Supreme Court No. 91615-2

Benton County Superior Court Nos. 13-2-00953-3 and 13-2-00871-5

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT INGERSOLL, et al.

Plaintiffs-Respondents,

v.

ARLENE'S FLOWERS, INC., et al.

Defendants-Appellant.

STATE OF WASHINGTON

Plaintiff-Respondent,

v.

ARLENE'S FLOWERS, INC., et al.

Defendants-Appellants.

BRIEF FOR PROFESSOR TOBIAS B. WOLFF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Rebecca A. Zotti, WSBA #49510
SEDGWICK LLP
One Union Square
600 University Street, Suite 2915
Seattle, WA 98101-4172
Phone: 206.462.7560
Fax: 877.541.3918
Counsel for the *Amicus Curiae*

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I. INTRODUCTION

The Free Speech Clause of the First Amendment is not a license for businesses to discriminate in the commercial marketplace. In an unbroken line of cases that spans decades, the Supreme Court of the United States has rejected all attempts to cloak discrimination against customers and employees in the mantle of free speech. When a business sells goods and services in the commercial market, it is not engaging in its own expression. Customers pay vendors to provide goods and services tailored to the customer's needs. They do not pay for the privilege of promoting a vendor's message. Selling commercial goods and services is conduct that the State may regulate, and anti-discrimination statutes like the Washington Law Against Discrimination do not provoke any First Amendment scrutiny. No court of final review has ever held otherwise.

Now that lesbian, gay, bisexual and transgender people have begun to escape their long history of state-sanctioned discrimination and secure a measure of equal treatment in the commercial marketplace, we are seeing the latest chapter in this old story. Once again, some businesses claim that the First Amendment licenses them to disregard anti-discrimination laws. Once again, courts are uniformly rejecting that claim. The New Mexico Supreme Court reaffirmed these settled principles in its unanimous ruling

in *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013). This Court should do the same.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to RAP 10.6, Tobias Barrington Wolff respectfully submits this brief *amicus curiae* in support of Respondents Robert Ingersoll, Curt Freed, and the State of Washington. RAP 10.6. Wolff is a Professor of Law at the University of Pennsylvania Law School who writes and teaches on the First Amendment.

III. STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in Respondent's brief.

IV. ARGUMENT

Three well-established principles require the rejection of Appellants' Speech Clause arguments.

First: Anti-discrimination laws regulate conduct, not speech. Discrimination by a business against its customers or employees in the public marketplace is commercial conduct, regardless of the service the business offers, and it "has never been accorded affirmative constitutional protections." *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984).

Second: When a business sells goods and services to the public, it is not a "speaker" engaged in its own expression, it is a vendor engaged in

business conduct. Customers do not pay for the privilege of facilitating the vendor's message, they pay for a product tailored to their own needs.

Third: The compelled speech doctrine has no application in this setting. That doctrine applies only when (1) the state chooses a message and imposes it on unwilling adherents or (2) the state forces a speaker to incorporate unwanted elements into the speaker's own message. *See Rumsfeld v. FAIR*, 547 U.S. 47, 63-65 (2006). In the absence of these circumstances, there is no compelled speech under the First Amendment.

All of these principles apply with full force to a business that sells goods or services involving creative or expressive skill. When a customer pays for work that involves creativity – a brief written by a lawyer; a graphic design layout; professional photographic services; a custom floral arrangement – the vendor is not a "speaker," it is a service provider. WLAD prohibits discrimination in that business transaction, and the First Amendment imposes no barrier to the statute's enforcement.

A. WLAD Does Not Target Speech.

WLAD does not regulate speech. Nothing in the statute makes reference to speech or expression. Neither was WLAD enacted to punish businesses for their opinions, nor to regulate conduct as a pretext for targeting symbolic speech. On its face and as applied in this case, WLAD regulates business conduct: invidious discrimination against customers.

