No. 91615-2

IN 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 STUTZMAN,

Appellants.

INGERSOLL and FREED,

Respondents,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS

Kristen K. Waggoner
WSBA no. 27790
Jeremy Tedesco*
AZ no. 023497
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
kwaggoner@adflegal.org
jtedesco@adflegal.org
**pending pro hac vice admission*

John R. Connelly
WSBA no. 12183
CONNELLY LAW OFFICES
2301 N. 30th St.
Tacoma, WA 98403
jconnelly@connelly-law.com

George Ahrend
WSBA no. 25160
AHREND LAW FIRM PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
gahrend@ahrendlaw.com

Alicia M. Berry
WSBA no. 28849
LIEBLER, CONNOR, BERRY & ST. HILAIRE, PS
1411 N. Edison St., Ste. C
Kennewick, WA 99336
aberry@licbs.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Mrs. Stutzman does not claim "that if an activity is expressive, the government cannot regulate it at all." Att'y Gen. Resp. Br. ("A.G. Br.") 25. She merely asks to have her constitutional rights to free speech and free exercise accounted for when the Court construes and applies the WLAD and CPA. Such balancing is mandated by this Court's precedent, which requires that courts "construe statutes to avoid constitutional doubt." *Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015). Public accommodation laws are not exempt from this rule. The U.S. Supreme Court has struck down the application of public accommodations laws applied to expressive activity on First Amendment grounds, despite claims of sexual orientation discrimination. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

Yet the State agrees with the trial court's extreme position that there can *never* be "a free speech exception (be it creative, artistic, or otherwise) to antidiscrimination laws applied to public accommodations." CP 2348. In keeping with *Hurley* and *Dale*, not to mention this Court's own free speech and free exercise precedent, the Court should hold that the WLAD and CPA do not require Mrs. Stutzman to create expression that violates her faith and artistic integrity.

Such a ruling is particularly appropriate under the circumstances of this case, where there is no evidence of animus based on sexual orientation. For over nine years Mrs. Stutzman designed floral arrangements marking events in Messrs. Ingersoll's and Freed's life together, knowing they identified as gay. She only once declined a commission from Mr. Ingersoll when his request would have required her to create expression that violated her beliefs. Mrs. Stutzman's decision was not irrational or invidious, but a reasoned one based on her sincere religious convictions about marriage that are shared by millions of people throughout the world. She conveyed her decision to Mr. Ingersoll in a kind and compassionate way. Afterward, they continued discussing his wedding plans and they hugged before parting ways.

This case boils down to this question: is there room in our tolerant, diverse, and freedom-loving society for people with different views about the nature of marriage to establish their "religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community"? *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). The trial court's and Respondents' answer is "no." Their view is that those who seek to establish their self-identity based on the millennia-old view that marriage is solely between a man and a woman may be coerced by law to express different views or be

silenced. This is contrary to the best of our historical and constitutional traditions, which mandate that citizens who hold non-majoritarian views be given room to express them and not be coerced, punished, and marginalized through force of law.

The trial court's and Respondents' view—that there can never be a free speech exception to public accommodation laws—endangers everyone. If correct, then the consciences of all citizens are fair game for the government. No longer could a gay print shop owner decline to print shirts adorned with messages promoting marriage between one man and one woman for a religious rally. Nor could an atheist painter decline to paint a mural celebrating the resurrection of Christ for a church. Indeed, no speaker could exercise esthetic or moral judgments about what projects to take on where a customer claims the decision infringes on his or her rights under the WLAD.

That is why the outcome here is so important. The freedoms Mrs. Stutzman seeks to vindicate provide an essential bulwark against government encroachments on all citizens' consciences. She stands with the gay print shop owner, atheist painter, and all other artists and speakers who may conscientiously object to promoting certain messages. If Respondents succeed in taking that right away from Mrs. Stutzman, they will have stripped it from everyone.

II. ARGUMENT

A. The State cannot constitutionally compel Mrs. Stutzman to engage in unwanted artistic expression.

1. Mrs. Stutzman's floral designs are protected artistic expression.

Mrs. Stutzman's custom floral designs are not "potentially expressive," A.G. Br. 25, as even the trial court recognized, CP 2347. They are *themselves* a form of pure artistic expression. As such, they are fully protected expression under the First Amendment. *Hurley*, 515 U.S. at 568-69 (recognizing that speech protections extend "beyond written or spoken words as mediums of expression," and specifically reach artistic expression); *Buehrle v. City of Key West*, — F.3d —, No. 14-15354, 2015 WL 9487716, at *2 (11th Cir. Dec. 29, 2015) (affirming First Amendment's broad protection of artistic expression); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) ("[T]he Supreme Court and our court have recognized various forms of entertainment and visual expression as purely expressive activities.").

This Court has held that even "wedding guests who celebrate nuptials by sounding their horns" are engaged in protected speech. *State v. Immelt*, 173 Wn.2d 1, 9 (2011). If simply making a congratulatory noise is speech, designing floral arrangements to celebrate a couple's union is surely protected expression as well. *See also id.* at 6 (noting the

State bears the burden of justifying speech restrictions). Moreover, weddings like parades "are public dramas of social relations." *Hurley*, 515 U.S. at 568 (quotation omitted); CP 608. Wedding floral arrangements inherently celebrate the couple's union and it is undisputed that Mrs. Stutzman's custom designs and floral services are individually tailored to that end. App. Br. 6-7, 25. Yet, the expression of a readily identifiable message is not required for art—a form of pure speech—to receive constitutional protection. *See Hurley*, 515 U.S. at 569 (First Amendment protection is not "confined to expressions conveying a 'particularized message.'"); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (same); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (same). Furthermore, Mrs. Stutzman has the constitutional right to determine, free from state interference, "what merits celebration" in the marriage context. *Hurley*, 515 U.S. at 574. Her sincere religious beliefs compel her to use her artistic talents to celebrate only those marriages that are between one man and one woman.

Importantly, the status of Mrs. Stutzman's floral designs as artistic expression cannot be disputed. Messrs. Ingersoll and Freed admit that Mrs. Stutzman's floral creations are "exceptional," "creative," and "thoughtful," CP 1741, 1745, 1795-98, 1852, and that floral designers like Mrs. Stutzman use wedding flowers to convey a "celebratory

atmosphere," "beautify the ceremony," "add a mood," and a certain "elegance," CP 1752, 1858. Mrs. Stutzman's expert confirmed this, testifying that she has a signature style that is reflected in all of Arlene's Flowers' work, CP 672, 1984, and that her wedding designs specifically "create a mood or feeling consistent with the personalities of the couple and . . . express the[ir] unity," CP 673.

Respondents virtually ignore the artistic nature of Mrs. Stutzman's floral design work, and thus never wrestle with the key question: whether free speech protections forbid Respondents from applying the WLAD and CPA to compel Mrs. Stutzman to create artistic expression that conflicts with her religious beliefs. Sidestepping the issue, they instead claim that Mrs. Stutzman's decision to engage in business transforms her artistic expression into a mere commodity that expresses no message at all. *See, e.g.*, Ingersoll & Freed Resp. Br. ("I.F. Br.") 36 ("Defendants do not . . . express any views of their own subject to constitutional protection . . .").

This argument is untenable. In the context of a tattoo-artist, the Ninth Circuit has explicitly rejected a similar argument:

> The fact that both the tattooist and the person receiving the tattoo contribute to the creative process or that the tattooist … 'provides a service,' does not make the tattooing process any less expressive activity, because there is no dispute that the tattooist applies his creative talents as well.

Anderson, 621 F.3d at 1062. This conclusion follows from common sense; the admissions of Messrs. Ingersoll and Freed, CP 15, 147, 1735, 1752, 1858; the uncontradicted testimony of Mrs. Stutzman and her expert witness, *see* App. Br. 4-7; and longstanding precedent.

As the Eleventh Circuit recently explained in another tattoo artist case, free speech protection is not a mantle worn by one party to the exclusion of others depending on factors like artistic technique, the medium in question, and each party's creative input. *Buehrle*, 2015 WL 9487716, at *2. Art frequently incorporates input from several parties, such as the artist and the patron. *Id.* at *3. That does not mean that free speech protections apply less strongly to Mrs. Stutzman who creates the expression than it does to the patrons who commission her art. *Id.*

The fact Mrs. Stutzman receives money for her artistic services has no bearing on the constitutional protection expression receives. Her designs are protected even though she would not have created them without the promise of payment, *Bery*, 97 F.3d at 696, and even though "compensation is received," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 783 (1988). Many times, the U.S. Supreme Court has rejected the State's opposing view.[1]

[1] *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011) (noting "economic motive[s]" result in "a great deal of vital expression"); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.6 (1988) (recognizing that "the degree of First Amendment

2. The compelled speech doctrine forbids applying the WLAD and CPA to compel Mrs. Stutzman's artistic expression.

Respondents argue that forcing Mrs. Stutzman to create expression that directly conflicts with her own views about marriage fails to even implicate her constitutional rights. A.G. Br. 24 ("Everyone understands that businesses sometimes do things with which they disagree because of legal requirements."); I.F. Br. 13 ("[T]he trial court's application of the WLAD does not require … Mrs. Stutzman to endorse the marriages of same-sex couples."). Their arguments cannot withstand scrutiny.

If the government could compel private citizens to create or convey unwanted expression simply because it was "legally required," as Respondents argue, *see* A.G. Br. 24; I.F. Br. 14, the compelled speech doctrine would cease to exist. *All* of the compelled speech the U.S. Supreme Court has invalidated in the last 70 years has been required by law.

West Virginia law, for example, required that school children salute the American flag and recite the Pledge of Allegiance. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943). Yet the U.S. Supreme Court held that the government could not compel them to communicate their agreement with its ideals in word or deed. *Id.* at 642. New

---

protection" speech receives "is not diminished merely because [it] is sold rather than given away").

Hampshire law compelled the married couple in *Wooley v. Maynard*, 430 U.S. 705, 707 (1977), to bear the state motto on their car license plates. Even so, the Supreme Court ruled that the government could not force them to foster a view they found morally objectionable. *Id.* at 715. North Carolina law similarly mandated that the professional fundraisers disclose the gross receipts they gave to charities to donors. *Riley*, 487 U.S. at 786. But that did not stop the U.S. Supreme Court from applying exacting First Amendment scrutiny and striking down the law, *id.* at 798-99. And federal law in *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2325-26 (2013), required organizations to affirm that they opposed prostitution before they received certain AIDS-prevention funds. Regardless, the Supreme Court invalidated that requirement and affirmed private citizens' constitutional right to decide what ideas and beliefs to express. *Id.* at 2327.

