of the people of this state." RCW 49.60.010.

a. Serving customers equally does not substantially burden Ms. Stutzman's religious practice

A law burdens free exercise under the Washington Constitution if it has a coercive effect on the practice of religion. *City of Woodinville*, 166 Wn.2d at 642-43. This does not mean that any burden is invalid, however. *Id.* 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, § 11). Thus, 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, this 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.* In practice, Washington courts have found a substantial burden where a government regulation restricts a church or religious institution or a practice central to a person's religious worship. *See id.* at 644-45 (moratorium on homeless tent cities applied 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. Hr'g Exam'r for the Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 252, 916 P.2d 374 (1996); *State v. Balzer*, 91 Wn. App. 44, 54-55, 954 P.2d 931 (1998) (use of marijuana in the Rainbow Tribe and Rastafarian faiths burdened by criminal marijuana laws).

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 law. *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). "[T]he key question is not whether a religious practice is inhibited, but whether religious tenets can still be observed." *Motherwell*, 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 religious practice.

Here, requiring the owner of a flower shop, a place of public

accommodation, to cease 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, she voluntarily undertakes both the benefits and burdens of the Washington marketplace. Washington businesses and business owners "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*, 106 Wn.2d at 648; *see also United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, L. Ed. 2d 127 (1982). Ms. Stutzman freely chose to enter the Washington marketplace as a florist, with all of its related benefits and corresponding regulations.

Ms. Stutzman also has alternatives to violating the WLAD that would allow her to observe her personal religious tenets. She claims that requiring her to serve customers equally would force her to spend substantial time designing flowers for weddings of gay and lesbian customers and to attend such weddings. Op Br. at 33-35. But state law does not require her to serve customers for their weddings at all, much less attend their weddings. It only requires that if she serves heterosexual customers for their weddings, she must also serve gay and lesbian customers equally. She is free to decline to serve weddings altogether, something she has done since this lawsuit began. CP 548.

Defendants argue that this option deprives them of economic benefits as well as the religious fulfillment of participating in opposite sex

weddings. Op. Br. at 34. But weddings account for only about three percent of Defendants' business. CP 94-95. Foregoing that is not the sort of burden this Court has ever considered substantial. "[N]ot all financial burdens have a coercive effect on the practice of religion," even when imposed directly on a church. *First United Methodist Church*, 129 Wn.2d at 249. Instead, only "gross financial burdens violate the right to free exercise." *Id.* There is no such burden here. As to the alleged burden on Ms. Stutzman's religious fulfillment, Defendants cite no case where a Washington court has found substantial burden based on an entitlement to personal religious fulfillment when engaging in business.

Another alternative would be for Ms. Stutzman to allow other employees to provide some or all wedding services. While she claims this would still result in her *business's* support of same-sex weddings in violation of her religious beliefs, she has already made the decision to allow her business to sell pre-arranged flowers to same-sex couples for their weddings. CP 547, 1616, 1633-34. Ms. Stutzman also claims that her business itself has rights under article I, section 11, but Defendants cite no case where that section's religious freedom clause has been applied to protect a for-profit business that is not 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. While Defendants cite *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), that case involved the federal Religious Freedom Restoration Act, not article I, section 11.

Furthermore, all of Defendants' alleged burdens "must be evaluated in the context in which [they arise]," including the "impact on others." *Woodinville*, 166 Wn.2d at 644. Finding a substantial burden here would mean that any time a business owner claims that a state regulation is contrary to her religious beliefs, the regulation would face strict scrutiny. Washington courts have never imposed that standard when a business owner claimed a religious exemption to a law enacted under the legislature's police power to protect the health, safety, and welfare of its citizens. *See Backlund*, 106 Wn.2d at 648. Defendants' proposal would lead to endless litigation, allowing businesses to claim that everything from environmental regulations to health code requirements must be narrowly tailored to serve a compelling interest. That is not the law.

In sum, prohibiting Defendants from discriminating does not significantly burden their 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 other employees design flowers for weddings—that would allow Ms. Stutzman to observe her own religious views.

b. Requiring places of public accommodation not to discriminate is narrowly tailored to support a compelling government interest

Even if this Court were to find a substantial burden, the state laws at issue here are narrowly tailored to support a compelling interest.

