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.

ROBERT INGERSOLL and CURT FREED,

Respondents,

v.

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

Appellants.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION

This appeal concerns a fundamental question: May the State compel a person to use her artistic skills to celebrate a same-sex wedding when she has long-served the requesting customer and doing so would violate her religious belief that marriage is between a man and a woman?

Appellant Barronelle Stutzman, a 70-year-old grandmother, owns and operates Arlene's Flowers, Inc. ("Arlene's"), in Richland, Washington.[1] Barronelle has regularly employed gay, lesbian, and bisexual employees and serves all members of the public. For nearly a decade, she has enjoyed creating artistic floral arrangements for Respondent Robert Ingersoll, including arrangements for Robert's partner, Curt Freed, for birthdays, anniversaries, and Valentine's Days. Barronelle considered Robert a friend.

A few months after Washington began recognizing same-sex marriage, Robert asked Barronelle about floral design work for his wedding. This was Barronelle's first same-sex marriage request. Barronelle could not fulfill Robert's request because her faith teaches that God created marriage between one man and one woman, and that she cannot participate in or use her artistic abilities to celebrate wedding ceremonies that conflict with her religious beliefs. Given their

[1] Barronelle Stutzman and Arlene's Flowers are at times referenced collectively as "Barronelle" because the lower court's ruling did not legally distinguish between the two.

longstanding business relationship and friendship, Barronelle felt she had to personally tell Robert why she could not participate in this particular event. She also referred him to three other floral shops.

When the Attorney General learned of Barronelle's actions, he sued Arlene's and Barronelle under the Consumer Protection Act ("CPA") and WLAD. Robert and his partner, now spouse, Curt Freed later filed an additional suit under the CPA and WLAD, which this Court consolidated with the State's action for purposes of appeal.

Dismissing statutory, free exercise, free speech, and free association defenses, the Superior Court ruled for the State and private plaintiffs on summary judgment. RA 259.[2] It then issued a final judgment for the State and private plaintiffs ordering Arlene's and Barronelle (1) to pay an as yet undetermined amount of damages, attorneys' fees, and costs to the private plaintiffs once all appeals are exhausted, (2) to pay $1,000 in fines and $1.00 in attorneys' fees and costs to the State, and (3) to create artistic floral arrangements for same-sex ceremonies and provide full wedding support if she continues to create and provide support for weddings between one man and one woman, and enjoining her from referring such requests to florists who have no objection. *See* Notices of

[2] The Superior Court's opinion and other key parts of the lower court record are reproduced in a separate and contemporaneously filed Record Appendix ("RA"). In addition, the full text of the statutes and constitutional provisions cited in this Statement of Grounds for Direct Review are reproduced in the Appendix to this brief.

Appeal (judgments attached thereto).

Direct review is warranted because the Superior Court's ruling has broad import, misconstrues the WLAD, and impairs the exercise of state and federal constitutional rights. The Court held that the State may force Barronelle to choose between engaging in compelled expression celebrating an event that violates her religious faith or foregoing the wedding design work she has loved for forty years. The Court also found that she faces personal liability for her decision. Such rulings present "fundamental and urgent issue[s] of broad public import which require[] prompt and ultimate determination" by this Court. RAP 4.2(a)(4).

II. NATURE OF THE CASE AND DECISION

Barronelle began working in Arlene's Flowers, originally owned by her mother, nearly 40 years ago. Since then, Barronelle has honed her artistic creativity and skill as a florist, purchasing the business from her mother in 1996. Robert was one of Barronelle's favorite clients because he commissioned unique and challenging pieces and they got along well together. When he was in the shop, Barronelle chatted with Robert about Curt. In March 2013, Robert came into the ship to talk with Barronelle about floral arrangements for his same-sex wedding ceremony.

When Barronelle designs arrangements for weddings, she invests significant creative thought and time and often provides full-wedding

support for long-time customers, including set-up at the ceremony and assisting the wedding party at the event. She did not wish to offend Robert and would gladly provide fresh cut flowers, floral supplies, and pre-made arrangements for any event. But fulfilling Robert's request would have required Barronelle to violate her religious beliefs, which teach that God ordained marriage between a man and a woman and prevent her from using her artistic talents to celebrate any marriage defined differently.