The same rule applies in the public accmmodation context. In *Hurley*, 515 U.S. at 561, an LGBT Irish group applied to march as a unit in a parade organized by a private group but their request was rejected. The LGBT group sued under state public accommodations law and Massachusetts courts ordered the parade organizers to include the group and "alter the expressive content of their parade." *Id.* at 572-73. The Supreme Court reversed and held that "[d]isapproval of a private speaker's

statement does not legitimatize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others." *Id.* at 581.

Nonetheless, the trial court's orders here force Mrs. Stutzman to do just that. The lower court held that Mrs. Stutzman must create artistic expression about marriage that is acceptable to Messrs. Ingersoll and Freed, yet conflicts with her religious belief that marriage is between a man and a woman, or face ruinous fines and attorneys' fees awards. That violates the First Amendment as free speech protections exist to shield "just those choices of content that in someone's eyes are misguided, or even hurtful." *Id.* at 574.

And it bears repeating that while Mrs. Stutzman intends her artistic creations celebrating marriage to convey a message, she need not prove that her floral arrangements convey a "particularized message" or that the government has compelled her to express one. No Supreme Court case has ever held such proof is necessary to prevail on a compelled speech claim. *See id.* Here, that is especially true, since compelled artistic expression is at issue. Indeed, as the Court has explained, "Arnold Schöenberg's atonal compositions, Lewis Carroll's nonsense verse, and Jackson Pollock's abstract paintings—regardless of their meaning, or lack thereof—are 'unquestionably shielded' as expressions of the creators'

perceptions and ideas." *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (quoting *Hurley*, 515 U.S. at 659). *See also Immelt*, 173 Wn.2d at 9 (protected speech includes congratulatory honking at wedding). So too are Mrs. Stutzman's artistic creations, including her choices of what art not to create.

For example, in *Hurley*, the Court noted that the excluded parade contingent could have been intending to express several possible messages. *Id*. But this proved irrelevant because "whatever the reason" the parade organizer excluded the contingent, it was enough that it simply "decided to exclude a message it did not like from the communication it chose to make." *Id.* That is precisely the constitutionally-protected choice Mrs. Strutzman has made here. Consequently, the trial court's orders compelling Mrs. Stutzman to create protected expression are unconstitutional and should be reversed. *Dale*, 530 U.S. at 659 (noting that in *Hurley* the Court "applied traditional First Amendment analysis to hold the application of [a] public accommodations law to [protected expression] violated the First Amendment").

3. *Rumsfeld* gives the State no constitutional cover to compel Mrs. Stutzman's artistic expression.

Respondents seek to avoid the controlling compelled speech precedent above by citing *Rumsfeld v. Forum for Academic and*

Institutional Rights, Inc., 547 U.S. 47 (2006), but they misconstrue that case's holding. *See, e.g.*, A.G. Br. 23 (arguing that *Rumsfeld* categorically upheld "equal-treatment requirements"); I.F. Br. 35 (same). In *Rumsfeld*, 547 U.S. at 54, the Supreme Court upheld a condition on funding by the Department of Defense that required universities to give military recruiters the same access to campus provided other employers. The court did so not because it generally approved of "equal treatment" requirements, but for three fact-specific reasons.

First, under its war powers, Congress could have directly required the universities to give equal access to military recruiters. The fact that Congress chose to use federal funding as a carrot instead of a war powers stick meant that the net effect on the universities was positive—the funding requirement provided more freedom rather than less. *Id.* at 58. That Congress could have successfully invoked its war powers to obtain the same result and that judicial deference is at its apogee where the national defense is concerned were crucial factors in the *Rumsfeld* Court's analysis. *See id.* at 58-60.

Second, the funding condition in *Rumsfeld* had no effect on the universities' own speech. *Id.* at 60. The universities were simply required to forward recruitment e-mails and post meeting notices on bulletin boards on the military's behalf. *Id.* at 61. Because these expressive actions were

negligible and purely ancillary to providing military recruiters physical access to campus, the Supreme Court held that they did not interfere, or imply any association, with the universities' own message opposing the "Don't Ask Don't Tell" policy. *Id.* at 64-65.

Third, the *Rumsfeld* Court held that the actions required of the universities did not qualify as expressive conduct. The Supreme Court explained that the Free Speech Clause safeguards only inherently expressive conduct. *Id.* at 66. What the universities sought to do—requiring military recruiters to interview at less convenient locations than other recruiters—was not expressive in and of itself. Accordingly, the Court ruled that their conduct was not protected speech. *Id.*

Not one of these factors applies here. The State has no war powers to invoke. And rather than incentivizing Mrs. Stutzman to create expression for the government by offering a "carrot" of government funds, the State is requiring her to do so for third parties with a "stick" of large fines and attorneys' fees awards.

Furthermore, no legitimate argument exists that applying the WLAD and CPA here would not effect Mrs. Stutzman's expression. The State seeks to compel her to actually *create* artistic expression that is diametrically opposed to her faith. In the iconic form of custom-designed wedding flowers, Mrs. Stutzman uses floral designs to create a mood

consistent with the personalities of the couple and to express their personal union through the meaning and symbolism (or language) of flowers. Appellants' Brief "App. Br." 5-6. To do so, she must become "emotionally invested not only in the final floral creation, but the ceremony" and apply her expertise in the components of design, such as color, space, depth, and texture, to create an artistic product. *Id.* If "the passive act of carrying the state motto on a license plate" unconstitutionally associated the drivers in *Wooley*, 430 U.S. at 715, 717 n.15, with the state's values, then forcing Mrs. Stutzman to actually *create* expression for Messrs. Ingersoll's and Freed's religious wedding unlawfully associates her with their viewpoint on marriage, *id.* at 715. The right of free speech clearly safeguards Mrs. Stutzman's right "to hold a point of view different from the majority and to refuse to foster . . . an idea [she] find[s] morally objectionable." *Id.*

Respondents' additional argument that patrons *own* Mrs. Stutzman's expression for free speech purposes, I.F. Br. 36, is not only incorrect but also irrelevant. The government may not force Mrs. Stutzman to host or accommodate another speaker's unwanted message. *See, e.g.*, *Hurley*, 515 U.S. at 559 (forcing inclusion of LGBT group's message in parade unconstitutional); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (compelling utility to

include third-party speech in its newsletter unconstitutional); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (mandating right-of-reply in newspaper in favor of third parties unconstitutional).

Unlike many compelled speech cases, the State seeks to require Mrs. Stutzman to actually *create* unwanted artistic expression with her own hands or to supervise and approve of such expression via an employee's work. Regardless of whether Mrs. Stutzman creates a custom wedding arrangement herself or with an employee's assistance, that expression bears Arlene's Flowers' name and artistic style, and thus Mrs. Stutzman's imprimatur. CP 183-84 (Mrs. Stutzman's uncontradicted testimony that her name is associated with all of Arlene's Flowers' arrangements); CP 672-73 (expert testimony confirming that Mrs. Stutzman and Arlene's Flowers have their "own unique artistic style" that is "evident" in all the work they produce, including their wedding arrangements). Simply put, all of Arlene's Flowers' expression is attributable to Mrs. Stutzman. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends.").

4. *Roberts* and *Hishon* are inapposite.

The State frequently cites *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), but that case has no application here. *Roberts* involved a peculiar

situation in which the U.S. Jaycees, an organization open to all comers, permitted women to be associate members and to participate in almost all of its activities but excluded them from full membership for no rational purpose. *Id.* at 613, 621. The *Roberts* Court found that granting women full admission would have no effect whatsoever on the Jaycees' ability to disseminate its views or its right to exclude those with different ideologies or philosophies from membership. *Id.* at 627. Thus, the *Roberts* Court permitted the application of a state public accommodations law that prohibited discrimination based on sex, *id.* at 615-16. If the admission of women had imperiled the Jaycees' ability to keep out opposing viewpoints, the *Roberts* Court would have ruled differently. *Id.* at 627-28.

Unlike *Roberts*, affirming the trial court's order here would not only impede Mrs. Stutzman's artistic expression, it would force her to *create* expression promoting an opposing view that runs directly contrary to her faith. As in *Hurley*, where application of state public accommodations law would "derogate from the [parade] organization's expressive message," *Dale*, 530 U.S. at 661, application of the CPA and WLAD here would detract from and fundamentally alter Mrs. Stutzman's creative expression about marriage. Such interference with a private speaker's religious and artistic expression is patently unconstitutional. *Hurley*, 515 U.S. at 576 (explaining the State may not require speakers

who are "intimately connected with the communication" to "affirm in one breath that which they deny in the next" (quotation omitted)).

The State's reliance on *Hishon v. King & Spalding*, 467 U.S. 69 (1984), a case in which the Supreme Court applied Title VII's ban on sex-discrimination to a law firm's exclusion of female attorneys from partnership, is similarly misplaced. King & Spalding could not explain how admitting a female partner would have *any effect* on its ability to contribute to the ideas and beliefs of society. *Id.* at 78. Its only rationale was invidious discrimination based on sex. *Id.*

In stark contrast, creating custom floral designs for Messrs. Ingersoll's and Freed's wedding would fundamentally change Mrs. Stutzman's artistic expression. App. Br. 30-31, 34-35. Reasoned distinctions among artistic subject matter are not invidious discrimination but a necessity in the world of art. App. Br. 6-7, 42-43.

That Respondents do not understand Mrs. Stutzman's distinction between creating expression celebrating marriage between one man and one woman and that celebrating *any other* marriage is beside the point.[2] A.G. Br. 24; I.F. Br. 14. Free speech protections ensure that Mrs. Stutzman's decision regarding what marriages merit celebration is

[2] As the uncontradicted testimony of Mrs. Stutzman's theological expert witness explained, this distinction is reasoned and grounded in the teachings of Mrs. Stutzman's faith. CP 606-09.

"beyond the government's power to control." *Hurley*, 515 U.S. at 575. As in *Hurley*, where a state court ordered a private parade group to give an LGBT group access to its expression, the trial court's order declares Mrs. Stutzman's "speech itself to be the public accommodation." *Id.* at 573. But, as *Dale* explained, no amount of "public or judicial disapproval of a tenet of [Mrs. Stutzman's] expression" about marriage can justify the State's efforts to alter her message. 530 U.S. at 661.