Appellants argue that they deserve a categorical exemption from WLAD because they sell a product that involves creative skill. That is not the law. The First Amendment does not exempt companies from general business regulations simply because they sell creative goods or services. When government enacts evenhanded laws that regulate the conduct of all businesses, no constitutional scrutiny is required. Only when government targets the expressive component of a business's activities is the First Amendment implicated. WLAD does no such thing.

In *Hishon,* the Supreme Court applied these principles to the commercial practice of law. Legal practice occupies an important place under the First Amendment: lawyers produce creative work when they advocate for a client, and the legal profession gives meaning to the right of access to court. Nonetheless, commercial legal practice is fully subject to laws that prohibit discrimination in the workplace and the market.

The Court held in *Hishon* that Title VII of the Civil Rights Act of 1964 forbids a law firm from refusing to promote a female associate because of her sex. In seeking to avoid that result, the firm argued that it was exempt from Title VII because its work enjoys First Amendment protection. The Court rejected the argument. Title VII neither regulates speech nor targets the expressive content of a company's work. Rather, the Court explained, it targets the conduct of workplace discrimination, and

"invidious private discrimination . . . has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78. Likewise, a commercial law firm may not discriminate against clients in violation of anti-discrimination laws. In *Nathanson v. Massachusetts Comm'n Against Discrimination*, 16 Mass. L. Rptr. 761, 2003 WL 22480688, 2003 Mass. Super. LEXIS 293 (Mass. Super. 2003), a Massachusetts court found that a divorce lawyer who "advertises to the general public via the white and yellow pages and local newspapers" violated state anti-discrimination law when she refused to take business from a client because he was a man. *Id*. at *6, *24. The law neither regulated the expressive component of the lawyer's work nor dictated the creative content of the lawyer's work. Therefore, the First Amendment was not implicated.[1]

In contrast, government cannot restrict the viewpoint that lawyers express when arguing on behalf of their clients. The Court affirmed this principle in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), holding that the First Amendment prohibits Congress from imposing a restriction that "prevents [a Legal Services] attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute . . . [violates] the United States Constitution." *Id*., at 536-

[1] A non-commercial advocacy organization, in contrast, would not be subject to WLAD precisely because it engages in the promotion of its own advocacy message rather than the sale of a service to the general public. *See In re Primus*, 436 U.S. 412 (1978).

37. Because Congress sought "to exclude from litigation those arguments and theories [it found] unacceptable," *Id*., at 546, its law targeted expression and provoked First Amendment scrutiny. WLAD, like Title VII, does not target the expressive content of any business.

The Court has applied the same principle to private schools. Direct regulation of a private school's expressive content – for example, dictating the viewpoint teachers must convey to students – would present serious First Amendment problems. But discriminatory practices receive no such protection. In *Runyon v. McCrary*, 427 U.S. 160 (1976), a private school refused to admit African-American students, prompting the children to sue for admission under federal civil rights laws. The school said that teaching non-White children would violate its segregationist beliefs and argued that the First Amendment gave it a right to discriminate. The Court rejected the argument. "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable," the Court explained. *Id*., at 175-176. "But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Id*.

The Court reiterated this principle yet again in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), a case involving the application of public nuisance laws to an adult bookstore. State authorities found that the

bookstore was facilitating illegal sexual activity on its premises and ordered it to close for a year. Although the order impeded Cloud's ability to sell protected materials, the First Amendment was not implicated:

> [W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . .

Id., at 706-07. When a law targets conduct and not speech, the fact that a business sells a good or service with expressive or creative content does not license it to violate the rules that govern all businesses. "[I]nvidious private discrimination" is conduct that lacks a "significant expressive element" and "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78; *Arcara*, 478 U.S. at 706.

Appellants seek to rely on a case in which a city singled out tattoo parlors for targeted regulation. *See* Br. of Appellants at 25–26 (quoting Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010)). But WLAD does not single out any business. When laws actually target expressive goods or services, it may raise First Amendment concerns. *See Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). When laws are neutral and impose generally applicable

requirements on all businesses, they raise no such concerns. Like the laws in *Hishon*, *Runyon* and *Arcara*, WLAD is a neutral regulation.