This Court and the U.S. Supreme Court have repeatedly recognized a compelling state interest in public accommodation laws

aimed at eradicating discrimination. For example, in *Roberts*, the Court emphasized the states' "strong historical commitment to eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." 468 U.S. at 623-24. The Court explained that public accommodation laws protect "the State's citizenry from a number of serious social and personal harms," *id.* at 625, and that discrimination "cause[s] unique evils that government has a compelling interest to prevent," *Id.* at 628. Thus, the central goal underlying public accommodation laws—eradication of discrimination—"plainly serves compelling state interests of the highest order." *Id* at 624.[6] Similarly, this Court has "held that the purpose of the WLAD—to deter and eradicate discrimination in Washington—is a policy of the highest order." *Fraternal Order of Eagles, Tenino Aerie 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.3d 655 (2002) (footnote omitted).[7]

Where the discrimination at issue has been based on sexual orientation, the U.S. Supreme Court has found public accommodation laws no less compelling. In *Romer*, 517 U.S. 620, the Court invalidated a state constitutional amendment forbidding any law designed to protect a

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[6] *See also New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 n.5, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (recognizing "State's 'compelling interest' in combating invidious discrimination"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) (public accommodation laws serve compelling state interests).

[7] *See also Ramm v. City of Seattle*, 66 Wn. App. 15, 25, 830 P.2d 395 (1992) (recognizing the importance of "state interests which can be shown to be compelling, such as the eradication of discrimination"); *Voris v. Human Rights Comm'n*, 41 Wn. App. 283, 290, 704 P.2d 632 (1985) ("Few state interests are more compelling than those surrounding the eradication of social disparity created by racial discrimination.").

person from discrimination based on sexual orientation. The 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 631. There could be no rational basis for requiring sexual orientation to be excluded from public accommodation protections. *Id.* at 635.

One reason why courts universally agree that eradicating discrimination is a compelling interest is the serious harms discrimination causes. These include social, psychological, and health consequences for the individuals discriminated against. *See, e.g.*, *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 ,Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (separating children based on race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"). Discrimination, by stigmatizing members of a disfavored group as "'innately inferior' and therefore as 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) (citation omitted).

Gay and lesbian individuals have long suffered discrimination in a wide range of forms, from hate crimes to job discrimination to exclusion from places of public accommodation, impacting the health and welfare of Washington's gay and lesbian residents. The American Psychological Association has concluded: "Although many lesbians and gay men learn to cope with the social stigma against homosexuality, this pattern of prejudice can have serious negative effects on health and well-being."[8] 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.[9] Discrimination against lesbian and gay people has been linked to higher rates of psychiatric disorders, substance abuse, and suicide.[10] Significantly, lesbian, gay, and bisexual people who live in states without protective laws (e.g., laws that prohibit job discrimination and hate crimes) have higher levels of mental

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[8] American Psychological Ass'n, *Sexual Orientation & Homosexuality: Answers to Your Questions For a Better Understanding* 2 (2008), http://www.apa.org/topics/lgbt/orientation.pdf.

[9] U.S. Dep't of Health & Human Services, *Healthy People 2020, Lesbian, Gay, Bisexual, and Transgender Health*, https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health (last visited Dec. 22, 2015).

[10] *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. Pub. 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. Pub. Health 57-60 (1998)).

health problems than those living in states with protective laws.[11]

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.* Discrimination, including discrimination based on sexual orientation, "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." *Id.* 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, eliminating discrimination based on sexual orientation is a compelling state interest necessary for the health, peace, and safety of Washington's citizens. For these reasons, the CPA and WLAD must survive a free exercise challenge under the express language of article I, section 11. Affirming the trial court would also follow a long line of Washington cases recognizing that the compelling state interests in protecting residents' health and welfare overcome religious objections. *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 795 (1980) (putative fathers'

[11] Mark L. Hatzenbuehler, Katherine M. Keyes, and Deborah S. Hasin, *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 Am. J. Pub. Health 2275-81 (Dec. 2009).

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).

Despite this clear line of state and federal authority recognizing the compelling interest in combatting discrimination, Defendants claim that no such interest is at stake here. All of their arguments fail.

Defendants first mischaracterize the State interest at stake, repeatedly describing the State's goal as "ensuring access to floral design services." Op. Br. at 45. That is specious. The State's goal is not to ensure that gay and lesbian residents can buy flowers, it is to ensure that they do not face the harms of discrimination while going about their daily lives. *See, e.g.*, *Roberts*, 468 U.S. at 625 (noting that discrimination "deprives persons of their individual dignity").

Similarly unavailing is Defendants' claim that the State's interest is not compelling here because most florists do not discriminate, so gay and lesbian couples can get wedding flowers elsewhere. Op. Br. at 46. That argument turns the law on its head. Could a restaurant refuse to serve African American or Jewish customers so long as most other restaurants

would serve them? Of course not.