5. The State's proposed unconstitutional condition compounds the constitutional harm.

The State claims that forcing Mrs. Stutzman to create unwanted expression is really no restriction at all, or at least not a substantial one. *See, e.g.*, A.G. Br. 30 (arguing Mrs. Stutzman isn't required to offer any service); *id*. at 23, 30 (arguing that if Mrs. Stutzman does not want to create floral arrangements for weddings that violate her faith, she can just stop providing wedding floral services). But Mrs. Stutzman's right to create artistic expression is not contingent on her willingness to accept all commissions. The State cannot condition Mrs. Stutzman's ability to create expression about marriage between a man and a woman on her agreement to create unwanted expression about other unions. *See DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001) (explaining that it is impermissible for the government to dilute private speech by

compelling private speakers to include all views on a topic) (citing *Hurley*, 515 U.S. at 575-76). Such a requirement would force Mrs. Stutzman to endorse Messrs. Ingersoll's and Freed's views on marriage and unlawfully burdens the exercise of her free speech rights. *Pac. Gas*, 475 U.S. at 18 ("[F]orced association with potentially hostile views burdens the expression of views different from [Respondents] and risks forcing [Mrs. Stutzman] to speak where [she] would prefer to remain silent").

The State's "solution" is that Mrs. Stutzman can just stop creating floral designs celebrating any weddings. But that an order compelling unwanted speech might lead the speaker to "blunt[]," "reduce[]," or eliminate its other constitutionally protected expression is an unconstitutional effect of the order, *not a cure for its unconstitutionality*. *See Tornillo*, 418 U.S. at 256-57 (italics added). If the State's' "solution" were permissible, the government would have the power to compel unwanted speech as an indirect means of silencing a speaker's desired expression. That is not the law, for it is just as unlawful for the government to deter or chill Mrs. Stutzman from operating an expressive business as it is for the government to prohibit her from operating such a business directly. *In re Dyer*, 175 Wn.2d 186, 203 (2012) ("[T]he government cannot condition the receipt of a government benefit on

waiver of a constitutionally protected right.") (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

B. Forcing Mrs. Stutzman to provide artistic services that contradict her faith violates her free exercise rights.

1. The State has violated Mrs. Stutzmans' rights under Article I, Section 11 of the Washington Constitution.

This Court is vigilant about addressing state constitutional issues separately, and here Wash. Const. Art. I § 11 provides more protection for religious freedom than its federal counterpart. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009). It protects religious beliefs and religiously motivated conduct, *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 224, 840 P.2d 174 (1992), and mandates strict scrutiny be applied to a substantial burden on sincere religious belief or conduct. *Woodinville*, 166 Wn.2d at 642. And though only "substantial" burdens trigger strict scrutiny under Art. I § 11, even a regulation that "indirectly burdens the exercise of religion" warrants strict scrutiny review. *First Covenant*, 120 Wn.2d at 226.

By exempting ministers and religious organizations from public accommodation laws that would otherwise require them to provide services related to marriage, RCW 26.04.010(4)-(6), the State has openly acknowledged that applying the WLAD and CPA in the marriage context

substantially burdens the free exercise of religion. Yet Respondents argue that Mrs. Stutzman loses her fundamental right to religious liberty because she operates an expressive business rather than a church. A.G. Br. 29, 32; I.F. Br. 15. Nothing in law or logic supports this view.

Both the U.S. Supreme Court and the Ninth Circuit have held that closely-held businesses like Arlene's Flowers may assert the free exercise rights of the families that own them. *Hobby Lobby*, 134 S. Ct. at 2768 ("[P]rotecting the free-exercise rights of corporations … protects the religious liberty of the humans who own and control those companies."); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) ("We have held that a corporation has standing to assert the free exercise right of its owners."). This Court should do the same.

In response, Respondents argue that *United States v. Lee*, 455 U.S. 252 (1982), holds that free exercise rights are waived in regard to commercial activity. A.G. Br. 2; I.F. Br. 15. But *Lee* recognized that "compulsory participation in the social security system interferes with . . . free exercise rights." 455 U.S. at 257. Thus, the *Lee* Court *found* a "burden[]" on religious liberty. *Id*. It did not reject any free exercise inquiry in the commercial context; rather, *Lee* simply held that imposing social security taxes on all citizens satisfies strict scrutiny. *Id.* at 258-61. But as the Supreme Court recently explained in *Hobby Lobby*, 134 S. Ct.

at 2784, that conclusion applies only to national taxation, not all endeavors related to commercial activity. *Id.* at 2770, 2784.

Respondents' citation of *Backlund v. Bd. of Comm'rs of King Cty. Hosp. Dist. 2*, 106 Wn.2d 632 (1986), is equally misplaced. A.G. Br. 28; I.F. Br. 15. In *Backlund*, 106 Wn.2d at 644, a doctor lodged a religious objection to purchasing professional liability insurance. This posed an obvious risk to the health and safety of his patients. *Id.* at 642. But rather than rejecting Dr. Backlund's free exercise claim out of hand, this Court *found* a burden and required the hospital that fired him to overcome strict scrutiny. *Id.* at 641. The hospital ultimately prevailed not simply because Dr. Backlund's religious exercise affected third parties but because (1) significant findings of fact established the compelling nature of the insurance requirement and (2) its purposes could not be achieved by any less restrictive means. *Id.* at 645-47. Far from supporting Respondents' assertions, *Backlund* thus shows that even business-related restrictions on healthcare providers must satisfy strict scrutiny if they burden religious freedom, as the trial court recognized. CP 2356.

Forcing Mrs. Stutzman to create unwanted expression celebrating Messrs. Ingersoll's and Freed's marriage undoubtedly poses a heavy burden on the exercise of her faith. Critically, whether a substantial burden exists depends on Mrs. Stutzman's religious perspective, *cf. Hobby*

Lobby, 134 S. Ct. at 2778, *not* the standpoint of those who seek to compromise her faith, A.G. Br. 29-30; I.F. Br. 25.[3] Both Mrs. Stutzman and her theological expert witness testified that using her art to celebrate a religious same-sex marriage would violate religious beliefs. CP 47, 606-09. This goes beyond a "slight inconvenience."[4] *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642-44 (2009).

Compelled attendance or participation in a religious exercise that Mrs. Stutzman views as theologically incorrect, such as Messrs. Ingersoll's and Freed's religious wedding, also severely burdens her free exercise rights. CP 606-09. Both the State and federal constitutions prohibit forced attendance at a religious event or involuntary participation in a religious practice. *Backlund*, 106 Wn.2d at 639 (quoting *United States v. Ballard*, 322 U.S. 78, 86-87 (1944)) (free exercise rights "'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship'"). But if Mrs. Stutzman continues to

---

[3] Mrs. Stutzman's religious understanding of marriage, as explained by the uncontradicted testimony of her expert witness, *see* App. Br. 8, need not be comprehensible or consistent to outsiders to merit free exercise protection, *see Backlund*, 106 Wn.2d at 640 (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981)). But, as the Supreme Court has already held, Mrs. Stutzman's religious understanding of marriage is rational and "based on decent and honorable religious or philosophical premises." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

[4] *But see Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) ("[C]ourts must not presume to determine the place of a particular belief in a religion . . . "); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

offer the superior personal service at weddings for which she is known, that is exactly what the trial court's orders require of her. CP 2420, 2554.

Contrary to the State's assertions, there is no option that would allow Mrs. Stutzman to comply with the trial court's orders and her faith. A.G. Br. 29. Arlene's Flowers' expression is equally attributable to Mrs. Stutzman regardless of whether she or an employee creates it. *See supra* Part II.A.3. Mrs. Stutzman has created custom wedding designs for her clients for decades. It is not only a service they expect but one Mrs. Stutzman finds religiously fulfilling because it allows her "to participate in marriage." CP 539. Not creating wedding designs altogether is not a means of complying with Mrs. Stutzman's religious beliefs—faith is what motivates her to celebrate marriage through her art. CP 539-43. It is a substantial burden on these beliefs, as the trial court rightly assumed, CP 2356, and as Appellants have explained, App. Br. 33-34.

Moreover, although it is not material to the substantial burden analysis, the economic value of floral designs pales in comparison to the relationship Mrs. Stutzman establishes with a new family who will return for designs celebrating Valentine's Days, Mother's Days, and a host of other occassions for decades. Weddings are also frequently large events and clients come to Mrs. Stutzman based on her floral designs they saw or

interactions they had with Mrs. Stutzman at a ceremony. CP 539. Strict scrutiny thus applies under the Washington Constitution.

2. The WLAD and CPA are not neutral or generally applicable under the United States Constitution.

Respondents readily acknowledge that the WLAD and CPA contain multiple secular and religious exemptions but contend they are neutral and generally applicable regardless. A.G. Br. 43-46. Their logic is that statutory exemptions are only relevant if the State's refusal to grant one to Mrs. Stutzman derives from religious animus. A.G. Br. 44; I.F. Br. 19. But illicit intent is not the *sine qua non* of a First Amendment violation. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). Proof of hostility or discriminatory motivation is *sufficient* to show that a law violates the Free Exercise Clause, but it is not *required*. *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006); *see, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (nine Justices found a free exercise violation while only two cited intent).

As Justice Alito explained when he was on the Third Circuit, the fact that a secular exemption is permitted while the requested religious exemption is denied amply shows a lack of neutrality on the State's part. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) ("[W]e conclude that the

Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*."). The State concedes these facts here. A.G. Br. 43-46. Moreover, the State's actions here are not tailored to combat invidious discrimination but hinder much more of Mrs. Stutzman's religious exercise than is necessary. *Lukumi*, 508 U.S. at 538 (recognizing laws "which visit[] gratuitous restrictions on religious conduct" are not neutral (quotation omitted)). For instance, Respondents contend that RCW 49.60.215(1) makes it unlawful for Mrs. Stutzman to do anything that even makes an *indirect* distinction between her religious message and Messrs. Ingersoll's and Freed's competing marriage views. A.G. Br. 13-14; I.F. Br. 8.

In terms of general applicability, the gold standard is the across-the-board criminal prohibition at issue in *Smith*, 494 U.S. at 884. The State concedes that the WLAD and CPA fall well short of this mark by exempting ministers, religious organizations and small businesses, as well as certain tenants and employees. A.G. Br. 43-46. Because the WLAD and CPA fail to prohibit secular and religious conduct that endangers the government's alleged interest in nondiscrimination to the same degree as Mrs. Stutzman's religious conduct, they fail the general applicability test. *Lukumi*, 508 U.S. at 543 (holding a law not generally applicable because it

"fail[ed] to prohibit nonreligious conduct that endanger[ed] [its] interests in a similar or greater degree than" the religious conduct in question). Strict scrutiny thus applies under the U.S. Constitution as well.