Barronelle understood Robert wanted her to use her artistic talents and imagination to create custom arrangements and provide wedding support.[3] Robert had already come into the store and told an employee he wanted to speak with Barronelle about his wedding. RA 11. When he returned, Barronelle met him in a corner of the store. After he brought up the wedding, Barronelle took his hand, and gently and respectfully told him that she could not "do his wedding" because of her relationship with Christ. RA 13. They continued to chat about his wedding plans. She referred him to other shops that she knew would provide beautiful work, one of which ended up arranging flowers for the wedding. Robert and

[3] The discussion was preliminary, so that the parties did not discuss the specific details for the arrangements. However, the Superior Court found no legal distinction between forcing Barronelle to provide full wedding support (custom design work and physical presence and personal assistance at the ceremony) and selling raw, unarranged product. RA 207-08; *see also* RA 11. The Court held it could order her to provide full wedding support. RA 230-31 n.19.

Barronelle hugged and he left.

The Attorney General and later the private plaintiffs filed suit, alleging that Arlene's and Barronelle committed discrimination based on sexual orientation in a place of public accommodation in violation of RCW 49.60.030 and 49.60.215 and RCW 19.86.

The Superior Court granted summary judgment for the State and private plaintiffs, concluding that Barronelle's decision not to use her artistic ability to celebrate Robert's marriage ceremony constituted sexual orientation discrimination under the WLAD. RA 228-30. Although it recognized that Barronelle is in the business of providing "artistic expression," RA 238, the Court rejected any distinction between her objection to being compelled to create expression related to a particular event and discrimination based on a person's sexual orientation, RA 230-31 n.19. The court ruled that even if such a distinction were valid, Barronelle nonetheless caused an "indirect discriminatory result" that violated the WLAD and CPA. RA 234.

The Superior Court observed an "insoluble" conflict between Barronelle's "religiously motivated conduct" and state public accommodations law. RA 238. But it rejected her state free exercise defense, holding that the substantial burden the State is imposing on her religious exercise satisfies strict scrutiny. It also rejected Barronelle's

federal free exercise defense, holding the WLAD and CPA neutral and generally applicable, despite existing exemptions, and denying her hybrid rights defense, RA 244.

The Superior Court rejected Barronelle's free speech defense as well, ruling that there can never be a "free speech exception (be it creative, artistic, or otherwise) to . . . public accommodation[]" laws, regardless of whether they require the "expression of a message with which the speaker disagrees." RA 239. The Superior Court's rejection of the free association defense was equally categorical. RA 243.

III. ISSUES PRESENTED FOR REVIEW

1. Whether gladly providing custom floral designs for a client for nearly a decade and only referring the client for one event, a same-sex wedding, because of one's religious beliefs constitutes sexual orientation discrimination in violation of the WLAD and CPA?

2. Whether the application of state public accommodation laws in this case violates Appellants' right to the free exercise of religion under article 1, section 11 of the Washington State Constitution and the First Amendment to the United States Constitution?

3. Whether the application of state public accommodation laws in this case violates Appellants' right to freedom of speech under article 1, section 5 of the Washington State Constitution and the First Amendment to the United States Constitution?

4. Whether the application of state public accommodation laws in this case violates Appellants' right to freedom of association under the First Amendment to the United States Constitution and article 1, section 5 of the Washington State Constitution?

5. Whether Barronelle should be subject to personal liability under the WLAD and CPA?

IV. GROUNDS FOR DIRECT REVIEW

This case implicates several issues of first impression following the State's recent recognition of same-sex marriage, including the proper interpretation and application of the State's public accommodation laws and Barronelle's constitutional rights to the free exercise of religion, free speech, and free association. These fundamental issues warrant prompt and ultimate determination by this Court. *See* RAP 4.2(a)(4).

A. This Court Should Determine Whether Barronelle's Religious Objection To Creating Artistic Floral Design Work And Providing Full-Wedding Support For A Long-Standing Customer's Marriage Ceremony That Violates Her Religious Beliefs Constitutes Sexual Orientation Discrimination.

The WLAD prohibits discrimination in places of public accommodation based on sexual orientation, RCW 49.60.215(1), and deems violations of the WLAD to be *per se* violations of the CPA, RCW 49.60.030(3). *See also* RCW 49.60.030(1)(b) (banning "discrimination … because of . . . sexual orientation"). But this Court has never determined that prohibition's scope. *See* RCW 49.60.020 (providing WLAD "shall not be construed to endorse any specific belief, . . . or orientation").

Barronelle regularly serves gay and lesbian clients, and will continue to do so. She gladly served Robert for nearly a decade. Her only objection is to using her artistic abilities to create artistic custom arrangements celebrating a particular event, *i.e.*, a marriage ceremony that

her religion teaches is contrary to God's plan and spiritually harmful to her. This religious objection extends to any marriage that is not between a man and a woman, not just those involving two persons of the same sex.

