No. 91615-2

THE 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 SUTZMAN,

Appellants.

INGERSOLL and FREED,

Respondents,

v.

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

Appellants.

BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 160 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. The Washington Law Against Discrimination ("WLAD") is fundamental to the enforcement of employee rights. Although the Defendant's constitutional challenge to the WLAD is made within the "public accommodations" context, a successful challenge will seriously undermine the entire statute. WELA appears in this case to support the integrity of the Washington Law Against Discrimination, which protects employees from discrimination in the workplace.

II. SUMMARY OF ARGUMENT

The Washington Law Against Discrimination prohibits discrimination on the basis of a broad range of protected classifications, including sexual orientation. The Defendants argue that this prohibition does not apply to their refusal to provide a floral arrangement for a Gay wedding. The Defendants independently rely on the constitutional right to free exercise of religion and the constitutional right to be free from compelled speech. The Defendants rely upon both the state and federal constitutions.

The Defendants argue, although they frame the issue differently, that the Washington Law Against Discrimination is unconstitutional "as

applied" to those with strongly held religious beliefs or who engage in certain kinds of expressive activity. "An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *City of Redmond v. Moore,* 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). Statutes are presumed constitutional, and the challenger of a statute must prove beyond a reasonable doubt that the statute is unconstitutional. *Sch. Dist.'s Alliance for Adequate Funding of Special Educ. v. State,* 170 Wn.2d 599, 605, 244 P.3d 1 (2010).

The WLAD is not unconstitutional as applied to people with strongly held religious beliefs or those engaged in expressive activity. The right to exercise one's religion freely "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)." *Emp't Div. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (internal quotation marks omitted). The WLAD is a neutral statute of general applicability.

The legislative purpose of WLAD is generally set forth in the statute itself. RCW 49.60.010. Specifically, this court has held that the purpose of the law is to deter and to eradicate discrimination in Washington. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995). The statute requires a liberal construction in order to accomplish these purposes. RCW 49.60.020. "A statutory

mandate of liberal construction requires that [the Court] view with caution any construction that would narrow the coverage of the law. *Shoreline Community College Dist. No. 7 v. Employment Sec. Dep't,* 120 Wn.2d 394, 406, 842 P.2d 938 (1992). A ruling that strongly held religious beliefs serve as a vehicle to circumvent the statute's anti-discrimination provisions would significantly narrow the coverage of the law.

Although the constitutional and statutory challenge to the WLAD in this case arises in the public accommodations context, a successful challenge would undermine the entire statute, including the protections afforded to employees. If the Defendants' argument succeeds, an employer, based upon religious beliefs, could argue, for example, that: (1) a health care clinic could refuse to hire a gay counselor; or (2) an employer could refuse to employ a gay employee who was getting married because the wages paid would fund the wedding. An nurse with religious beliefs might argue that a hospital would have to accommodate her refusal to provide contraceptive care, even if the costs were more than *de minimus.* If the Defendants' argument succeeds, the rights of all protected classifications under the WLAD would have to be balanced against the employer's alleged constitutionally protected religious beliefs. The qualifications to the WLAD that Defendants urge this Court to adopt would create enormous uncertainty and undermine the very purpose of the law. The Court should rule that the Washington Law Against Discrimination is not unconstitutional as applied to those with strongly held religious beliefs.

III. ARGUMENT

A. A Constitutional Challenge Carries A High Burden Of Persuasion

The Defendants and the amici in support have argued that the anti-discrimination provisions of the WLAD are inapplicable to individuals with strongly held religious beliefs and who are engaged in certain types of expressive activity. In support of this argument, they rely upon both the Washington and United States Constitutions. In effect, they argue that the WLAD is unconstitutional as applied. The Defendants fail, however, to explain the burden which they must satisfy for their argument to succeed.