C. Freedom of expressive association protects more than group membership.

Respondents argue that the freedom of expressive association does not apply to Mrs. Stutzman because this case is not about group membership. A.G. Br. 47; I.F. Br. 39-40. But *Roberts*, 468 U.S. at 618, 622, explains that the freedom of association protects Mrs. Stutzman's ability to associate for the purpose of engaging in *any activity* protected by the First Amendment, including a wide variety of political, social, economic, educational, religious, and cultural ends. To claim its protection, Mrs. Stutzman must simply show that she "engage[s] in some form of expression." *Dale*, 530 U.S. at 648. She passes this threshold by collaborating with others to create artistic floral designs that communicate "those views, and only those views, [about marriage] that [she] intends to express." *Id*. 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. *Id.*

Respondents inconsistently contend that membership cases like *Dale* are irrelevant here. A.G. Br. 47. Respondents themselves rely heavily on *Roberts*, a case which arose in the group membership context. A.G. Br. 33-34, 37-38; I.F. Br. 30-31, 35, 37. Respondents assert that patrons like Messrs. Ingersoll and Freed *own* Mrs. Stutzman's expression for free speech purposes, but that they are complete *outsiders* to her expressive endeavors for purposes of free association. I.F. Br. 36, 39. Such contradictory arguments are self-defeating.[5]

In short, strict scrutiny applies because the State seeks to prohibit Mrs. Stutzman from selecting the artistic endeavors she collaborates with others to create. *United States v. Playboy*, 529 U.S. 803, 818 (2000) ("The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. . . . [absent] Government . . . decree, even with the mandate or approval of a majority."); *Buehrle*, 2015 WL 9487716, at *3 ("Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work."). Eliminating that freedom undoubtedly "affects in a significant way" Mrs. Stutzman's ability to express her religious view of marriage through her art. *Dale*, 530 U.S. at 648. In fact, it forces her "to propound a point of

[5] Because Respondents' hybrid rights argument relies solely on their flawed free speech, free exercise, and free association analysis, Appellants will not separately address it here.

view contrary to [her] beliefs" or stop collaborating with others to create custom wedding designs altogether, thus forcing Mrs. Stutzman to cease associating with those who share her viewpoint. *Id.* at 654. As the U.S. Supreme Court has explained, the interests embodied in the State's public accommodations law do not justify such a severe intrusion on Mrs. Stutzman's constitutional rights. *Id.* at 659.

D. Application of the WLAD and CPA to compel Mrs. Stutzman to create unwanted artistic expression fails strict scrutiny.

Strict scrutiny is not the generic and superficial inquiry that the State claims, but rather is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It is simply not enough for Respondents to argue that eradicating discrimination is a compelling interest *per se,* particularly when *Roberts*, 468 U.S. at 628, and *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 n.5 (1988)—two of the principal cases upon which they rely—recognize a compelling interest only in combating *invidious* discrimination. A.G. Br. 33; I.F. Br. 29-30.

That courts may, at times, use imprecise language in describing the form of discrimination the government has a compelling interest in combating is beside the point. Washington's own Judicial Code of Conduct recognizes that eradicating invidious discrimination is the only

compelling interest the State possesses and that whether discrimination is invidious is a context-specific inquiry that depends on many factors, including the "religious, ethnic, or cultural values" in question. WA. R. CJC 3.6(A) cmt. 2. As the U.S. Supreme Court has explained, Mrs. Stutzman's reasoned religious and artistic distinctions are not invidious. *Obergefell*, 135 S. Ct. at 2603 (recognizing that belief in one-man, one-woman marriage is "based on decent and honorable religious or philosophical premises"); App. Br. 41-46.

Strict scrutiny, moreover, looks beyond broadly formulated interests in eradicating discrimination to the State's marginal interest in enforcing the WLAD and CPA as applied against Mrs. Stutzman. *Hobby Lobby*, 134 S. Ct. at 2779. That interest consists only of forcing Mrs. Stutzman to create unwanted artistic expression and services to any extent Messrs. Ingersoll and Freed desire. And that is not a valid, let alone a compelling, state interest.[6] *Hurley*, 515 U.S. at 578-79. Simply put, "[d]isapproval of a private speaker's statement does not legitimate use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others." *Id.* at 581. Nor can the State's

[6] Mrs. Stutzman clearly has no monopoly on floral design services that would silence Messrs. Ingersoll's and Freed's expression of competing marriage views. *Hurley*, 515 U.S. at 578. They readily obtained wedding flowers nearby and received "enough support from florists that [they] could get married about 20 times and never pay a dime for flowers." CP 1271; 1746-47; 1860, 1867.

interest be compelling here since it leaves significant damage to that interest unprohibited, as both the WLAD and CPA contain numerous secular and religious exceptions. *Lukumi*, 508 U.S. at 547; App. Br. 38.

In addition to the State's inability to show a compelling interest here, to affirm this Court must conclude that enforcement of the WLAD and CPA would not "materially interfere with the ideas [Mrs. Stutzman seeks] to express." *Dale*, 530 U.S. at 657. This it cannot do. Even if the Court weighs Mrs. Stutzman's freedom of expressive association against the State's interest in ensuring access to floral design services, the State must lose because the trial court's orders require Mrs. Stutzman to *create* unwanted expression. *Id.* at 658-59 (explaining that, under the freedom of association, "after finding a compelling state interest," the Court has set "the associational interest in freedom of expression . . . on one side of the scale, and the State's interest on the other"); App. Br. 44- 46.

The State also bears the burden to show that compelling Mrs. Stutzman to engage in unwanted expression is the most narrowly tailored means of serving its interest. But all Respondents claim (without any supporting evidence) is that alternatives, such as referrals to other nearby florists, ranking programs, or directories, will cause consumers to take an action or be inconvenienced. A.G. Br. 37; I.F. Br. 45. That is insufficient.

Under strict scrutiny, this Court may not assume that any "plausible, less restrictive alternative would be ineffective." *Playboy*, 529 U.S. at 816.

By claiming a harm to dignity, Respondents attempt to bolster their vague assertions that no less restrictive alternative will do. A.G. Br. 37; I.F. Br. 45. Although being confronted with the reality that others disagree may be hurtful, it is not sufficient to compel expression. *Hurley*, 515 U.S. at 578-79 (attempting "to produce speakers free of . . . biases, whose express[ion] . . . would be at least neutral towards . . . particular classes . . . . is a decidedly fatal object"). Absent invidious or irrational animus, the fact that we live in a diverse society that encompasses a broad spectrum of views on controversial topics, such as marriage, is something to be celebrated and protected. And Mrs. Stutzman's dignity interest in the freedom of expression and free exercise of her religion is no less at stake. *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (noting that "free exercise is essential in preserving [believers'] dignity and in striving for a self-definition shaped by their religious precepts").

E. Mrs. Stutzman did not violate the WLAD.

1. Mrs. Stutzman's objection is based on her religious beliefs concerning marriage, not sexual orientation.

The trial court recognized that Ms. Stutzman declined to create unwanted expression for Messrs. Ingersoll's and Freed's wedding based

on her religious view of marriage. CP 2335. The facts bear this out. Messrs. Ingersoll and Freed spent at least $4,500 at Barronelle's shop and ordered floral arrangements from her thirty times or more over nearly a decade. CP 1735-36. If Mrs. Stutzman's objection were based on Messrs. Ingersoll's and Freed's sexual orientation, she would not have designed and created flowers celebrating their anniversaries, Valentine's Days, and private parties as a couple. CP 15, 147, 1735. Far from showing any animosity towards Messrs. Ingersoll and Freed or their relationship, Mrs. Stutzman always treated them with kindness and respect. App. Br. 11 n.4. She repeatedly discussed their relationship with Mr. Ingersoll and even spoke to him about the details of their wedding. CP 158, 543.

Mrs. Stutzman declined to participate in an event. It was the event, not Mr. Ingersoll's sexual orientation that caused her religious dilemma. The record contains no evidence suggesting otherwise and this Court must construe the facts in Mrs. Stutzman's favor. Indeed, the *only* reason Mrs. Stutzman referred this particular commission was because she believed that Mr. Ingersoll wanted her to create custom floral designs and the usual personal services she offers at weddings, including facilitating Messrs. Ingersoll's and Freed's wedding ceremony and reception. CP 47, 544-46; App. Br. 35. Both of these acts would violate Mrs. Stutzman's religious beliefs. CP 609. Given Mrs. Stutzman's long history of creating custom

designs for Messrs. Ingersoll and Freed, that she regularly employs and serves gay and lesbian individuals, and that she expected to be personally involved in the wedding ceremony and reception, this Court should conclude that referring this particular commission is not invidious discrimination "because of" sexual orientation in violation of the WLAD and CPA. RCW 49.60.030(1).

The trial court's contrary conclusion is based on its belief that same-sex marriage is limited to those of a particular sexual orientation. CP 2337-39. Respondents repeat this error by arguing that "only gay and lesbian people marry same-sex partners." A.G. Br. at 12; I.F. Br. 11.

That is simply not true. WLAD views human sexuality as a spectrum, rather than binary. As a result, it defines sexual orientation to include bisexuality. RCW 49.60.040(26). Bisexual persons are, by definition, attracted to members of either sex. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/ bisexual (last visited Dec. 28, 2015). If a bisexual man chooses to marry a straight or bisexual woman, Mrs. Stutzman will create expression celebrating that marriage.[7] But if the same bisexual male chooses to marry a bisexual or

[7] *See, e.g.*, Kevin John Zimmerman, *Maintaining Commitment in Long-Lasting Mixed-Orientation Relationships: Gay Men Married to Straight Women* (2013) (Digital Repository Theses and Dissertations, Iowa State University Graduate College), *(available at* lib.dr.iastate.edu/cgi/viewcontent.cgi?article=4471 &context=etd (last visited Dec. 28, 2015)); Amity P. Buxton, Not All 'Straight Spouses' Are Straight:

homosexual man, Mrs. Stutzman will refer because that union runs contrary to her religious understanding of marriage. In short, the sexual orientation of those marrying is irrelevant to Mrs. Stutzman. Her only concern is with creating expression that celebrates marriage between one man and one woman and no others, whatever the patron's sexual orientation or that of their spouse(s) may be.