One can imagine a law firm or a private school making the same arguments that Appellants press before this Court. A lawyer's work is "expressive activity," the argument would go. A lawyer "speaks on behalf of" her law firm or client, signing her name to papers submitted to the court and conveying the client's "message." The practice of law is not merely "mechanical" but requires "creativity" and the lawyer's distinctive "style" as he "represents" his client. *Compare* Br. of Appellants at 25-26. All these assertions would be true. None would call into question the obligation of a law firm or a private school to obey neutral, generally applicable laws that prohibit commercial entities from discriminating in the workplace or the marketplace. The same holds true for Appellants.

B. <u>WLAD Does Not Violate the Compelled Speech Doctrine.</u>

Appellants' effort to reframe its assertions as a compelled speech argument does not change the result. The Supreme Court has identified two circumstances that can give rise to compelled speech: (1) when the state imposes its chosen message on unwilling adherents, or (2) when state compulsion forces a speaker to incorporate unwanted elements into its own message. Neither circumstance is present here. WLAD does not

impose any state-chosen viewpoint, and Appellants are not propounding their own message when they sell floral arrangements to their customers.

1. WLAD Neither Compels Affirmation of Belief Nor Imposes a State-Chosen Message.

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), was the foundational compelled speech case, establishing the principle that the State may not impose its own ideology on unwilling adherents. *Barnette* involved a West Virginia law that required school children to recite the Pledge of Allegiance to the American flag, a patriotic message chosen by the State and involving "affirmation of a belief and an attitude of mind." *Id*., at 633. In striking down the law, the Supreme Court declared that government must not "prescribe what shall be orthodox in politics, nationalism, religion, or matters of opinion, or force citizens to confess by word or act their faith therein." *Id*., at 642.

The Court has repeatedly applied this principle when government has imposed its chosen message on unwilling speakers. In *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a Florida law that compelled newspapers to publish responses from political candidates when they ran editorials critical of those candidates. In *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986) ["*PG&E*"], the Court prohibited California from compelling a utility

company to send customers environmental literature chosen by the State based on viewpoint. And in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court prohibited New Hampshire from penalizing a couple for covering the state motto on their car license plate, holding that the State cannot "require[] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public" nor force drivers to "use their private property as a 'mobile billboard' for the State's ideological message." *Id*. at 713, 715.

The core violation in all these cases has been the same: the State has selected a message and compelled individuals to affirm that message or become unwilling public ambassadors for it. Such compulsion is impermissible if the State's chosen message embodies its own ideology, as in *Barnette* and *Wooley*, or if the State selects one speaker's viewpoint and requires others to promote that view, as in *Tornillo* and *PG&E*.

WLAD does not involve any such compulsion. The statute does not impose the State's own message on unwilling speakers. Neither does it select a private message based on viewpoint and require businesses to publish it. WLAD has nothing to do with messages. It prohibits a form of business conduct – discrimination against customers and employees – and

applies that prohibition without reference to expression. The *Barnette*/*Wooley* line of cases is inapplicable.

Appellants insist that compliance with WLAD "forces" Appellants to speak. Br. of Appellants at 26-31. But the authorities on which Appellants rely all involve attempts by the State to compel a specific message. All agree that the State may not compel a group to agree with a certain viewpoint. WLAD involves no such compulsion. Appellants are not forced to express any view about marriage and same-sex couples, and they are free to voice their opposition to marriage equality as publicly as they choose, as Mrs. Stutzman has done repeatedly. *See, e.g.*, Barronelle Stutzman, "Why a Friend is Suing Me," The Seattle Times, at www.seattletimes.com/opinion/why-a-good-friend-is-suing -me-the-arlenes-flowers-story/ (Nov. 9, 2015). WLAD only requires a business that sells its product in the market to treat customers equally.