Defendants also assert, for the first time on appeal, that discrimination based on a "reasoned religious distinction" is not invidious, so there is no state interest in preventing such discrimination. Op. Br. at 41-42. That has never been the rule. If it were, *any* religiously-based distinction could justify discrimination. For example, Ms. Stutzman's own Southern Baptist faith for decades offered a purportedly "reasoned religious distinction" for race discrimination.[12] Did that exempt Southern Baptists from anti-discrimination laws? Of course not. Yet even now, Defendants' own expert testified that florists and other businesses should be allowed to refuse service to interracial couples and others based on their religious beliefs. CP 2155-56.

Defendants rely on inapposite cases in their attempt to limit the State's interest only to preventing subjectively "invidious" discrimination. Op. Br. at 41-42. *Moran v. State*, 88 Wn.2d 867, 874, 568 P.2d 758 (1977), did not involve a class protected under the WLAD or a denial of services; it was about whether state law unfairly favored existing holders of TV tower leases over new applicants. *Id.* at 874-75. And *Roberts* nowhere held that states may regulate only invidious discrimination. The word "invidious" appears once, in passing, while the Court repeatedly emphasized states' "compelling interest in eradicating discrimination"

[12] *See, e.g.*, Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention (1995) (acknowledging that historically, "Christian morality" led "some Southern Baptists to believe that racial prejudice and discrimination are compatible with the Gospel."), http://www.sbc.net/resolutions/899/resolution-on-racial-reconciliation-on-the-150th-anniversary-of-the-southern-baptist-convention.

generally. 468 U.S. at 623-24 (noting that the Minnesota public accommodations law "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. *That goal* . . . plainly serves compelling state interests of the highest order.") (emphasis added).

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 distinctly private places. RCW 49.60.040(2). These exemptions help minimize conflict between the WLAD and religious belief. But 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, ending discrimination is a compelling state interest, and prohibiting discrimination is narrowly tailored to achieve that goal.

2. The First Amendment's Free Exercise Clause Confers No Right to Discriminate

The superior court enjoined Defendants from "discriminating against any person because of their sexual orientation" and from "any

disparate treatment in the offering of goods, merchandise, or services to any person because of their sexual orientation." CP 2563. Defendants claim that this order violates Ms. Stutzman's First Amendment right to exercise her religion and that application of the CPA and the WLAD to her conduct must withstand strict scrutiny. Neither claim is correct.

a. Consistent with the Free Exercise Clause, the State may regulate religiously motivated conduct through a neutral and generally applicable law

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const., amend. I. It was applied to states in *Cantwell v. Conn.*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). As the Court explained in *Cantwell*, the Free Exercise Clause "embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* at 303-04. The Court has specifically affirmed the government's ability to regulate religiously-motivated conduct in commercial activity: "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." *Lee*, 455 U.S. at 261.

The constitutional right to exercise one's religion therefore "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)." *Empl. Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (internal quotation marks omitted). As the Court explained: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Id.* at 878-79. "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Id.* at 879 (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940)). Thus, a law that is neutral and generally applicable is subject to rational basis review even if it prohibits conduct motivated by religion; strict scrutiny applies only if a law is not neutral and generally applicable. *Id.* at 885-90; *accord 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) ("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").

As shown below, the CPA and the WLAD are neutral laws of generally applicability, so this Court should apply rational basis review, which both laws easily survive. But even under strict scrutiny, there is no constitutional violation because the statutes are narrowly tailored to

further the compelling government interest in eradicating discrimination.

b. The CPA and WLAD are neutral

"[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). But if limiting "the exercise of religion . . . is not the object of the [law] but merely the incidental effect . . . the First Amendment has not been offended." *Smith*, 494 U.S. at 878. Defendants offer no evidence that the goal of the CPA or the WLAD is to "restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. On the contrary, neither statute targets religious motivation or practices.

The CPA does not restrict religious belief or target religious practice in any respect. The CPA's purpose 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 19.86.920. The CPA's prohibitions apply whether a person's conduct is motivated by religion, greed, or simple malice. Indeed, the actor's intent is irrelevant in establishing a CPA violation. *See Kaiser*, 161 Wn. App. at 719 (intent is not required to prove that an act or practice is deceptive). There is no plausible argument that the law was intended to target 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, prejudice, or personal distaste. RCW 49.60.010. Indeed, since its passage in 1949, one purpose of the WLAD has been "to prevent and eradicate discrimination on the basis of . . . creed[.]" *Fraternal Order of Eagles*, 148 Wn.2d at 237. To say that a law passed to prevent religious discrimination is actually aimed at implementing such discrimination turns the law on its head.