In fact, when counsel asked Mrs. Stutzman whether she would create expression commemorating same-sex marriage for a heterosexual friend or best man, Mrs. Stutzman explained that she could not "make the bouquet for the wedding." CP 173. Mrs. Stutzman's religious objection is thus to the event. It makes no difference whether the patron is heterosexual, homosexual, or bisexual person, or an organization like GLAAD that has no sexual orientation at all.

Equally important, Mrs. Stutzman's religious objection applies to any marriage not between one man and one woman—not just same-sex unions. She will not, for instance, create expression celebrating the second (or subsequent) marriage of a polygamous couple who are heterosexual or bisexual and opposite sex. CP 545; *see Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2014) (striking down Utah's criminal ban on polygamous cohabitation). Because Mrs. Stutzman's religious

---

Bisexual Spouses in Mixed-Orientation Marriages, http://www.huffingtonpost.com/amity-p-buxton/not-all-straight-spouses_b_2033703 html (last visited Dec. 28, 2015).

objection extends to custom designs for any marriage between anyone other than one man and one woman whether they identify as heterosexual, bisexual, or homosexual, this Court should hold that her actions were based on religious precepts related to marriage, not sexual orientation.

2. Other courts have ruled that a content-based objection is not person-based discrimination.

Although the State claims that drawing any distinction between status and conduct in this context would be unprecedented, *see, e.g.*, A.G. Br. 12-13 ("[C]ourts have universally rejected a false distinction between status and conduct . . . ."), that is not the case. The U.S. Supreme Court has never considered a public accommodations suit involving same-sex marriage, but it has struck down *both* state court findings of sexual orientation discrimination that it has encountered on First Amendment grounds because application of those laws unconstitutionally interfered with private speech. *See Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 579.

This Court would not be the first to distinguish between sexual orientation discrimination and refusing to espouse third parties' competing views, as Respondents claim. I.F. Br. 1. *Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n*, No. 14-CI 04474, at 10 (Fayette Cir. Ct. Apr. 27, 2015), (see Appendix), for example, involved a religious business owner's decision not to print t-shirts

promoting a gay pride festival. A Kentucky trial court held that this denial "was based upon the *message* of . . . the Pride Festival and not on the *sexual orientation* of" the participants. *Id.* at 10. It also explained that private citizens have a "right to hold dearly and not be compelled to be part of the advocacy of messages opposed to their sincerely held Christian beliefs." *Id.* The same logic applies here. Mrs. Stutzman objects to being forced to create expression about marriage that violates her faith. Her religious and artistic freedom should be respected, just as Mrs. Stutzman respects Messrs. Ingersoll's and Freed's freedom to live out their beliefs.

A county human rights commission in Virginia also dismissed a sexual-orientation discrimination complaint based on a business owners' refusal to copy LGBT-advocacy videos because the law in question did "not prohibit content based discrimination." *Bono Film & Video, Inc. v. Arlington Cnty. Human Rights Comm'n*, 72 Va. Cir. 256, 2006 WL 3334994, at *2 (Va. Cir. Ct., Nov. 16, 2006). That distinction between content and sexual orientation applies here as well. Mrs. Stutzman's artistic choice of subject matter (or content) is to design flowers celebrating a sacred event, marriage between one man and one woman. Such marriages comport with the faith that inspires her work.

3. Respondents ignore the WLAD's textual distinction between sexual orientation and marital status.

Respondents identify two decisions from New Mexico and Colorado that have equated sexual orientation with marital status for purposes of applying their respective states' anti-discrimination laws. *See* A.G. Br., at 12-14 & n.2 (citing *Elane Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013)); I.F. Br., at 10-12 (citing *Elane* and *Craig v. Masterpiece Cakeshop, Inc.*, — P.3d —, 2015 WL 4760453 (Colo. App., Aug. 13, 2015), *rev. pending*). One of the reasons these cases are distinguishable is because, unlike Washington, New Mexico prohibits discrimination in public accommodations based on "spousal affiliation," and Colorado based on "marital status." *See Elane*, 309 P.3d at 60-61 (citing N.M. Stat. Ann. § 28-1-7(F)); *Craig*, 2015 WL 4760453, at * n.5 (citing Colo. Rev. Stat. § 24-34-601(2)(a)). In both cases, this language precluded defendants from distinguishing between sexual orientation and marital status.

In contrast, the WLAD omits "marital status" as a protected classification in the context of public accommodations, even though it provides protection to marital status in other contexts, such as insurance, employment and real estate. *Compare* RCW 49.60.030(1) & 49.60.215 *with* RCW 49.60.178, .180, .190, .200, .222 & .225. This provides an

explicit basis in the text of the WLAD for distinguishing discrimination based on sexual orientation from discrimination based on marital status. *See* App. Br., at 20-21.

4. *Bray* supports Mrs. Stutzman, not the State.

The State maintains that *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), supports their argument that there is no distinction between status and conduct in this context, but *Bray* aids Mrs. Stutzman not the State. A.G. Br. 12-13. The *Bray* Court encountered a claim that the organized obstruction of access to abortion clinics violated the Civil Rights Act of 1871 because it demonstrated animus towards women as a protected class.[8] *Id.* at 269. Although only women can become pregnant, the Court explained that not every act concerning pregnancy is a classification based on sex. *Id.* at 271. The abortion protestors operated from common, respectable motives that were not based on irrational opposition to women. *Id.* at 269-72. And the *Bray* Court required such invidious discriminatory animus before it would find a violation of 42 U.S.C. § 1985(3). *Id.* at 272.

Bray's invidious discrimination requirement supports Mrs. Stutzman's reading of the WLAD and CPA. App. Br. 19-21. Not every

[8] In light of constitutional concerns, the Supreme Court explained that it had interpreted 42 U.S.C. § 1985(3), which applies to both public and private conduct, as requiring "'invidiously discriminatory motivation.'" *Bray*, 506 U.S. at 268. This Court should do the same here to protect Mrs. Stutzman's constitutional rights.

act related to Messrs. Ingersoll's and Freed's marriage is a classification based on sexual orientation. Mrs. Stutzman's decision to decline Mr. Ingersoll's artistic commission was not based on invidious discrimination, but on the teachings of her faith that are shared by millions of people. And the U.S. Supreme Court has acknowledged that Mrs. Stutzman's religious distinctions regarding marriage are reasonable and have no underlying animus. *Obergefell*, 135 S. Ct. at 2594.

That some gay men engage in same-sex marriage (although some bisexual men do as well) does not invidious discrimination make. More is required, as the Washington State's Code of Judicial Conduct recognizes, "invidious discrimination is a complex question" that depends on many factors, including the "religious, ethnic, or cultural values of legitimate common interest" to their adherents. WA. R. CJC 3.6 cmt. 2. The State utterly fails to address this authority or the specific facts of this case, which plainly show that Mrs. Stutzman's decision was not invidious.

5. In urging that Mrs. Stutzman has no religious rights under the WLAD, the State ignores the text, purpose and required liberal construction of the law.

Respondents are unwilling to admit the possibility that Mrs. Stutzman has any rights as a religious business owner under the WLAD that must be balanced against the right to be free from discrimination based on sexual orientation. *See* A.G. Br., at 18; I.F. Br., at 14-17.

However, they avoid Mrs. Stutzman's arguments, which are grounded in the plain text, purpose and required liberal construction of the WLAD:

> • The WLAD protects religion as well as sexual orientation. *See* RCW 49.60.010 & 49.60.030(1); App. Br., at 21-22.
>
> • The WLAD's declaration of civil rights is broadly phrased in terms that include the right to operate a business without discrimination, including one that provides a public accommodation. *See* RCW 49.60.030(1); App. Br., at 21-22.
>
> • The declaration of civil rights contains a non-exclusive list of circumstances where civil rights are protected, thus not foreclosing protection of civil rights in other, unenumerated contexts. *See* RCW 49.60.030(1); *Marquis v. City of Spokane*, 130 Wn.2d 97, 105-13, 922 P.2d 43 (1996); App. Br., at 21-22.
>
> • The declaration of civil rights includes "[t]he right to engage in commerce free from any discriminatory boycotts or blacklists," confirming that persons do not forfeit their rights when they go into business. RCW 49.60.030(1)(f); *see* App. Br., at 20 n.12.
>
> • There is no express limitation on the rights of religious citizens simply because they engage in business or provide a public accommodation. *See* App. Br., at 22.
>
> • The purpose of the WLAD and statutory mandate of liberal construction require the Court to recognize the civil rights of business owners as well as customers. *See* RCW 49.60.010 & 49.60.020; App. Br., at 22.

Rather than addressing these points, the State and Respondendts cite RCW 49.60.215(1) to support an argument that the WLAD only protects customers of public accommodations, not business owners who provide public accommodations. *See* A.G. Br., at 18; I.F. Br., at 15-16. The cited statute, RCW 49.60.215(1), makes discrimination in public

accommodations an "unfair practice" for purposes of proceedings before the Washington State Human Rights Commission (HRC). *See* RCW 49.60.120(4) (conferring authority upon HRC "[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter"). In this way, RCW 49.60.215(1) reflects the HRC's enforcement authority and priorities. It does not act as a limit on the plain language or purpose of the WLAD.

Next, Messrs. Ingersoll and Freed argue that all businesses are subject to regulation, and that religious business owners cannot avoid regulation on grounds of their religion. *See* I.F. Br., at 15. This rebuttal is not responsive to Mrs. Stutzman's argument that her civil rights under the WLAD should be balanced against those of Mr. Ingersoll and Mr. Freed under the circumstances here. Messrs. Ingersoll and Freed assume that she has nothing to weigh in the balance.

Finally, Mr. Ingersoll and Mr. Freed caricature Mrs. Stutzman's position—that her rights should be balanced against those of Messrs. Ingersoll and Freed under this case's circumstances—as an attempt to "trump any customer's rights to access goods and services without discrimination." I.F. Br., at 16. Nothing could be further from the truth. The balancing approach proposed by Mrs. Stutzman is consistent with the approach taken by the Court in other contexts where there are competing

claims of right, and it does not foreordain that the rights of religious persons will prevail in all cases. Mrs. Stutzman acknowledges that the balance must be conducted on a case-by-case basis. *See* App. Br., at 23-24. At a minimum, the Court should acknowledge the existence of competing claims of right in this case, and hold that, under the narrow circumstances presented, the balance favors Mrs. Stutzman.[9]

F. It is not "unfair" for Mrs. Stutzman to refuse to create expression opposing the millennia-old teachings of her faith.