The Supreme Court reaffirmed these important limits on compelled speech doctrine in its recent decision in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). The *Rumsfeld* case arose when law schools sought to escape a federal statute that required them to host military recruiters at on-campus commercial job fairs. The schools disapproved of the military's policy of refusing to interview gay students. A federal statute, the Solomon Amendment, required schools to grant access to the military on terms

equal to those available to other recruiters. *See id*., at 52-55. When schools created or disseminated speech as part of the service they offered other participants in the job fair, they had to do the same for military recruiters: "in assisting military recruiters, [the] law schools provide[d] some services, such as sending e-mails and distributing flyers, that clearly involve speech." *Id*. at 60. The Court found no First Amendment problem:

> [Federal law] neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy . . . . [Solomon] regulates conduct, not speech. It affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*.

Id., at 60. The Solomon Amendment, the Court explained, was "a far cry from the compelled speech in *Barnette* and *Wooley*." *Id*., at 62.

WLAD is an even further cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment protects a single entity (the military) and requires equal access in a specified setting (recruiting at colleges and universities). Thus, it was at least arguable in *Rumsfeld* that federal law had conscripted schools to serve as ambassadors for a specific recruiting message chosen by the government, using the schools' own speech as the vehicle. The plaintiffs in *Rumsfeld* made that argument the centerpiece of their case, but the Supreme Court rejected it squarely: "The Solomon Amendment, unlike the laws at issue in those cases, 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." *Id*., at 62. This holding applies with even more force to WLAD. Washington's public accommodations law applies to all businesses that sell goods and services to the general public and it protects all people from the specified forms of invidious discrimination. It is a law of general applicability. It is thus even more clear that WLAD "does not dictate the content of [any] speech at all." *Id*. *Wooley* and *Barnette* are inapplicable. As the Ninth Circuit has said, "[T]he holdings of both *Barnette* and *Wooley* are limited to compelled speech that affects the content of the speaker's message by touching on matters of opinion, or to compulsions that force the speaker to endorse a particular viewpoint." *Jerry Beeman & Pharmacy Servs. v. Anthem Prescription Mgmt., LLC*652 F.3d 1085, 1098 (9th Cir. 2011).

WLAD neither imposes the State's own ideological message nor conscripts businesses to host a private viewpoint of the State's choosing. Appellants cannot assert a claim under *Barnette* and *Wooley*.

2. WLAD Does Not Force Speakers to Incorporate Unwanted Elements into Their Own Messages.

WLAD also does not force speakers to incorporate unwanted elements into their own messages. Appellants are not engaged in the communication of their own message when they sell goods and services to

the general public, they are engaged in a commercial transaction. The second type of compelled speech argument is thus inapplicable.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), is the paradigm case here. *Hurley* involved a dispute between a gay Irish-American group and the private organizer of a St. Patrick's Day parade in Boston. The gay group wanted to participate as a unit marching in the parade under its own banner, but the organizers refused. The group sued under a state anti-discrimination statute and prevailed before the state court, which interpreted its law to extend outside the commercial context and ordered the organizer to admit the group. The Supreme Court reversed, finding that this expansive application of the law violated the First Amendment's prohibition on compelled speech.

The ruling in *Hurley* was based on two key facts: (1) a parade is an "inherent[ly] expressive[]" event that conveys the speaker's own message – a "street corner" speaker writ large; and (2) the parade organizer is the speaker, for "we use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Id*., at 568, 579. The organizers must be able to select which units will march in a parade, because "every participating unit affects the message conveyed by the private organizers." *Id*., at 572–

73. The compelled inclusion of unwanted units would force the organizers to alter a message they were presenting as their own.