Defendants' only argument that these laws are not neutral is that they exempt religious organizations and ministers from some rules. Op. Br. at 37. In Defendants' view, this amounts to "differential treatment [that] lacks religious neutrality." *Id.* That is incorrect.

Washington law does allow religious officials and organizations to decline to participate in or provide services for weddings. RCW 26.04.010(4)-(6). But it makes no religious distinction in doing so. The exemption for religious officials extends to a "regularly licensed or ordained minister or any priest, imam, rabbi, or similar official of *any* religious organization[.]" RCW 26.04.010(4) (emphasis added). The exemption for religious organizations extends to "churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations . . . and other entities whose principal purpose is the study, practice, or advancement of religion." RCW 26.04.010(7)(b). Defendants fail to explain how providing these exceptions prevents Ms. Stutzman from exercising "the right to define

[her] own concept of existence, of meaning, of the universe, and of the mystery of human life." *See* Op. Br. at 37. The CPA and the WLAD regulate conduct, not belief.

c. The CPA and WLAD are generally applicable

"A law is not generally applicable when the government, 'in a selective manner[,] impose[s] burdens only on conduct motivated by religious belief.' " *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (alterations in source) (quoting *Lukumi*, 508 U.S. at 543). That is not remotely what the CPA or WLAD does.

Defendants argue that the WLAD is not generally applicable, pointing to exceptions in the WLAD for certain small businesses and certain employees, which they claim undermine the purposes of the law to the same degree as would an "artistic expression" exemption. Op. Br. at 38-39. But the mere existence of exceptions does not show that a law is not generally applicable. *See, e.g.*, *Stormans, Inc.*, 586 F.3d at 1135 ("That the pharmacy regulations recognize some exceptions cannot mean that the Board has to grant all other requests for exemption to preserve the 'general applicability' of the regulations."). For example, the tax code contains numerous exemptions, but that does not mean that the government must grant religious groups any additional exemption they want. *See Smith*, 494 U.S. at 880. In truth, exemptions are relevant in this context only if they show that the government has "decide[d] that the . . . interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43. That is not the case here.

Even a cursory glance at recent Washington appellate decisions shows that the CPA and WLAD are both used to restrict many kinds of unfair conduct, very little of which is or might be religiously motivated. *See, e.g.*, *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 334 P.3d 541 (2014) (WLAD case alleging age discrimination in employment; employer's defense was that other candidates were more qualified for position and were the "best fit"); *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 172 P.3d 688 (2007) (WLAD case challenging refusal to hire pregnant job applicant; employer's defense was that applicant could not satisfy physical requirements); *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 334 P.3d 14 (2014) (CPA case challenging unfair debt collection practices); *Panag*, 166 Wn.2d 27 (CPA case challenging unfair and deceptive methods insurance company used while pursuing subrogation claims).

Moreover, even the exemptions about which Defendants complain show that the State does not seek to prohibit only "conduct with a religious motivation." *Lukumi*, 508 U.S. at 543. For example, the primary exception Defendants contest is the WLAD's exemption for "distinctly private" organizations. RCW 49.60.040(2). But this narrow exception is constitutionally required to protect the associational rights of truly private organizations. *See, e.g.*, *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 12, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *id.* at 18 (O'Connor, J., concurring) ("our cases also recognize an association's First Amendment right to control its membership, acknowledging, of course, that the strength of any such right varies with the nature of the

organization"); *Fraternal Order of Eagles*, 148 Wn.2d at 227 (Madsen, J., concurring) ("the 'distinctly private' exemption in the WLAD simply embodies the constitutional standard set forth by the United States Supreme Court"). A constitutionally required exemption cannot be unconstitutional.

Defendants also list a few narrow exemptions addressing tenancy without making any real attempt to explain how they "undermine WLAD and CPA purposes" to the same or a greater degree than the exemption they seek for "religiously-objectionable weddings." Op. Br. at 38-39.

In short, the CPA and WLAD are neutral and generally applicable laws. Defendants have not shown otherwise.

d. Because the CPA and WLAD are neutral and generally applicable, they are subject only to rational basis review, not strict scrutiny

Because the WLAD and CPA are neutral laws of general applicability, they are subject to rational basis review. They easily withstand such review, as Defendants concede by never arguing otherwise. But even if strict scrutiny applied, the WLAD and CPA would survive because they are narrowly tailored to further the government's compelling interest in eradicating discrimination, as shown above.

D. Defendants' Perfunctory "Hybrid Rights" and Freedom of Association Claims Are Meritless

Defendants devote two paragraphs to arguing that the superior court's ruling violates their right to freedom of association and the "hybrid rights" doctrine. Op. Br. at 39-41. Neither argument withstands scrutiny.