In an as-applied challenge a party contends "that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *City of Redmond v. Moore,* 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). Statutes are presumed constitutional, and the challenger of a statute must prove beyond a reasonable doubt that the statute is unconstitutional. *Sch. Dist's Alliance for Adequate Funding of Special Educ. v. State,* 170 Wn.2d 599, 605, 244 P.3d 1 (2010). The beyond-a-reasonable-doubt standard when used in this context describes, not an evidentiary burden, but rather a requirement that the challenger convince the court that there is no reasonable doubt that the statute violates the constitution. *Island County v. State,* 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

The Defendants in this case have failed to satisfy this burden. As explained more fully by the Plaintiffs and the amici that support them, the

WLAD is a neutral statute of general application and is not unconstitutional as applied to people with strongly held religious beliefs.[1]

B. Ruling That The WLAD Is Unconstitutional As Applied Would Undermine The Entire Statute And Create Uncertainty And Confusion

The legislative purpose of Washington's law against discrimination is set forth in the statute itself. RCW 49.60.010 in relevant part provides:

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

The Court has recognized that the purpose of the law is to deter and to eradicate discrimination in Washington. *Kilian v. Atkinson,* 147 Wn.2d

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1 The right to exercise one's religion freely "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)." *Emp't Div. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (internal quotation marks omitted). A neutral law of general application need not be supported by a compelling government interest even when "the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Such laws need only survive rational basis review. *Miller v. Reed,* 176 F.3d 1202, 1206 (9th Cir. 1999). The WLAD is a neutral statute of general applicability. Its purpose to prohibit discrimination based upon sexual orientation is rationally related to a legitimate governmental interest.

16, 23, 50 P.3d 638, 640 (2002); *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994). The statute embodies a public policy of the highest priority. *Xieng v. Peoples Natl. Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993). The statute requires liberal construction in order to accomplish it purposes. RCW 49.60.020. The statutory mandate of liberal construction requires that the Court view with caution any construction that would narrow the coverage of the law. *Shoreline Community College Dist. No. 7 v. Employment Sec. Dep't,* 120 Wn.2d 394, 406, 842 P.2d 938 (1992). The Defendants' argument would significantly narrow the coverage of the law, and create great uncertainty about its future application.

In *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 317 P. 3d 1009 (2014), the Court was asked to decide whether the exemption of nonprofit religious organizations from the definition of "employer" under the Washington Law Against Discrimination, RCW 49.60.040(11) was unconstitutional. The Court filed a decision with three separate opinions. The first opinion, designated as the lead opinion, was authored by Justice Charles Johnson, in which Justices Madsen, Owens, and James Johnson joined. A second opinion, designated as the dissenting opinion, was authored by Justice Stephens, in which Justices Gonzales, Fairhurst, and Gordon-McCloud joined. A third opinion, designated as concurring in part in dissent was authored by Justice Wiggins. The opinion by Justice Wiggins became the controlling opinion. *See Marks v. United States,* 430

U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'").

Justice Wiggins concurred with the lead opinion's conclusion that the statute was not facially unconstitutional, but held that it was unconstitutional as applied to the Plaintiff, who was employed as a security guard. Justice Wiggins concluded that the exemption "is constitutionally applied in cases in which the job description and responsibilities include duties that are religious or sectarian in nature." Otherwise, applying strict scrutiny, the exemption is unconstitutional as applied under Art. I., Section 12. *Ockletree*, 179 Wn.2d at 806.

In *Ockletree*, the Court created a constitutional bright line: The anti-discrimination protections afforded under the WLAD are not constitutionally applicable to those who have religious job duties, but in contrast they are fully applicable to those without religious or sectarian job functions regardless of their beliefs. *See also Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, ___ U.S. ___, 132 S. Ct. 694, 703 (2012)(the First Amendment "ministerial exception" applies only to "ministers"). The Defendants' arguments would obscure the bright line recognized in *Ockletree*, paving the way for all individuals with strongly held religious beliefs to constitutionally challenge the WLAD as applied to them. For example, if the Defendants' argument succeeds, Arlene's Flowers could

legally refuse to hire a gay employee without religious job duties because the employee does not wish to communicate the owner's religious vision.