In support of its argument that Mrs. Stutzman committed an independent violation of the CPA, the State argues that her refusal to create unwanted expression was "unfair." A.G. Br. 19-22. But there is nothing "immoral, unethical, or oppressive" about Mrs. Stutzman's refusal to express an understanding of marriage that runs contrary to her faith. *Blake v. Fed. Way. Cycle Ctr.*, 40 Wn. App. 302, 310 (1985) (quoting *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)). Even *Obergefell*, 135 S. Ct. at 2594, recognized that Mrs. Stutzman's position on marriage is held in good faith by reasonable and sincere people throughout the world.

[9] The State (but not Messrs. Ingersoll and Freed) cites the immunity provision included in Referendum Measure No. 74, which amended the definition of marriage, to support its argument that Mrs. Stutzman should be held liable for declining to arrange flowers for Mr. Ingersoll's and Mr. Freed's wedding. *See* A.G. Br., at 15 (citing RCW 26.04.010(6)). While the grant of immunity can support an inference that liability exists under certain circumstances, it does not impose liability, nor does it define the contours of such liability. The liability, if any, of Mrs. Stutzman must be based on the WLAD's text.

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. The State implicitly acknowledges this fact by exempting ministers and religious organizations from public accommodation laws that would otherwise require them to provide "services, or goods related to the solemnization or celebration of a marriage." RCW 26.04.010(4)-(6).

This should make it apparent that public policy does not favor compelling Mrs. Stutzman to violate her religious beliefs, as the State suggests. A.G. Br. 19. On the contrary, the (1) existing religious exceptions to the State's public accommodation laws, (2) WLAD's prohibition on discrimination based on creed, and (3) protections for religious liberty included in Article 1, Section 11 all decisively show that public policy supports protecting Mrs. Stutzman's free exercise rights.

In the same vein, this Court has recognized that its "most important duty" under the State Constitution is to protect "religious liberty, and to see [it is] not narrowed or restricted because of some supposed emergent situation." *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 225 (1992) (quotation and alteration omitted). It should do just that here by reversing the trial court's unlawful ruling.

G. Mrs. Stutzman's requested exemption would not result in the harm that the State claims.

The exemption for expressive businesses that Mrs. Stutzman suggests would not have the adverse effects the State claims. In fact, it would not even apply to the scenarios that the State mentions. Mrs. Stutzman's opening brief explains that the narrow compelled-speech defense she advocates would be available only 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.

The State's warnings about discrimination at restaurants thus completely miss the mark. A.G. Br. 12, 37-38; I.F. Br. 11, 32, 43. There is nothing expressive about food commonly available at a restaurant. And the State has a compelling interest in ensuring access to necessities of life like food, shelter, and transportation—the traditional focus of state public accommodation laws. *See Dale*, 530 U.S. at 657. But expressive luxuries like Mrs. Stutzman's floral design services, are a different story. *Id.* at 658 (explaining that it is "peculiar" and unlawful for the State to apply a public accommodations law to give "'protected individuals with a message . . . the right to participate in [Mrs. Stutzman's] speech, so that the communication produced [is] shaped by all those protected by the law

who wished to join in with some expressi[on] . . . of their own'") (quoting *Hurley*, 530 U.S. at 572-73)).

Therefore, the answer to Respondents' menu hypothetical, A.G. Br. 12; I.F. Br. 11, is that Mrs. Stutzman is happy (and may be required) to sell Messrs. Ingersoll and Freed uncut flowers and premade arrangements. However, like the parade organizers in *Hurley*, 515 U.S. at 572-73, who could not be required "to alter the expressive content of their parade," the State cannot force Mrs. Stutzman to alter her artistic expression to include Messrs. Ingersoll's and Freed's competing view of marriage. That is not ordering off the menu, it is creating a new menu and it violates Mrs. Stutzman's "autonomy to choose the content of [her] own message." *Id.* at 573; *see id.* at 581 (explaining that private speakers may refuse the requests of those "whose manifest views [are] at odds with" their own).

Respondents wrongly argue that providing a compelled speech exception would result in untold "discrimination." I.F. Br. 45. Religious objectors engaged in expressive businesses in the State are rare, as demonstrated by this novel case. Discovery demonstrated that Messrs. Ingersoll and Freed had no substantive problems in the Tri-Cities area except a single waiter who for an unknown reason failed to offer them attentive service; rather, they both had a positive experience living in the Eastern part of the State. CP 1732-34, 1846-47. In fact, they were

inundated with offers of floral arrangements and hired two local florists—including one Mrs. Stutzman referred Mr. Ingersoll to—with ease. CP 1746, 1749-1750, 1853-55, 1867. Moreover, in the 7 year period from 2006-2013 the Human Rights Commission received only 70 complaints of sexual orientation discrimination in public accommodations—just 10 a year. Not a *single* complaint was substantiated. CP 1508-34.

Nor has nationwide discrimination against gays and lesbians flourished after the U.S. Supreme Court rejected state court findings of sexual orientation discrimination in *Hurley* (1995) and *Dale* (2000). Quite the opposite, after the court vindicated dissenters' free speech rights, positive attitudes towards gays and lesbians *increased* nationwide. That shows the path towards a peaceful and inclusive society is tolerance of diverse views, not stripping away objectors' right of conscience.

H. Respondents' warnings about pervasive racism and comparing Mrs. Stutzman's desire to create art consistent with her religious beliefs to race discrimination are unfounded.

Respondents wrongly claim that protecting religious liberty would lead to pervasive racial discrimination. I.F. Br. 16. The Supreme Court rejected this exact argument in *Hobby Lobby*. The primary *Hobby Lobby* dissent suggested that the Court's opinion would lead to race discrimination in hiring "cloaked as religious practice," but the Court responded that its decision "provides no such shield" and that "[t]he

Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." 134 S. Ct. at 2783.

Moreover, Mrs. Stutzman's faithfulness to a millennia-old religious teaching about marriage shared the world over by millions of people does not resemble invidious race discrimination in the marriage or any other context.[10] As one constitutional scholar has observed concerning comparisons to race discrimination:

> There remains . . . a crucial difference between the race-based discrimination against African Americans in the Jim Crow South and *any* other form of discrimination or exclusion in our country. The pervasive impediments to equal citizenship for African Americans have not been matched by any other recent episode in American history. Our country has harmed many people . . . . But the systemic and structural injustices perpetrated against African Americans—and the extraordinary remedies those injustices warranted—remain in a class of their own.

John D. Inazu, *A Confident Pluralism*, 88 S. Cal. L. Rev. 587, 603 (2015).

Importantly, when the U.S. Supreme Court struck down bans on same-sex marriage, it went out of its way to underscore the difference between race discrimination and the belief in one-man, one-woman

[10] Mrs. Stutzman abhors racial discrimination of all types, including in the marriage context. She recognizes that one cannot rationally distinguish marriage between a man and woman of the same color and marriage between a man and a woman of different hues. CP 537-38; *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944) ("[D]iscriminations based on race alone are obviously irrelevant and invidious.").

marriage. It explicitly affirmed that the many people who support the latter do so out of "decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell*, 135 S. Ct. at 2602.

Respondents nonetheless invoke the Jim Crow era as a reason they should prevail. I.F. Br. 16-17, 30, 31, 44 (relying on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964), which involved a motel's refusal to rent to African-Americans). They are effectively claiming that their inability to coerce Mrs. Stutzman (who had served them for nearly ten years) to create expression that conflicts with her conscience, even though they easily obtained their desired floral design work from another florist (to whom they were referred by Mrs. Stutzman), is comparable to the systematic, structural, and pervasive obstacles to African-Americans' participation in the political, civic, and economic life of the nation that typified the Jim Crow era. It is not. It is difficult to conceive of any comparison that would not belittle the shameful treatment of African-Americans in our society, but this case falls well short.

I. Because Mrs. Stutzman did not engage in deceptive, misleading, or false conduct, personal liability is inappropriate.

Respondents cite *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 305-09 (1976), and *Grayson v. Nordic*

Constr. Co., 92 Wn.2d 548, 554 (1979), in support of imposing personal liability on Mrs. Stutzman here. A.G. Br. 48-49; I.F. Br. 42-43. But those cases simply ruled that intentionally deceptive, misleading, and patently false acts are types of wrongful conduct that justify imposing personal liability on a participating corporate officer. *Grayson*, 92 Wn.2d at 554. Mrs. Stutzman engaged in no such deceptive or false conduct here. Accordingly, imposing personal liability on her would be inappropriate.

III. CONCLUSION

This Court should reverse the trial court's judgments and rule in Mrs. Stutzman's favor on the statutory or constitutional grounds herein.

Respectfully submitted this the 5th day of February, 2016.

Kristen K. Waggoner
WSBA no. 27790
Jeremy Tedesco*
AZ no. 023497
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
kwaggoner@adflegal.org
jtedesco@adflegal.org
**pending pro hac vice admission*

John R. Connelly
WSBA no. 12183
CONNELLY LAW OFFICES
2301 N. 30th St.
Tacoma, WA 98403
jconnelly@connelly-law.com

George Ahrend
WSBA no. 25160
AHREND LAW FIRM PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
gahrend@ahrendlaw.com

Alicia M. Berry
WSBA no. 28849
LIEBLER, CONNOR, BERRY & ST. HILAIRE, PS
1411 N. Edison St., Ste. C
Kennewick, WA 99336
aberry@licbs.com

CERTIFICATE OF SERVICE

On February 5, 2016 I served the Reply Brief of Appellants via email to the following:

Noah Purcell at NoahP@atg.wa.gov
Todd Bowers at toddb@atg.wa.gov
Kimberlee Gunning at KimberleeG@atg.wa.gov
Rebecca Glasgow at RebeccaG@atg.wa.gov
Alan Copsey at AlanC@atg.wa.gov
Kristen Jensen at KristinJ@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 Plaintiffs Mr. Ingersoll and Mr. Freed

Kristen K. Waggoner
WSBA no. 27790
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
kwaggoner@adflegal.org

APPENDIX

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION
CIVIL ACTION NO. 14-CI-04474

HANDS ON ORIGINALS, INC. PLAINTIFF-APPELLANT

V

LEXINGTON-FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION DEFENDANT-APPELLEE

and

AARON BAKER FOR GAY AND LESBIAN
SERVICES ORGANIZATION DEFENDANT-APPELLEE

****

OPINION AND ORDER

Following the Hearing Commissioner's Opinion and Order filed on October 6, 2014 and the adoption of said Opinion and Order by the Lexington-Fayette Urban County Human Rights Commission (hereinafter "Commission") on November 19, 2014, the Plaintiff-Appellant, Hands On Originals, Inc. (hereinafter "HOO") timely filed a Complaint and Notice of Appeal of said Order on December 8, 2014 to the Fayette Circuit Court. This Court thereafter entered an Agreed Scheduling Order setting forth deadlines for the filing of a Motion for Summary Judgment by HOO, Response by the Commission, Reply by HOO and scheduling Oral Arguments on March 13, 2015.