Appellants and their *amici* confuse the issue when they seek to invoke *Hurley*. They say that floral arrangements constitute expression entitled to First Amendment protection and then argue that businesses that provide floral arrangements are engaged in "protected artistic expression." The argument fundamentally misunderstands compelled speech doctrine. *Hurley* used the term "inherently expressive" to describe a setting in which a speaker is engaged in communicating its own message. A parade organizer qualifies. A business selling goods and services does not. Put simply, it is the wedding customer who is the parade organizer here, not the vendor. Indeed, it would come as quite a shock to any customer if a wedding vendor proclaimed itself to be the "speaker" in this setting. Imagine a vendor showing up at a wedding and announcing, "Here is how you must organize your ceremony, and here is what it must contain. You are using my flowers, so this is *my* message. *I* am the speaker."

Here too, *Rumsfeld* provides clarity. Rejecting the law schools' attempt to invoke *Hurley*, the Court held:

> Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's

> recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper . . . .

Rumsfeld, 547 U.S. at 64. So too here. As the New Mexico Supreme Court explained, "[u]nlike the defendants in *Hurley* or the other cases in which the United States Supreme Court has found compelled-speech violations, [a commercial vendor] sells its expressive services to the public. It may be that [the vendor] expresses its clients' messages . . . , but only because it is hired to do so." *Elane Photography*, 309 P.3d at 66. Customers that hire Arlene's Flowers are not paying to facilitate a message chosen by Arlene's Flowers or Mrs. Stutzman, any more than a client would pay a law firm to promote some agenda the firm might have. Customers hire Appellants to provide the floral arrangements the customers choose. CP 2107. A florist is neither a "parade organizer" nor a "street corner speaker" under *Hurley*.

WLAD also does not require businesses to "endorse" the message of any customer when providing commercial goods and services. As the New Mexico Supreme Court explained, "It is well known to the public that wedding photographers are hired by paying customers and . . . may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)." *Elane Photography*, 309 P.3d at 69-70. This conclusion rests on a solid foundation. In *Rumsfeld*, law

schools attempted an endorsement argument, saying that "if they treat military and nonmilitary recruiters alike [at commercial job fairs] in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies," *Rumsfeld*, 547 U.S. at 64-65. The Court rejected the argument: "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id*. at 65. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court rejected a similar argument by a shopping center that objected to a law requiring equal access to its property for groups engaged in demonstration. As the Court explained, views expressed by private citizens at "a business establishment that is open to the public" would "not likely be identified with those of the owner," particularly where there was "no governmental discrimination for or against a particular message" and the business owner was free to "disavow any connection with the message." *Id*. at 87. Equal access laws do not compel "endorsement" in a commercial setting.

WLAD does not impose any state-chosen message on the Appellants. It does not regulate any "inherently expressive" setting in which Appellants are "street corner" speakers. And it does not require Appellants to endorse any message of its customers. The Company may

prefer not to take business from gay patrons, but that preference does not transform a prohibition on discrimination into compelled speech.

3. Appellants' Comparisons Are Inapposite.

These principles provide answers to the array of hypotheticals that Appellants and their *amici* advance. Appellants call themselves "floral artists" akin to "master painters like Van Gogh, Renoir, and Monet." Br. of Appellants at 24. This description does not change the analysis. If an artist establishes a business advertising to the public that he will paint wedding portraits for a fee, that business cannot discriminate against couples based on race, sexual orientation, or religion in violation of WLAD, any more than a law firm can violate Title VII when choosing its employees. *See Hishon*, 467 U.S. at 78. These businesses memorialize the messages of customers. They do not engage in their own expression. That fact renders the compelled speech doctrine inapplicable.

Appellants' *amicus* argues that "freelance writers and singers," "a graphic artist," or an "actor [who] refused to perform in a commercial" could be regulated if Respondents prevail. Cato Institute brief at 12–13. But WLAD does not apply to freelance workers. The law regulates public accommodations. RCW 49.60.030; RCW 49.60.215. As Appellants admit, "Arlene's Flowers is 'a for-profit Washington corporation that sells goods and services to the general public.'" CP 2310-69. WLAD merely

requires that a business offering its services to the general public "make *all of the products or services that business chose to sell* available for purchase by everyone without discrimination." *Id*. *Elane Photography* notes the same distinction, finding that a freelance photographer "hired by certain clients but [who] did not offer its services to the general public" would not be subject to New Mexico's anti-discrimination law. *Elane Photography*, 309 P.3d at 66. A freelancer is not a public accommodation.