C. The Concern That Reliance On The Constitutional Right Of Free Exercise Of Religion Will Undermine The WLAD Is More Real Than Theoretical

This case arises in the context of discrimination in places of public accommodation. But the constitutional argument advanced by the Defendants has obvious and serious implications within the employment context as well.[2]

In their Reply Brief, the Defendants assert: "Critically, the freedom of association protects Mrs. Stutzman's ability to enter into artistic partnerships with those who share her view of marriage and not enter into expressive partnerships with those who wish to communicate an opposing viewpoint." Arlene Flowers Reply Br. at 26. But the Defense ignores the fact that the constitutional freedom of association is embodied in the private club exception: "The WLAD's language specifically exempting 'any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations' recognizes the constitutional right to intimate association afforded to such groups."

2 In applying the WLAD, Washington courts have relied upon construction of the statute as a whole or on rulings in one context to apply to another. *See, e.g., Griffin v. Eller*, 130 Wn.2d 58, 78, 922 P.2d 788, 797 (1996) (relying on statutory construction of multiple contexts: "The term "unfair practices" also appears in many other sections in the Act, describing in general or specific terms unfair practices in credit, insurance, employment (by employers, labor unions and employment agencies), public accommodations and real estate."); *Lewis v. Doll*, 53 Wn. App. 203, 206, 765 P.2d 1341, 1343 (1989) (ruling in public accommodations case relying on employment law precedent).

Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 260, 59 P.3d 655, 674 (2002) (concurrence, Madsen, J.). Defendants are not a private club. As a result, "the relationships among [businesses that are not distinctly private] are not so intimate as to afford the group constitutional protection in the decision of its members to exclude" members of classes protected by the WLAD. *Id*. Indeed, more than half a century ago, this Court repudiated constitutional arguments of freedom not to associate with certain customers when made by a hair salon. In *Browning v. Slenderella Sys. of Seattle*, 54 Wn.2d 440, 455, 341 P.2d 859, 869 (1959), the Court held that a hair salon's "courteous" steering of a black woman to leave (as opposed to outright refusal to serve) was "outrageous" and illegal, rejecting a dissent that framed a business owner's freedom to refuse service "because of the reluctance of employees to render intimate personal service to Negroes" as grounded in the Thirteenth Amendment. *Id*. at 861-863. (J. Mallory, dissent) (emphasis added). As explained by other amici, such opinions were often rooted in religious beliefs. *See, e.g.*, Brief of NAACP Legal Defense Fund. The Court should repudiate such an assault on the WLAD.

The implications of a successful legal challenge by the Defendants are far broader than they pretend. Indeed, accepting the Defendants' invitation to recognize a religious right to discriminate would almost certainly transform the workplace into a maelstrom of cultural conflict. Mrs. Stutzman argues "that her civil rights under the WLAD should be

balanced against those of Mr. Ingersoll and Mr. Freed under the circumstances here." Arlene Flowers Reply Br. at 42. According to the defense, "[t]he proper balance favors the rights of Mrs. Stutzman under the narrow circumstances present in this case" because "the protection of religion under the WLAD is grounded in the religious freedom provision of the Washington Constitution, whereas the protection of sexual orientation in public accommodations appears to be grounded in the Legislature's police power." Arlene Flowers Opening Br. at 23. But the defense has not shown a right to discriminate against one's customers based on one's religious beliefs so there is no conflict of competing rights. Nor has the defense shown that there is a hierarchy of rights under the WLAD—a quagmire this Court need not enter to resolve the issues before it in this case. Notably, if Defendants are right that businesses have a constitutionally-mandated right that necessarily trumps "conflicting" statutory rights then the balance would always favor their religious rights, not just "under the narrow circumstances present in this case."

Thus, if an employer's sincerely held religious beliefs mandate that she missionize, then as a result of Defendants' arguments she would possess the right to subject her employees to religious education or prayer. Similarly, Arlene Flowers would be free to deny religious accommodations to Jews or Muslims because the accommodation requested violates her sincerely held beliefs, which are constitutionally based rather than statutorily based. Under Washington law, when the cost of a religious accommodation is more than *de minimus* the employer need

not grant an accommodation. *See Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014). If the Defendants prevail here, however, employers with sincerely held religious beliefs could be expected to argue that where accommodations to other faiths are not consonant with those of the employer, the employer is free to deny them—essentially undercutting the standard set in *Kumar*.