The Court has reviewed the Record for the Commission, the excellent Memoranda from all Counsel and has heard oral Arguments thereon as scheduled. The matter was taken under Advisement by the Court. It is now ripe for decision.

PROCEDURAL HISTORY

Although HOO disputes some of the Hearing Commissioner's recitation of facts in the Order of October 6, 2014, the essential facts are not in serious dispute. HOO candidly admits the essential facts are not material to resolution of this case (HOO Memoranda in Support of Motion for Summary Judgment at pp. 14 – 15). The essential facts as found by the Hearing Commissioner and as determined by this Court from the Commission Record are as follows:

On or about March 28, 2012, Aaron Baker filed a Verified Complaint with the Commission on behalf of the Gay and Lesbian Services Organization (hereinafter "GLSO"). The Complaint alleged that on or about March 8, 2012, HOO denied that organization the full and equal enjoyment of a service when HOO refused to print the official t-shirts for the organizations' 2012 Pride Festival. Following an investigation by the Commission, a determination of Probable Cause and Charge of Discrimination was filed by the Commission against HOO on November 13, 2012. The Charge of Discrimination alleged that HOO violated local Ordinance 201-99; Section 2:33 from the Lexington-Fayette Urban County Government (Sometimes referred to as the "Fairness Ordinance"). This Ordinance generally prohibits a public accommodation from discriminating against individuals, *inter alia*, based upon their sexual orientation or gender identity.

HOO is a small business located in Fayette County, Kentucky which prints promotional materials such as shirts, hats, bags, blankets, cups, bottles and mugs and communicates messages for its customers with these promotional materials. The work is

artistic in nature as well as the design of the promotional material in question. HOO employs five full-time graphic design artists to carry out the expressive purposes of its clients. Blaine Adamson is one of three owners of HOO and has been Managing Owner since 2008. He and his co-owners are Christians who believe that the Holy Bible is the inspired Word of God and that they should strive to live consistently with its teachings. HOO's owners, through Blaine Adamson, as Managing Owner, operate HOO consistently with the teachings of the Bible.

HOO has a stated policy on its website which provides:

> Hands On Originals both employs and conducts business with people of all genders, races, religions, sexual preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.

HOO acknowledges that it is a "public accommodation" as that term is defined in the "Fairness Ordinance" and those sections of the Kentucky Civil Rights Act which are incorporated by reference in the aforementioned Ordinance. At all relevant times herein, Adamson instructed his sales representatives to decline to design, print or produce orders whenever the requested material was perceived to promote an event or organization that conveys messages that are considered by Adamson or HOO to be inappropriate or inconsistent with Christian beliefs. HOO has declined at least thirteen orders over the past several years preceding the filing of this Complaint on the basis that HOO believed the designs to be offensive contrary to their Christian beliefs or otherwise inappropriate.

Sales persons were directed by Adamson to bring proposed orders directly to him if there were any questions about the appropriateness of the orders.

At all relevant times, GLSO was an organization located in Lexington, Fayette County which represents and is an advocate for the gay, lesbian, bisexual, transgender, queer, questioning, intersex and ally community. GLSO holds an annual event called the "Lexington Pride Festival" that supports these persons or its message. Aaron Baker, on behalf of GLSO, charges in the Complaint before the Commission that after having accepted an order to print t-shirts for the Pride Festival in 2012, HOO refused to print the t-shirts allegedly because of the sexual orientation of the GLSO members which is prohibited by the Fairness Ordinance. GLSO is an advocacy group. Through its various programs, publications and other media, GLSO speaks in favor of sexual relationships and sexual activities outside of a marriage between a man and a woman. GLSO seeks to change attitudes concerning this issue and similar issues through its programs and publications. GLSO's members and its constituents and supporters come from all walks of life and all sexual orientations. Aaron Baker, GLSO's former president and the person that filed the Complaint on behalf of GLSO in this case, is married to a person of the opposite sex and does not identify himself as gay.

In February 2012, with the 2012 Lexington Pride Festival being scheduled for June 30, 2012, GLSO board member Shepherd contacted 3 t-shirt printing companies to obtain price quotes for the t-shirts to be used at the 2012 Pride Festival. This board member initially spoke with Kaleb Carter, an employee of HOO. Another individual from GLSO sent an email to Carter providing him with a color print of the desired design

of the t-shirt. Carter reviewed the submitted design and did not express any objection to it at that time. Carter gave GLSO a written quote via email. Carter had not yet presented a copy of the design of the t-shirt to Adamson prior to giving GLSO a written quote.

On or about March 8, 2012 a GLSO representative, Don Lowe, contacted HOO to discuss the quote. Lowe spoke with Adamson in that conversation. At the time of that conversation, Adamson had not spoken to Lowe or any other representative of GLSO regarding the order. Adamson had not viewed a copy of the t-shirt design at that point and did not do so during the phone conversation with Lowe. Adamson questioned Lowe about the GLSO organization, its mission and what the organization generally promoted. Lowe advised Adamson that the organization was the sponsor of the Lexington Pride Festival which was a gay pride festival in downtown Lexington scheduled for the summer. Adamson asked Lowe what would be printed on the shirt. Lowe gave Adamson a detailed description of the front of the t-shirt design. Adamson was thus made aware of the type of activities that typically occur at gay pride festivals including the display of signs and other communications promoting romantic relationships and sexual activity outside of marriages between a man and a woman, the sexually suggestive outfits and costumes and the distribution of sex-related items such as condoms and lubricants. Adamson also understood that groups like GLSO promote messages supporting sexual relationships or sexual activities outside of a marriage between a man and a woman.

It was thus obvious to Adamson from his conversation with Lowe of GLSO, that producing the t-shirts as requested would require HOO to print a t-shirt with the words

"Lexington Pride Festival" communicating the message that people should take pride in sexual relationships or sexual activity outside of a marriage between a man and a woman. Adamson has consistently expressed his belief that this activity would disobey God if he were to authorize HOO to print materials expressing that message. Thus, Adamson told Lowe that HOO could not print the t-shirts because those promotional items did not reflect the values of HOO and HOO did not want to support the festival in that way. Several other printing companies later offered to print the t-shirts for GLSO for free or at a substantially reduced price. HOO even offered to contact other printing companies to get the work done at the same price as quoted by HOO. At no time did GLSO representatives Lowe or Shepherd disclose their sexual orientation and no HOO representative inquired of them about that issue. It is the understanding of the Court that GLSO later got their requested t-shirts printed at little or no cost to that group.

STANDARD OF REVIEW

This case is before the Court on Appeal by HOO from an adverse decision issued by the LFUCG Human Rights Commission. Accordingly, the Standard of Review by this Court is found in KRS 13B.150 which provides in part as follows:

> (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record,... the Court, upon request, may hear oral argument and receive written briefs
>
> (2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
>
> (a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Without support or substantial evidence on the whole record;

(d) Arbitrary, capricious, or characterized by abuse of discretion;

(e) Based on a ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

(f) Prejudice by a failure of the person conducting the proceeding to be disqualified pursuant to KRS 13B. 040(2); or

(g) Deficient as otherwise provided by law.

This Court fully understands it is reviewing this matter under the limitations set out in (2) above. The following analysis and Judgment are based on the evidence in the Commission record before the Hearing Commissioner, the Constitutions of the United States and Kentucky and well-settled precedent from the United States Supreme Court.

ANALYSIS AND OPINION

(I) THE ORDER FROM THE HUMAN RIGHTS COMMISSION VIOLATES THE RECOGNIZED CONSTITUTIONAL RIGHTS OF HOO AND ITS OWNERS TO BE FREE FROM COMPELLED EXPRESSION

HOO and its owners have a Constitutional right of freedom of expression from government coercion. The Commission conceded at oral argument that the Commission was created by the Lexington-Fayette Urban County Government and its members are appointed by the Mayor. Thus, the action and the order of the Commission in this case is government action without dispute.

These Constitutional guarantees are found in both the Constitution of the United States (First Amendment) and in the Commonwealth of Kentucky (§1 § 8). The Commission agreed that HOO and its owners have those Constitutional protections when it adopted the Order of the Hearing Commissioner. ("The Hearing Commissioner agrees that these cases support a finding that when the Respondent (HOO) prints a promotional item, it acts as a speaker, and that this act of speaking is constitutionally protected.) (Hearing Commissioner Order at pp 13 – 14). These Constitutional freedoms as noted by the United States Supreme Court in *Wooley v Maynard*, 430 U.S. 705, 714 (1977):

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.

Wooley, supra involved the issue of whether or not the motorists of New Hampshire could be compelled to display a license plate with the motto of "Live Free or Die". The United States Supreme Court held that this was inappropriate state action and concluded that the government could not require the motorist to display the state motto upon the vehicle license plates.

The Hearing Commissioner in its Order attempted to distinguish *Wooley* from the case at bar with the explanation that "In this case there was no government mandate that the Respondent (HOO) speak." (Hearing Commissioner Order at p 14). If this is characterized as a Finding of Fact, it is inaccurate, is not supported by the Record and is clearly erroneous. In fact, HOO and its owners, because they refused to print the GLSO t-shirts that offended their sincerely held religious beliefs, have been punished for the

exercise of their Constitutional rights to refrain from being forced to speak. The statement is not a fair or accurate Conclusion of Law either based upon precedent from the United States Supreme Court. HOO and its owners have a Constitutional right to refrain from speaking just as much as they enjoy the Constitutional right to speak freely. *Wooley, supra.*

The Commission in oral arguments before the Court and in its Memoranda agreed that HOO and its owners have a sincerely held Christian belief that it is contrary to the Holy Bible for persons to engage in sexual activities outside of a marriage between one man and one woman. The Pride Festival is without dispute a strong advocate for sexual relationships outside of that principle.