Defendants' freedom of association argument relies on *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), which held that New Jersey could not force the Boy Scouts to accept gay members. But *Dale* relied on the right of a group to exclude a person from membership "if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Defendants have never explained how that right is even implicated here. Neither Defendant is a membership organization, and the State is not requiring them to accept anyone as a "member" against their will. Defendants' desire not to provide certain services to certain customers simply is not protected by the right to freedom of association. *See, e.g.*, *Hishon*, 467 U.S. at 78 ("[D]iscrimination 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."). And even if it were protected, the Supreme Court has held that the interest of eliminating discrimination is sufficient to justify infringement on expressive association. *See, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) ("Even if the [state public accommodations statute] does work some slight infringement on [the association's] right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."); *Roberts*, 468 U.S. at 628 (same).

As for the "hybrid rights" doctrine, it is both irrelevant and

unhelpful. That doctrine, suggested in dictum in *Smith*, 494 U.S. at 882, calls for application of strict scrutiny where a law infringes not only the right to exercise one's religion, but also another constitutional right. But for that doctrine to apply, Defendants must show "a likelihood . . . of success on the merits" of their other claim—either their free speech claim or their free association claim. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). Defendants can show no such likelihood, as detailed above. But even if they could and strict scrutiny applied, state law here survives strict scrutiny, as already noted.

E. Ms. Stutzman Is Personally Liable for Violations of the Consumer Protection Act Because She Participated in and Approved the Discriminatory Conduct

The standard for imposing personal liability under the CPA is well established. As this Court explained nearly forty years ago, an individual, including a corporate officer, is personally liable if she "participate[d] in" or "with knowledge approve[d] of" acts or practices that violate the CPA. *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976); *see also Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979). This is consistent with the CPA's plain language, which makes clear that liability is not limited to business entities, but also encompasses "natural persons." *See* RCW 19.86.080(1) (authorizing attorney general to "bring an action in the name of the state . . . against any person); RCW 19.86.010(1) (defining "person" to include "natural persons" as well as corporations and other entities).

It is undisputed that Ms. Stutzman participated in the illegal discrimination at issue and had knowledge of and approved the unlawful acts, thus satisfying either prong of the *Ralph Williams'* standard. She personally told Mr. Ingersoll that Arlene's Flowers would not provide him with a good or service offered to the public, and she did so because he planned to marry another man. CP 350-51, 426. She then decided to enact a policy that Arlene's Flowers would not do flowers for weddings of gay or lesbian couples. CP 421-22. Under well-established precedent and the CPA's plain language, Ms. Stutzman is thus personally liable.

Defendants offer several baseless responses. They first claim that it matters that Ms. Stutzman kept her business and personal finances separate, but in the case they cite for that proposition, *Grayson*, 92 Wn.2d 548, this Court imposed personal liability *even though* the business owner kept his business and personal finances separate. *Id.* at 553-54. They also cite a Court of Appeals case for the notion that the CPA does not permit personal liability unless a corporate officer engages in "intentionally deceptive, misleading, or patently false conduct." *See* Op. Br. at 49 (citing *One Pacific Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 108 Wn. App. 330, 347-48, 30 P.3d 504 (2001), *reversed in part*, 148 Wn.2d 319 (2002)). But that case was not even brought under the CPA, and in any event, this Court vacated the portion of the opinion Defendants cite. 148 Wn.2d at 337 ("we find it unnecessary to address the issue of whether the corporate form should be disregarded"). Moreover, the idea that "intentional" conduct is required before a corporate officer can be

found personally liable for a CPA violation conflicts with case law holding that a CPA claim "does not require a finding of an intent to deceive or defraud[.]" *Wine v. Theodoratus*, 19 Wn. App. 700, 706, 577 P.2d 612 (1978); *Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976).

In short, the superior court correctly applied the CPA's language and longstanding precedent in finding Ms. Stutzman personally liable. She participated in the unlawful acts, knew of them, and approved them.

V. CONCLUSION

Defendants refused to serve Mr. Ingersoll when he sought flowers for his wedding to his partner, Mr. Freed. This was discrimination based on sexual orientation, pure and simple. Defendants' refusal violated the CPA per se, because it violated the WLAD, and independently, because it was an unfair practice in trade or commerce contrary to the public interest.

Neither the federal 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 affirm the superior court's well-reasoned opinion.

Respectfully submitted this 23rd day of December, 2015.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, a true and correct copy of the Attorney General's Response Brief, upon the following:

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Dear Clerk and Counsel:

Attached for filing and service, please find the Attorney General's Response Brief for the above-entitled matter.

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