These scenarios are more than plausible; they are the explicit aim of Defendants' ideological allies and their counsel. *See, e.g.*, Michael Kent Curtis, *A Unique Religious Exemption From Antidiscrimination Laws In The Case Of Gays? Putting The Call For Exemptions For Those Who Discriminate Against Married Or Marrying Gays In Context*, 47 WAKE FOREST L. REV. 173, 182-83 (2012) ("The [Beckett Fund for Religious Liberty's] examples of conflict with sincere religious beliefs include religious objectors who decide not to hire people in same-sex marriages, who refuse to extend spousal benefits to same-sex couples, and who refuse to provide otherwise available housing to same-sex couples…. Since the Fund also lists gay couples, it seems its plan may end up going beyond gay marriage. As a matter of logic it is hard to see why it should stop at married gays and not include gays living with their partners and single gays."). The Alliance Defending Freedom website reports its recent successful defense of an employment discrimination action brought by the EEOC on the ground that the employer would "be violating his faith if he were to pay for and otherwise permit his employees to dress as members of the opposite sex while at work, ..."

https://www.adflegal.org/detailspages/press-release-details/funeral-home-buries-federal-govt-in-michigan-religious-freedom-case. Recently, a Spokane Fire Fighter alleged wrongful termination in violation of the First Amendment because he was prohibited from using the Department's email system to promote a religious point of view at work. The Washington State Court of Appeals in a divided opinion affirmed summary judgment against the Fire Fighter. *See Sprague v. Spokane Valley Fire Department,* No. 33352-3-III (Wash. Ct. App. September 21, 2016). A ruling that the WLAD is unconstitutional as applied will cause the proliferation of religious related claims in the workplace.

The defense claims that the WLAD would only be unconstitutional as applied to (1) businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression, (2) who are offering expressive goods or services, (3) in the public accommodation context." App. Br. 46-47. In reality, the list would have to be much longer. Many businesses and professions are engaged in expressive activity.[3] Indeed, the lawyers for the Defendants, ADF, have made the same unsuccessful argument in other states on behalf of a baker, *Craig v. Masterpiece Cakeshop, Inc.*, __ P.3d __, 2015 WL 4760453 ¶¶ 4, 44, 74 (Colo. App. Aug. 13, 2015) (rejecting argument that "decorating cakes is a

3 The ADF website illustrates how it seeks to expand the argument it is asserting on behalf of Arlene's Flowers to protect therapists. *See* https://www.adflegal.org/detailspages/press-release-details/adf--american-counseling-association-must-honor-freedom-of-conscience--religion (challenging American Counseling Association Ethics Committee memorandum that "condemned approaches to therapy which attempt to change sexual orientation.").

[constitutionally protected] form of art"). The ruling sought here would fling the doors wide open to wedding planners, bakers of wedding cakes, caterers, and graphic artists, and others who are engaged in making artistic or expressive choices. Similarly, the exemption might apply to pharmacologists who don't want to supply Plan B or condoms.[4] The proposed exemption that Defendants claim applies to florists would apply with equal force to these and many other professionals.

Another amicus explains the fallacy in trying to portray this as an exemption limited in any meaningful way, noting that Defendants' reliance on incorporating artistic concepts such as "components of previous eras and cultures," reflecting "the mood and look desired by the couple," and use of "fabrics, pictures, and a variety of other objects to generate ideas" are associated with a host of other professions including chefs, architects, interior designers, tailors, and barbers. *See* Amicus Brief filed by Americans United for Separation of Church and State (AUSCS) at 4. Even assuming that the Court could articulate some exemption that was meaningfully limited in scope, AUSCS explains how this would undermine the goals of the WLAD: "the legal regime proposed by Arlene's Flowers would create a two-tiered system of rights and obligations: No-frills providers would be required to comply with

4 Holding that the law mandates such an exemption for pharmacists would be contrary to the Ninth Circuit's opinion in *Stormans, Inc. v. Wiesman,* 794 F.3d 1064 (9th Cir. 2015). Yet, mandating the exemption for florists but not pharmacists seems arbitrary at best.

antidiscrimination laws, while skilled professionals would be free to discriminate at will." AUSCS Br. at 4.