The Commission in its oral argument says it is not trying to infringe on the Constitutional Rights of HOO and its owners but is seeking only to have HOO "...treat everyone the same." Yet, HOO has demonstrated in this record that it has done just that. It has treated homosexual and heterosexual groups the same. In 2010, 2011 and 2012, HOO declined to print at least thirteen (13) orders for message based reasons. Those print orders that were refused by HOO included shirts promoting a strip club, pens promoting a sexually explicit video, and shirts containing a violence related message. There is further evidence in the Commission record that it is standard practice within the promotional printing industry to decline to print materials containing messages that the owners do not want to support. Nonetheless, the Commission punished HOO for declining to print messages advocating sexual activity to which HOO and its owners strongly oppose on sincerely held religious grounds.

HOO did not decline to print the t-shirts in question or work with GLSO representatives because of the sexual orientation of the representatives that communicated with HOO. It is undisputed that neither HOO representatives Carter nor Adamson knew or inquired about the sexual orientation of either GLSO representatives Lowe or Shepherd. Rather, as is uncontested and actually found by the Hearing Commissioner at page 4 of the Order, the conversation between GLSO representative Lowe and HOO owner Adamson was about GLSO's mission and what the organization generally promoted. GLSO has admitted that the shirt in question communicates messages. In depositions before the Commission, GLSO representatives conceded that the logo on the shirt in question communicates the message that people should be proud about sexual relationships other than marriages between a man and a woman. This statement, of course, is directly contrary to the beliefs and values of HOO and its owners as expressed in its Mission Statement and actions. It is their Constitutional right to hold dearly and not be compelled to be part of the advocacy of messages opposed to their sincerely held Christian beliefs. In short, HOO's declination to print the shirts was based upon the **message** of GLSO and the Pride Festival and not on the **sexual orientation** of its representatives or members. In point of fact, there is nothing in the record before the Commission that the sexual orientation of any individual that had contact with HOO was ever divulged or played any part in this case.

There is ample precedent from the United States Supreme Court that the Commission in its Order violated the Constitutional rights of HOO and its owners in its Order issued November 19, 2014. *Hurley v Irish-American Gay, Lesbian and Bisexual*

Group of Boston, 515 U.S. 557 (1995) illustrates this principle. In *Hurley*, parade organizers in Boston had refused to allow a group of gay, lesbian and bisexual decedents of Irish immigrants to march in a St. Patrick's day parade. The group sued. This case also involved a "public accommodation" law like the case at bar. The issue in *Hurley* as framed by the United States Supreme Court was whether a government could require a private citizen to include marchers of a group imparting a message the organizers do not wish to convey. The United Stated Supreme Court **unanimously** held that such a mandate violates the First Amendment. The public accommodation law in *Hurley* was similar to, if not a close recitation of, the "Fairness Ordinance" in the case at bar. If Massachusetts could not compel parade organizers to include a group advocating a message that the parade organizers did not support, how can the LFUCG Human Rights Commission interpret the "Fairness Ordinance" to compel HOO and its owners to print a t-shirt conveying a message that HOO and its owners do not support and in fact find blasphemous? The Court holds that the Commission cannot take this action consistent with the U.S. Constitution.

Similarly, in *Boy Scouts of America v Dale*, 530 U.S. 640 (2000) the United States Supreme Court was faced with the issue of whether or not the Boy Scouts of America could expel an assistant scout master under New Jersey's public accommodation law after he publicly declared he was homosexual. The United States Supreme Court held that applying New Jersey's public accommodations law to require the Boy Scouts to admit the assistant scout master violated the Boy Scouts' First Amendment right of expressive association. There is no question in the case at bar that HOO, in designing

and printing promotional materials, engages in "expressive association" which the Unites States Supreme Court upheld as a First Amendment right in *Dale*. Like the Boy Scouts in *Dale*, HOO is entitled to claim First Amendment protection as a for profit corporation in this case. *Hurley, supra*. The message on the t-shirt in question is undoubtedly expressive association in advocating pride in sexual activity outside of a marriage between one man and one woman. HOO and its owners have a Constitutional right to that sincerely held religious principle. The infringement and violation of same by the Commission is contrary to established United States Supreme Court precedent and the Constitution of both the United States and Kentucky.

The Commission Order held and adopted the Hearing Commissioner Opinion that "...the application of the Fairness Ordinance does not violate the Respondent's (HOO) right to free speech, does not compel it to speak, and does not burden the Respondent's (HOO) right to be to the free exercise of religion". This statement is not supported by the facts in the record before the Commission and is contrary to well established precedent from the United States Supreme Court and the Constitutions of the United States and Kentucky. That statement is also clearly erroneous as a matter of law and as a conclusion of law. The exact opposite is, in fact and law, true.

This Court has undertaken review of this case based upon KRS 13B.150 and under the doctrine of "strict scrutiny." The Commission Order applies to "speech", the "free exercise thereof", and violation of the Constitutional right of HOO and its owners to refrain from compelled expression. This Court does not fault the Commission in its interest in insuring citizens have equal access to services but that is not what this case is

all about. There is no evidence in this record that HOO or its owners refused to print the t-shirts in question based upon the sexual orientation of GLSO or its members or representatives that contacted HOO. Rather, it is clear beyond dispute that HOO and its owners declined to print the t-shirts in question because of the MESSAGE advocating sexual activity outside of a marriage between one man and one woman. The well established Constitutional rights of HOO and its owners on this issue is well settled and requires action by this Court.

(II) THE COMMISSION'S ORDER VIOLATES HOO'S AND ITS OWNERS'FREE EXERCISE OF RELIGION PROTECTED BY KRS 446.350

In a summary paragraph found on page 16 of the Order from the Hearing Commissioner, which was adopted by the Commission, the following statements are made:

> The evidence of record shows that the Respondent (HOO) discriminated against the GLSO because of its members' actual or imputed sexual orientation by refusing to print and sell to them the official shirts for the 2012 Lexington Pride Festival. In addition, the Hearing Commissioner holds that the application of the Fairness Ordinance does not violate the Respondent's (HOO) right to free speech, does not compel it to speak, and does not burden the Respondent's (HOO) right to the free exercise of religion.

With all due respect to the Hearing Commissioner and the Human Rights Commission, these statements are not factually accurate and are in direct contrast to well established precedent from the United States Supreme Court interpreting the Federal Constitution. Further, KRS 446.350 provides as follows:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion of programs or access to facilities.

Both HOO and its owners are entitled to assert claims under this statute. The statute protects the religious freedom of all "persons" in Kentucky. While "person" is not defined in KRS 446.350 specifically, it is defined in KRS 446.010(33) to include corporate bodies and other companies. The statute's protection applies to corporations like HOO. See *Burwell v Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 – 69 (2014). The fact that HOO is a for profit corporation does not deprive it from having standing on this issue. *Hobby Lobby, supra*

The statute is applicable to the case at bar because HOO and its owners exercise of religion was motivated by the owners sincerely held religious beliefs. The Commission has admitted that HOO and its owners religious beliefs are sincerely held and that the sincerity of their beliefs is not at issue. (Commission Order at p 8). The Commission's Order substantially burdens HOO's and its owners' free exercise of religion wherein the government (Commission) punished HOO and its owners by its order for exercising their sincerely held religious beliefs. This is contrary to established Constitutional law. *Sherbert v Verner*, 374 U.S. 398, 403 (1963). Because the Commission's Order requires HOO and its owners to print shirts that convey messages contrary to their faith, that Order inflicts a substantial burden on their free exercise of religion.

As this Court has determined that the Commission's Order substantially burdens HOO and its owners free exercise of religion, the Court must look to the Commission to "…prove by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest." KRS 446.350. In the case at bar, the Commission has not even attempted, much less shown by "clear and convincing evidence" or otherwise, that it has any compelling government interest in the consequences imposed upon HOO and its owners in this case. As previously mentioned, it is the understanding of this Court based on the record that GLSO was able to obtain printing of the t-shirts in question at a substantially reduced price or perhaps even had them printed for free. This was the offer extended by HOO owner Adamson in the initial phone conversation with a GLSO representative to refer GLSO to another printing company to do the work for the same price quoted by HOO. The Court holds that the Commission has not proven by clear and convincing evidence or otherwise that it has a compelling governmental interest to enforce in this case. Therefore, it must also be concluded as a matter of law that the Commission's Order violates KRS 446.350 as well.

CONSIDERATION OF OTHER ISSUES RAISED

Although HOO has raised other issues, the Court sees no need to address them in light of the foregoing analysis.

CONCLUSION, ORDER AND JUDGMENT

By reason of the foregoing, it is the Order and Judgment of this Court that the Motion for Summary Judgment and Stay Pending Judicial Review filed by the Plaintiff-

Appellant, Hands on Originals, Inc., should be and is hereby GRANTED. Further, it is the Conclusion, Order and Judgment of this Court that the Commission's Order issued on November 19, 2014 which incorporated by reference the Hearing Commissioner's Opinion and Order issued on October 6, 2014 is hereby REVERSED upon grounds that the Court finds the Commission's final Order pursuant to KRS 13B.150, is:

(a) In violation of Constitutional and statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Without support of substantial evidence on the whole record;

(d) Arbitrary, capricious, or characterized by an abuse of discretion; and

(e) Deficient as otherwise provided by law.

It is therefore ORDERED AND ADJUDGED that this case is REVERSED AND REMANDED to the Commission with the directions that the Commission VACATE and SET ASIDE its Order issued on November 19, 2014 and DISMISS ALL CHARGES AGAINST HOO.

Dated this 27th day of April, 2015

HON. JAMES D. ISHMAEL, JR.

This is to certify that a true and correct copy of the foregoing Opinion and Order was served upon the following parties, via First Class Mail and e-mail, this 27th day of April, 2015 as follows:

Bryan H. Beauman, Esq.
Sturgill, Turner, Barker &
Moloney, PLLC
333 West Vine Street, Suite 1400
Lexington, KY 40507

bbeauman@sturgillturner.com

James A. Campbell, Esq.
Byron J. Babione, Esq.
Kenneth J. Connelly, Esq.
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, AZ 85260

jcampbell@alliancedefendingfreedom.org
bbabione@alliancedefendingfreedom.org
kconnelly@alliancedefendingfreedom.org

Tracey Burkett, Esq.
114 East Main Street, Suite C
P.O. Box 1373
Richmond, KY 40476

Tracey.burkette@burkettlawky.com

Aaron Baker
Gay and Lesbian Services Organization
389 Waller Avenue, Suite 100
Lexington, KY 40504

VINCENT RIGGS, C.F.C.C.
BY: _____d.c.