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-Appellants.

STATE OF WASHINGTON.
Plaintiff-Respondent,

v.

ARLENE'S FLOWERS, INC., et al.
Defendants-Appellants.

BRIEF OF AMICUS CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS, LEGAL VOICE, AND THE NATIONAL LESBIAN, GAY, BISEXUAL, AND TRANSGENDER BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS

Karolyn A. Hicks, WSBA #30418
Karolyn.Hicks@stokeslaw.com
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
Tel. (206) 892-2155
Fax. (206) 464-1496

Shannon P. Minter
sminter@nclrights.org
Christopher Stoll
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
Tel. (415) 392-6257

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Statutes

Additional Authorities

I. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici* are set forth in the Motion for Leave to File *Brief of Amici Curiae*, filed herewith.

II. STATEMENT OF THE CASE

Amici adopt Plaintiffs-Respondents Robert Ingersoll and Curt Freed's Statement of the Case.

III. ARGUMENT

A. Introduction

Appellants-Defendants Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts, and Barronelle Stutzman (collectively "Arlene's Flowers") argue that businesses owned by persons who have certain religious beliefs should be permitted to deny services to same-sex couples so long as they do so in a "kindly" manner, refer such couples to other businesses, or so long as the couples can obtain similar services from other businesses. Arlene's Flowers concedes that it denied services to Respondents Robert Ingersoll and Curt Freed because they are a same-sex couple, despite the express prohibition of such discrimination under Washington law. In the face of that clear prohibition, Arlene's Flowers asks the Court to create a new exemption that would permit certain businesses to violate the plain language of the anti-discrimination law if customers can purchase similar services "nearby," Appellant's Br. at 24,

or even if customers are turned away "kindly and compassionately." *Id.* at 43. Any such exemption would be not only unworkable, but fatal to the core purposes of anti-discrimination laws, which exist as much to protect personal dignity and to further the state's compelling interest in eradicating the harms caused by discrimination as to ensure access to particular services.

Amici strongly agree with Respondents Ingersoll and Freed that requiring public businesses to comply with anti-discrimination laws such as the WLAD does not infringe upon religious liberty or freedom of speech. In this brief, amici address the related argument—also advanced by Arlene's Flowers—that permitting businesses to discriminate against same-sex couples does not cause any significant harm so long as other similar businesses are willing to serve them.

The argument advanced by Arlene's Flowers disregards an essential purpose of laws that prohibit discrimination by businesses operating in the public sphere. As the Washington State Legislature and the United States Supreme Court have explained, anti-discrimination laws are intended to uphold the dignity of all citizens, including persons denied service for a discriminatory reason by a single public establishment or on a single occasion, and to ensure that all persons can interact on equal terms in our shared civic life. Indeed, some of the most poignant images from

the civil rights movement of the 1960s were those of African-American citizens being denied service at lunch counters, restaurants, hotels, and other businesses purportedly open to the public. Whether or not those citizens could receive services elsewhere, or whether or not they were treated "kindly and compassionately," was irrelevant.

Discrimination causes serious harms that go far beyond the mere inability to purchase a particular product from a particular business. As research has shown, being targeted by discrimination inflicts a uniquely harmful type of injury, independent of any injury caused by the denial of an opportunity or service, and the negative impact can last throughout a person's life. Such injuries exact a serious toll on the health and wellbeing of individuals and our society as a whole.

By asking this Court to hold that businesses may discriminate on prohibited bases so long as customers can buy similar services "nearby," or so long as the customers are treated "kindly" when they are turned away, Arlene's Flowers misses the point of anti-discrimination laws and disregards the serious harms caused when businesses openly discriminate against particular groups. *Amici* urge the Court to affirm the order of the Superior Court.

B. Washington's Public Accommodations Laws Were Enacted To Protect Personal Dignity, Foster Participation in Civic Society, and Provide Equal Opportunities.