Nevertheless, the Superior Court, primarily relying on an opinion by the New Mexico Supreme Court, *see Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), ruled that religious objections to expressing a celebratory message about, and participating in, same-sex marriages constitutes sexual orientation discrimination, despite Barronelle having served gay and lesbian customers for years. RA 229-30, 234. And it did so despite the WLAD's clear language stating that it "shall not be construed to endorse any specific belief, practice, behavior, or orientation," RCW 49.60.020, and without taking into account that RCW 49.60.030(1) also establishes Barronelle's right to be free of religious discrimination, which is equally implicated here, as a broad "civil right" to be protected in more than just the statutorily enumerated contexts. *See Kumar v. Gate Gourmet Inc.*, 180 Wn. 2d 481, 489 (2014) ("creed" in the WLAD has long been equated with "religion"). Such important matters of state law, with evident impact on constitutional freedoms, should be determined by this Court.

B. This Court Should Determine Whether Barronelle's State And Federal Free Exercise Rights Are Violated By The Application Of The WLAD And CPA To Compel Her To Create Custom Floral Work Celebrating Marriages That Are Not Between One Man and One Woman.

Under the Washington Constitution, religious freedom is a "paramount right" with a scope "more expansive than [that] conferred by the Federal Constitution." *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 224 (1992) (quotation omitted). Article 1, section 11 "focuses both on belief and on conduct" and makes clear that courts' "most important duty" is to safeguard "religious liberty, and to see [it is] not narrowed or restricted because of some supposed emergent situation." *Id.* at 225 (quotation and alteration omitted).

Thus, Art. I, § 11 subjects all laws to strict scrutiny if they substantially burden a sincerely held religious belief. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn. 2d 633, 642 (2009). There is no dispute that Barronelle's objection to creating custom floral designs celebrating marriages that do not include one man and one woman is based on a sincerely held religious belief. RA 246. And the Superior Court rightly assumed that the WLAD imposes a substantial burden on Appellants' exercise of religion.[4] RA 247. Indeed, it is clearly a

[4] This burden is not limited to the wedding revenue itself. Weddings generate lifetime referrals. Moreover, the Court's order forces Barronelle to forego all weddings, the pinnacle of a florist's work, or surrender her religious beliefs. RA 6-10.

substantial burden to coerce Barronelle—under threat of personal and professional liability for fines and ruinous attorneys' fees awards—to use her heart, mind, and artistic abilities to design and create artistic expression—or otherwise participate in a wedding ceremony—when that event violates her sincerely held religious beliefs.

The Superior Court also rejected Barronelle's First Amendment free exercise defense because it regarded the WLAD and CPA as neutral and generally applicable laws and her hybrid rights claim as lacking a viable free speech or free association foundation. RA 244. But existing religious and secular exemptions to the WLAD and CPA for others, *see, e.g.*, RCW 26.04.010, 49.60.040, & 49.60.222, raise significant questions as to their neutrality and generally applicability. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993) (noting the "differential treatment of two religions" may be "an independent constitutional violation"); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (providing secular exemptions "while refusing religious exemptions . . . trigger[s] heightened scrutiny"). And significant free speech and free association case law substantiates her hybrid rights claim. *See infra* pp. 11-15.

Direct review is warranted to determine if applying the State's public accommodation laws to force Barronelle to create and design floral

arrangements and provide full-wedding support for marriages that conflict with her religious beliefs violates her free exercise rights. The Superior Court wrongly concluded that the State had a compelling interest to force her to violate her sincerely held religious beliefs in this way. RA 248-50. But it failed to "look beyond broadly formulated interests" in promoting non-discrimination and "scrutinize the asserted harm of granting specific exemptions to particular religious claimants."[5] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quotation and alterations omitted). Nor did the Superior Court consider whether other means of furthering this goal exist "without imposing a substantial burden on [Appellants'] exercise of religion." *Id.* at 2780. Both questions are worthy of this Court's prompt resolution.

C. This Court Should Determine Whether Barronelle's State And Federal Free Speech Rights Are Violated By Applying The WLAD And CPA To Coerce Her Artistic Expression.

The Superior Court recognized that Barronelle engages in "artistic expression." RA 238. Nonetheless, it held that no potential free "speech exception (be it creative, artistic, or otherwise)" exists to state public accommodation laws even if they "require[] communication or expression of a message with which the speaker disagrees." RA 239. Not only does

[5] Between 2006 and 2013, only seventy complaints of sexual-orientation discrimination by a public accommodation were made to the Washington Human Rights Commission, none of which were substantiated. RA 138-165. Accommodating Barronelle's sincerely-held religious beliefs thus poses no threat to the State's interests.

this categorical ruling address a question of broad public import, it conflicts with longstanding compelled-speech precedent.