But consider a more apt hypothetical. Suppose that a painter sets up a store in which he offers to paint the portrait of paying customers, advertising his business to the general public. But when a white customer enters the store, the owner turns him away, saying, "I don't paint portraits of white people." The store would stand in violation of WLAD and the First Amendment would pose no obstacle to liability. The painter brings artistic skill to his work, but he is not engaged in his own expression when he sets up a portraits-for-hire store. As in *Rumsfeld*, discrimination against customers in this commercial setting is conduct the State may prohibit.

In contrast, consider an artist who paints on his own time, choosing his subjects according to his own inspiration, and then sets up a store in which he sells his work to the public. *Barnette*, *Wooley*, and *Hurley* would prohibit any law from dictating the content of the painter's work. He engages in his own artistic expression when creating the work, and

interference by the State would constitute a regulation of his message. However, when that same artist displays his work in a store and sells it to the public, he may not then turn away customers based on race or sex, even if he would prefer not to sell them his work. Selling the finished product in the market is business conduct by a public accommodation.

The First Amendment gives broad protection to businesses that sell expressive products and services. It prohibits government from dictating their creative choices, as in *Velazquez*, prevents the State from selecting ideological messages and using businesses as tools for their promulgation, as in *Tornillo* and *PG&E*, and protects the right of business owners to engage in their own expression. But the First Amendment is not a libertarian manifesto entitling businesses to operate without any restrictions on their conduct in the marketplace. Discrimination against customers and employees in the public market is illegal business conduct, and it "has never been accorded affirmative constitutional protections." *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984).

V. CONCLUSION

Amicus respectfully asks this Court to affirm the judgment below.

RESPECTFULLY SUBMITTED this 28th day of September, 2016.

SEDGWICK LLP

s/Rebecca A. Zotti

Rebecca A. Zotti, WSBA #49510
SEDGWICK LLP
600 University Street, Suite 2915
Seattle, WA 98101
Telephone: (206) 462-7560
Email: rebecca.zotti@sedgwicklaw.com
Attorneys for *Amicus Curiae*
Professor Tobias Wolff

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2016, I caused the foregoing document to be served by email on the following counsel of record, who have consented in writing to service in this manner:

Kristen K. Waggoner at kwaggoner@telladf.org
George Ahrend at gahrend@ahrendlaw.com
John R. Connelly at jconnelly@connelly-law.com
Alicia M. Berry at aberry@licbs.com
Counsel for Appellant Arlene's Flowers

Michael R. Scott at michael.scott@hcmp.com
Amit D. Ranade at amit.ranade@hcmp.com
Jake Ewart at jake.ewart@hcmp.com
Margaret Chen at mchen@aclu-wa.org
Elizabeth Gill at egill@aclunc.org
Counsel for Respondents Ingersoll and Freed

Rebecca Glasgow at rebeccag@atg.wa.gov
Noah Purcell at noahp@atg.wa.gov
Alan Copsey at alanc@atg.wa.gov
Todd Bowers at toddb@atg.wa.gov
Kimberlee Gunning at kimberleeg@atg.wa.gov
Kristin Jensen at kristinj@atg.wa.gov
Counsel for Respondent State of Washington

Hank L. Balson at hbalson@pilg.org
Carmen N. Green at green@au.org
Richard B. Katskee at katskee@au.org
Greg Lipper at glipper@clintonbrook.com
Counsel for Amicus Curiae, Americans United for Separation of Church and State