Arlene's Flowers argues that it should not be held liable for discriminating against Robert and Curt in part because the couple allegedly could have found another florist, including florists who offered to provide services free of charge. *See, e.g.*, Appellant's Br. at 13, 24, 46. In particular, Arlene's Flowers argues that the government has no compelling interest in prohibiting such discrimination when "no access problem exists" because the persons denied services by one business because of their sexual orientation or other protected characteristic can simply purchase the services elsewhere. *Id.* at 46. Arlene's Flowers also suggests that businesses should not be held liable for discrimination if that discrimination is done "kindly and compassionately." *Id.* at 43. These arguments disregard the core purposes of public accommodations laws, which seek not simply to ensure that individuals can receive services, but also to protect personal dignity, foster participation in civic society, provide equal opportunities to members of historically disadvantaged groups, and prevent the corrosive social and individual harms caused by discrimination in the public sphere.

Washington courts look to analogous provisions of federal law when applying the Washington Law Against Discrimination ("WLAD").

See Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 247 & n. 98, 59 P.3d 655 (2002) (citing a federal court's interpretation of the Civil Rights Act of 1964 in construing the WLAD's application to public accommodations); "When interpreting Washington law, [Washington courts] may look to federal case law when a federal anti-discrimination law contains the same protections and mandates the same broad construction." *Tafoya v. State Human Rights Comm'n*, 177 Wn. App. 216, 224, 311 P.3d 70 (2013). The history of federal anti-discrimination laws is therefore instructive in understanding the purposes of the provisions at issue here and how the exemption sought by Arlene's Flowers would undermine the primary reasons that such laws exist.

Early federal laws barring discrimination in public accommodations focused on the negative psychological and social impacts of such discrimination, rather than on the mere denial of services. When the Senate Commerce Committee reviewed the Civil Rights Act of 1964, the committee found that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." Senate Commerce Committee Report on the Civil Rights Act of 1964, S. Rep. No. 872, at 16 (1964).

Similarly, the United States Supreme Court has explained that public accommodations laws do not focus on "mere economics," *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291, 85 S. Ct. 348, 13 L. Ed. 2d 858 (1964) (Goldberg, J., concurring); rather, they "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Id.* at 250 (citing S. Rep. No. 872 at 16-17). Public accommodations laws also serve to "eliminate the unfairness, humiliation, and insult" of discrimination "in facilities which purport to serve the general public." *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64, 67 (5th Cir. 1975); *Anderson v. Pantages Theater Co.*, 114 Wash. 24, 31, 194 P. 813 (1921) (noting that discrimination in public accommodations "carries with it the elements of an assault upon the person, . . . personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering").

Selective enforcement of anti-discrimination laws—permitting some businesses to discriminate because a person may purchase the same item or service from another business or was treated "compassionately"—would defeat a core purpose of the laws by permitting virtually any business at any time to treat a class of persons as second-class citizens, so long as there are at least some other businesses that do not discriminate.

Indeed, if adopted by courts in the past, such a rule would have permitted many forms of racial segregation to continue virtually unabated—for example, by permitting restaurants and lunch counters to exclude African-American patrons so long as they could be seated at other establishments or so long as they were turned away politely. Such a result is unthinkable and underscores the dangerous and far-reaching implications of the position Arlene's Flowers proposes.

Recognizing such an exemption would defeat the main reason public accommodations laws exist—to "protect[] the State's citizenry from a number of serious social and personal harms" by ensuring that members of historically disadvantaged groups can participate as full members of civic society. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *see also* RCW 49.60.010 (noting that discrimination "menaces the institutions and foundation of a free democratic state"). As the U.S. Supreme Court explained in *Romer v. Evans*, states have enacted anti-discrimination laws in order to protect their citizens "against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Because discrimination "forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities,"

discrimination in public spheres "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625.