As this Court has explained, "[f]ree speech is a fundamental right on its own as well as a keystone right enabling us to preserve all other rights." *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 536 (1997). "Freedom of speech includes the freedom not to speak or to have one's [resources] used to advocate ideas one opposes." *State v. Wash. Educ. Ass'n*, 156 Wn.2d 543, 557 (2006), *overruled on other grounds by Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

Free speech protections for artistic expression are "particularly strong" when the state compels expression, "for then the law's . . . reluctance to force private citizens to act augments its constitutionally based concern for the integrity of the artist." *Redgrave v. Bos. Symphony Orchestra, Inc.*, 855 F.2d 888, 905 (1st Cir. 1988) (internal citation omitted). Barronelle provided expert testimony confirming that her work is artistic expression. *See* RA 122-130. Yet the Superior Court found the artistic nature of her speech to be irrelevant here.

The Superior Court also disregarded controlling precedent applying the compelled speech doctrine in the public-accommodations context. Describing the application of public accommodation laws to expressive activities as "peculiar," the U.S. Supreme Court has explained

that such laws may not "be used to produce thoughts and statements acceptable to some groups" because the freedom of speech "has no more certain antithesis." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572, 579 (1995).

Free speech protections bar the government from attempting to "produce speakers free of . . . biases, whose expressive conduct [are] at least neutral toward . . . particular [protected] classes." *Id.* at 579; *see Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 115 (1997) (Washington Constitution "more protective" of free speech than the First Amendment). Yet the Superior Court treated the State's effort to produce speakers who are not only "neutral" toward non-traditional marriages, but supportive, as binding. This Court should resolve the conflict between Barronelle's free speech rights and the Superior Court's injunction requiring her to express a message about non-traditional marriages with which she disagrees.

D. This Court Should Determine Whether Barronelle's Freedom of Expressive Association Is Violated By Applying the WLAD and CPA To Force Her To Associate With Unwanted Views.

Implicit in the right of free speech is "a corresponding right to associate with others in pursuit of . . . political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quotations omitted). This freedom of expressive association protects individuals' right to join together "to express those

views, and only those views, that [they] intend[] to express." *Id.* at 648. Consequently, it "presupposes a freedom not to associate" with those advocating different opinions or viewpoints. *Id.*

The freedom of expressive association applies when government commands an individual or group to associate with another who would "affect[] in a significant way [its] ability to advocate public or private viewpoints." *Id.* It "is crucial in preventing the majority from imposing its views on [individuals] or groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. The Superior Court ruled that free association did not apply here because Barronelle's views in favor of traditional marriage are "[i]nvidious private discrimination." RA 243.

But constitutional protection has always been extended "to speech and conduct that society at large views as . . . politically incorrect." *State v. Williams*, 144 Wn.2d 197, 209 (2001). That some may deem associating only with couples celebrating marriages between a man and woman "invidious" is not a reason to force Barronelle to associate with those communicating other views. *See Dale*, 530 U.S. at 660.

The U.S. Supreme Court has ruled that public accommodations laws must give way when their enforcement would "materially interfere with the ideas" that an individual seeks to express. *Dale*, 530 U.S. at 657. Resolving the conflict between this binding caselaw and the Superior

Court's ruling is worthy of this Court's direct review.

E. The Personal Liability Question Merits Direct Review.

The Superior Court imposed personal liability on Barronelle for actions she took as a corporate owner and officer despite the fact that the parties agreed she "maintained the corporate form," RA 196, and no evidence of fraud, misrepresentation, or intentional misconduct exists. *See Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552-53 (1979) (holding that when the "affairs of the corporation [are] separate . . . and no fraud or manifest injustice [exists,] the corporation's separate entity should be respected"). And *Brown v. Scott Paper Worldwide Co*, 143 Wn.2d 349, 361 (2001) does not require personal liability because this case has nothing to do with employment discrimination and employer liability. This unprecedented ruling of broad public import warrants prompt review.

V. CONCLUSION

For these reasons, Arlene's Flowers and Barronelle Stutzman respectfully request that this Court grant direct review.

Respectfully submitted this the 1st day of June, 2015.

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CERTIFICATE OF SERVICE

On June 1, 2015 I served Appellants' Statement of Grounds for Direct Review with Appendix and Appellants' Record Appendix via email to the following:

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