Since Defendants contend their constitutionally-based rights outweigh competing protected rights under the WLAD, it is hard to see any limitation, despite Defendants' contention that their challenge is narrowly limited in this case to artistic expression. The essence of their argument is that they cannot be constitutionally required to support ideas or practices that offend their religious beliefs. If so, then the owner of Arlene's Flowers could fire a gay employee who is getting married because she does not want to pay wages used to fund gay marriage, or fire a female employee who moves in with her boyfriend because the employer's beliefs are incompatible with pre-marital sex.

In sum, there exists a meaningful potential that the Defendants' arguments are equally applicable to employment law. At a minimum, the scope of the Defendants' constitutional arguments would create confusion, uncertainty, an abundance of litigation, and undermine the protections afforded by the Washington Law Against Discrimination.

D. Arlene Flowers' Refuse And Refer Is Illegal

Apparently recognizing that simply refusing to serve members of the public based on their protected characteristics is suspect, Defendants suggest they could comply with the law by taking a softer approach: refuse them service but refer them elsewhere. *See* Arlene Flowers Opening Br. at 48 ("Any harm [to the gay couple] would be further mitigated by Mrs. Stutzman's good-faith referrals to an alternate provider" and that "The

State could also institute educational programs or ranking systems that promote non-discrimination and businesses that exemplify those ideals.").

Under this rationale, for-profit businesses that have religious objections to serving members of a protected class would be excused from complying with the law so long as they shoo away unwelcome customers by referring them elsewhere, such as to the internet, which contains a list of gay-friendly businesses. *See, e.g.*, http://pinkmag.com/seattle.html. Academic supporters of this approach suggest that such businesses act prophylactically to warn gay customers that they are not welcome so they are not surprised. *See* Curtis, 47 WAKE FOREST L. REV. at 198-99, *supra*. Presumably, they would put a sign on their door or on their websites or in the newspaper stating that they do not welcome gay customers and won't serve them, but will offer referrals.

But determining liability on whether a business bothers to offer a competitor's name before kicking the customer out the door unserved would trivialize the significance of the refusal and the dignitary harm caused by a business owner's refusal to do business with a person because of their sexual orientation or other protected characteristic. And if businesses can refuse to serve customers based on their religious beliefs, why couldn't they refuse to employ individuals based on their religious beliefs? The meaninglessness of the "polite" referral is even more apparent in the employment context, in which the employer would contend that it would be free to refuse considering an applicant for

religious reasons so long as the employer recommended other businesses at which the applicant could apply.

Defendants propose to simply recreate the discriminatory conditions that led the State of Washington as well as many other states and Congress to adopt the public accommodations laws in the first place. But this proposal runs afoul of the plain language of the WLAD, which prohibits refusing service. The WLAD's disallowance of a refuse-but-refer approach to religious objections is reasonable and consistent with the First Amendment. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084-85 (9th Cir. 2015) ("Whether facilitated referrals also further patients' access to [Plan B] medication is irrelevant. On rational basis review, Plaintiffs [pharmacies objecting to stocking Plan B on religious grounds] still have the burden to negate the Commission's chosen method for achieving that goal.").

E. Liability Under The WLAD Does Not Depend On Ill-Will Or Hostility

The defense argues that no liability attaches because it lacks hostility toward the Plaintiffs: "Mrs. Stutzman and other people of faith are not purveyors of invidious discrimination. They simply cannot endorse the redefinition of what they consider to be an immutable religious institution." Arlene Flowers Reply Br. at 44; Arlene Flowers Opening Br. at 43.

For the reasons explained by the Washington State Association for Justice ("WSAJ") in its amicus submission, this argument is plainly wrong

under the law, and would undermine the substantial factor test applicable not only in public accommodation law but also in employment law.

IV. CONCLUSION

The court should rule that the WLAD is not unconstitutional as applied to those with strongly held religious beliefs who engage in expressive activity.

Respectively submitted this 23rd day of September, 2016.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served via electronic mail a copy of this document entitled **Brief of Amicus Curiae Washington Employment Lawyers Association** on the following individual(s):

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DATED this 23rd day of September, 2016, at Seattle, Washington.

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