The exemption sought by Arlene's Flowers is also profoundly inconsistent with "the goal of equal opportunity, a value that is central to American constitutionalism." Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. Rev. 1243, 1249 (1997). "The enactment of a public accommodations statute is one highly effective way in which a state can attempt to level society's playing fields, thus enabling each of its citizens to fulfill his potential." *Id.* Laws such as the WLAD play a critical role in promoting social cohesion and equality, protecting vulnerable individuals and groups from the "stigmatizing injury, and the denial of equal opportunities" caused by discrimination in the public sphere. *Roberts*, 468 U.S. at 625.

Our nation's highest court has repeatedly recognized this goal of eradicating discrimination as a "compelling" interest "of the highest order." *Id.* at 628 (finding that Minnesota's "compelling interest in eradicating discrimination" against women justified application of the state's anti-discrimination law despite a possible impact on associational freedom); *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). This Court has

similarly held that WLAD's purpose "to deter and eradicate discrimination in Washington" is "a public policy of the highest priority." *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848, 292 P.3d 779 (2013). The WLAD recognizes that "practices of discrimination against any of its inhabitants . . . 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.

Arlene's Flowers's argument undermines the core purposes of Washington's public accommodations law—to protect the equality and dignity of members of disadvantaged groups and to allow them to participate fully in civic society. Whether the Plaintiffs could find another florist or whether they were treated kindly is irrelevant to their claim under the WLAD. Washington prohibits discrimination by businesses because such discrimination is inherently damaging to "the institutions and foundations of a free democratic state," RCW 49.60.010, and because it stigmatizes and injures individuals, thus undermining the shared values of equal dignity and equal citizenship. By suggesting that the State has an interest in prohibiting discrimination only if the victim cannot obtain services elsewhere or is treated with open contempt, Arlene's Flowers

presents a radical—and unsupported—view of the law that ignores the State's compelling interest in eradicating discrimination.

Arlene's Flowers's position also disregards the clear language of Washington's laws, which contain no exception for an otherwise unlawful refusal of service simply because the person could obtain the service elsewhere. *See* RCW 49.60.303*; see also State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010) (holding that where the provisions of a statute are clear, "its meaning is to be derived from the language of the statute alone."). If the legislature had intended to create such a significant exception to the WLAD—permitting businesses to discriminate so long as customers can obtain similar services "nearby"—it would have said so. In the absence of any such provision, the plain language of the WLAD must control, and the statute must "be construed liberally for the accomplishment of [its] purposes." RCW 49.60.020. The rule proposed by Arlene's Flowers' would do just the opposite—creating an unwritten exception that would impede the WLAD's purposes and greatly narrow its scope.

C. Discrimination Causes Serious Physical, Psychological, and Social Harms.

The exemption sought by Arlene's Flowers also fails to recognize the full impact of discrimination on the individuals affected. Being

exposed to an act of discrimination causes unique and serious harms that go well beyond the mere denial of an opportunity or service, and that may have a lasting negative impact on a person's long-term health and wellbeing. Prejudice-related stressful life events have a unique deleterious impact on health that persists above and beyond the effect of stressful life events unrelated to prejudice. David M. Frost et al., *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 J. of Behavioral Med. 1, 1 (2015).

Leading medical and mental health authorities, such as the American Psychological Association and the federal Centers for Disease Control and Prevention ("CDC"), have found that discrimination based on sexual orientation and gender identity "detrimentally affect[s] psychological, physical, social, and economic well-being." *See* American Psychological Association, *Sexual Orientation & Marriage* (July 28 & 30, 2004), http://www.apa.org/about/policy/marriage.aspx; Centers for Disease Control and Prevention, *Stigma and Discrimination* (updated Sept. 17, 2015), http://www.cdc.gov/msmhealth/stigma-and-discrimination.htm.