Christian E. Mammen at chris.mammen@hoganlovells.com
Kaitlyn A. Golden at Kaitlyn.golden@hoganlovells.com
Jessica Ellsworth at jessica.ellsworth@hogan.lovells.com
Laura Szarmach at laura.szarmach@hoganlovells.com
Nichole Schiavo at nicole.schiavo@hoganlovells.com

Steven M. Freeman at sfreeman@adl.org
Seth M. Marnin at smarnin@adl.org
Michelle N. Deutchman at mdeutchman@adl.org
Counsel for Amici Curiae, Anti-Defamation League and Twenty-Six Other Organizations

Ilya Shaprio at ishapiro@cato.org
Jayme Weber at jweber@cato.org
Jeffrey Paul Helsdon at jhelsdon@tacomalawfirm.com
Counsel for Amicus Curiae, The Cato Institute

Mark John Holady at mark@holadylaw.com
Counsel for Amici Curiae, Christian Legal Society, Association of Christian Schools International, and National Association of Evangelicals

Thomas Olmstead at lawoffice@tomolmstead.com
Counsel for Amicus Curiae, Ethics and Religious Liberty Commission of the Southern Baptist Convention

David M. S. Dewhirst at daviddewhirst@gmail.com
Stephanie D. Olson at Stephanie.diane.olson@gmail.com
Counsel for Amicus Curiae, International Christian Photographers Association

Daniel J. Shih at dshih@susmangodfrey.com
Lindsey G. Eccles at leccles@susmangodfrey.com
Jennifer C. Pizer at jpizer@lambdalegal.org
Counsel for Amici Curiae, Lambda Legal Defense and Education Fund, Inc. and Others

Charles C. Sipos at csipos@perkinscoie.com
David A. Perez at dperez@perkinscoie.com
Sherrilyn Ifill at sifill@naacpldf.org
Janai Nelson at jnelson@naacpldf.org
Coty Montag at cmontag@naacpldf.org
Joshua A. Rosenthal at jrosenthal@naacpldf.org
Caren E. Short at cshort@naacpldf.org
Christina Swarns at cswarns@naacpldf.org
Counsel for Amicus Curiae, NAACP Legal Defense and Educational Fund, Inc.

Karolyn A. Hicks at Karolyn.Hicks@stokeslaw.com
Shannon P. Minter at sminter@nclrights.org
Counsel for Amici Curiae, National Center for Lesbian Rights, Legal Voice, and The National Lesbian, Gay, Bisexual, and Transgender Bar Association

Floyd E. Ivey at feivey@3-cities.com
Counsel for Amicus Curiae, Protecting Constitutional Freedoms Inc.

Mark Rienzi at mrienzi@becketfund.org
Adele Keim at akeim@becketfund.org
Diana Verm at dverm@becketfund.org
Michael A. Patterson at map@pattersonbuchanan.com
Counsel for Amicus Curiae, The Becket Fund for Religious Liberty

Donovan Flora at donovan@johnsonflora.com
Rebecca Roe at roe@sgb-law.com
Judith A. Lonnquist at lojal@aol.com
Ian S. Birk at ibirk@kellerrohrback.com
Bryan P. Harnetiaux at bryanpharnetiauxwsba@gmail.com
Counsel for Amicus Curiae, Washington State Association for Justice

Leonard J. Feldman at feldman@pwrlk.com
Jamila A. Johnson at jajohnson@schwabe.com
Counsel for Amici Curiae, Washington Businesses

Thomas C. Berg at tcberg@stthomas.edu
Kimberlee Wood Colby at kcolby@clsnet.org
Counsel for Amici Curiae, Christian Legal Society

Jeremy Tedesco at jtedesco@adflegal.org
Counsel for Amici Curiae, Alliance Defending Freedom

Karolyn Hicks at kah@stokeslaw.com
Kelby Fletcher at kelby.fletcher@stokeslaw.com
Chris Stoll at cstoll@nclrights.org
Counsel for Amici Curiae, National Center for Lesbian Rights

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s/Rebecca A. Zotti
Rebecca A. Zotti, WSBA #49510