The stress caused by discrimination based on a person's sexual orientation or gender identity can lead to serious health risks, including increased risk for cardiovascular disease and diabetes; higher rates of

asthma, allergies, osteoarthiritis, and chronic gastro-intestinal problems; and an earlier onset of disabilities. David J. Lick et al., *Minority Stress and Physical Health Among Sexual Minorities*, 8 Perspectives on Psychological Science 521 (Sept. 2013); *see also* Kerith J. Conron et al., *A Population-Based Study of Sexual Orientation Identity and Gender Differences in Adult Health*, 100 Am. J. of Pub. Health 1953 (Oct. 2010); Massachusetts Department of Public Health, *The Health of Lesbian, Gay, Bisexual, and Transgender (LGBT) Persons in Massachusetts* (2009) (available at http://www.mass.gov/eohhs/gov/departments/dph/programs/admin/dmoa/repi/the-health-of-lgbt-persons.html).

Stigma and discrimination can lead to serious psychological harms as well. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychological Bulletin 674 (Sept. 2003). Individuals who are targeted because of their sexual orientation or gender identity suffer significantly increased mental health problems, including higher rates of substance abuse, affective disorders such as depression and anxiety, and even suicide. *Id.*.

Experiences of stigma and discrimination "can significantly lower the self-esteem of stigmatized individuals, leading to social withdrawal,

decreased expectation for oneself, avoidance of attempts at high achievement, and angry resentment." Brief of Amici Curiae American Anthropological Association et al. Addressing California Proposition 8's Stigmatizing Effects, *Hollingsworth v. Perry*, 2013 WL 769317 at *11(U.S. Supreme Court No. 12-144) (Feb. 28, 2013).

Moreover, once an individual has experienced discrimination, even ostensibly minor events "can be evocative of past and present feelings of social disapproval, rejection, and disrespect." *Id.* at 8-9. Thus, victims of discrimination may continue to experience many residual mental health problems, including "sleep disturbances and nightmares, headaches, diarrhea, uncontrollable crying, agitation and restlessness, increased use of drugs, and deterioration in personal relationship." Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 Journal of Interpersonal Violence 366 (1990).

In sum, a robust body of research shows that acts of discrimination do more than deprive individuals of particular services—they also cause serious harms to health and wellbeing, at great cost to the individuals directly affected and to society as a whole. These findings bolster the State's compelling interest in eradicating discrimination based on personal characteristics such as race, religion, gender, sexual orientation, and gender identity. They also show that discrimination causes serious harms

even when a person can obtain services elsewhere. No public accommodation should receive a "free pass" to discriminate, even under purportedly limited circumstances, because the harms inflicted by that discrimination reverberate more broadly and in ways that are demeaning of human dignity and health.

IV. CONCLUSION

For the reasons stated above, the Court should affirm the order of the Superior Court.

SUBMITTED this 8th day of February, 2016.

Karolyn A. Hicks
WSBA #30418
STOKES LAWRENCE, P.S.

Shannon Minter
Christopher Stoll
NATIONAL CENTER FOR LESBIAN RIGHTS

Attorneys for *Amicus Curiae*

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 8th, 2016, I arranged for service of the foregoing Amicus Curie Brief to the court and to the parties to this action by email:

Kristen K. Waggoner at kwaggoner@telladf.org
John R. Connelly at jconnelly@connelly-law.com
George Ahrend at gahrend@ahrendlaw.com
Alicia M. Berry at aberry@licbs.com
Attorneys for Appellants

Todd Bowers at toddb@atg.wa.gov
Kimberlee Gunning at kimberleeg@atg.wa.gov
Attorneys for State of Washington

Michael R. Scott at mrs@hcmp.com
Amit D. Ranade at amit.ranade@hcmp.com
Jake Ewart at mje@hcmp.com
Margaret Chen at mchen@aclu-wa.org
Elizabeth Gill at egill@aclunc.org
Attorneys for Respondents Mr. Robert Ingersoll and Mr. Curt Freed

Melissa Raynor-Redmond
Practice Assistant