IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

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

Defendants.

ROBERT INGERSOLL and CURT FREED,

Plaintiffs,

vs.

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

Defendants.

No. 13-2-00871-5
(Consolidated with 13-2-00953-3)

MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFFS' LACK OF STANDING, GRANTING PLAINTIFF STATE OF WASHINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND CONSTITUTIONAL DEFENSES, AND GRANTING PLAINTIFFS INGERSOLL AND FREED'S MOTION FOR PARTIAL SUMMARY JUDGMENT

A motion hearing occurred in the above-captioned matter on December 19, 2014, in Kennewick, Washington. The Plaintiff, State of Washington, by and through the Attorney General, was represented through argument[1] by Todd Bowers, Senior Counsel and Noah Purcell, Solicitor General. The Plaintiffs Robert Ingersoll and Curt Freed were present, and were represented through argument by Jake Ewart and Michael R. Scott, both of Hillis Clark Martin & Peterson, P.S. The Defendants, Arlene's Flowers, Inc., d/b/a/ Arlene's Flowers and Gifts, and Barronelle Stutzman, were present, represented by Alicia Berry, Liebler, Connor, Berry & St. Hilaire, PS,

[1] Additional counsel assisted in preparation of the briefing and declarations for both the Plaintiffs and Defendants.

through argument of Kellie Fiedorek and Kristen Waggoner, of Alliance Defending Freedom, appearing *pro hac vice*.

Before the court were three motions: 1) Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing, 2) Plaintiff State Of Washington's Motion For Partial Summary Judgment On Liability And Constitutional Defenses, and 3) Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment. At the motions hearing, the Court heard argument from all parties and took the motions under advisement. After further consideration, the Court now denies and grants these motions, respectively.

I. INTRODUCTION

A. Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing

In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3, Defendants moved for summary judgment, asking this Court to dismiss all claims brought against them by both the Attorney General (hereinafter AG) and the Individual Plaintiffs. Defendants assert that despite the actual interaction that occurred on March 1, 2013 between Stutzman and Ingersoll, further discovery has shown that Ingersoll and Freed only wanted to purchase raw materials for their ceremony, which Stutzman was and is willing to provide. As such, they argue that there is in fact no concrete dispute between the parties, Ingersoll and Freed are now married, and thus the claims are moot and there is nothing for this Court to decide. Further, Defendants argue that what other individuals may want from Defendants in the future is speculative. Thus Defendants assert that the matter should be dismissed on summary judgment.

Both the AG and Individual Plaintiffs respond that Defendants ignore what did happen, a refusal to sell arranged flowers to Ingersoll, and the Defendants' *post hoc*

understanding of what Ingersoll may have wanted cannot undo the refusal. Further, they point out the Defendants' unwritten policy to engage in the same practice in the future also supports a finding that the cases are not moot. For the reasons set out below, the Court concludes[2] that the material facts of this case are what actually happened on March 1, 2013, not what might have happened. Given these facts and the Defendants' unwritten policy to engage in the same conduct in the future, the cases are not moot. The Court therefore denies the Defendants' motion.

B. Plaintiff's Motion For Partial Summary Judgment On Liability And Constitutional Defenses (Considered With Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment And Memorandum Of Authorities)

In Benton County Cause Number 13-2-00871-5, the AG has moved for partial summary judgment, arguing that Defendants have admitted acts that constitute a violation of the Washington Law Against Discrimination (hereinafter WLAD) in trade or commerce, and thus constitute a *per se* violation of the Consumer Protection Act (hereinafter CPA) as a matter of law. Further, the AG argues that the Defendants' four remaining constitutional affirmative defenses in their Answer[3] fail as a matter of law, and must therefore be dismissed. Those affirmative defenses are as follows: 1)

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[2] In reaching this conclusion, the Court reviewed and considered the Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack of Standing, filed October 6, 2014 (along with the Declaration of Kristen Waggoner and attachments thereto), Plaintiffs Robert Ingersoll and Kurt Freed's Opposition To Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing, filed December 8, 2014 (along with the Declaration of Jake Ewart and attachments thereto), the State's Response To Defendants' Motion For Summary Judgment On Standing, filed December 8, 2014 (along with the Declaration of Todd Bowers and attachments thereto), as well as Defendants' Reply Supporting Their Motion For Summary Judgment On Plaintiffs' Lack Of Standing, filed December 15, 2014. As to all pending motions, the Court has also reviewed and considered Defendants' Supplemental Summary Judgment Briefing On Four Non-Constitutional Affirmative Defenses, filed on February 13, 2015, Plaintiffs' Notice Of Supplemental Authority, filed February 12, 2015 (along with the attachment thereto) and Plaintiff Robert Ingersoll And Curt Freed's Brief Regarding Procedural Posture Of Four Remaining Non-Constitutional Affirmative Defenses In Individual Actions, filed February 13, 2015.

[3] The AG's Complaint in Benton County Cause Number 13-2-00871-5 was filed on April 9, 2013. The Defendants' Answer, containing the affirmative defenses reference above, was filed on May 16, 2013. A Complaint by the Individual Plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed on April 18, 2013, to which the Defendants' answered on May 20, 2013. These matters were previously consolidated for consideration of these motions.

this action, as applied to the Defendants' conduct, is preempted by the First Amendment to the United States Constitution; 2) this action, as applied to the Defendants' conduct, violates Article 1, Section 11 of the Washington State Constitution (and as to the Individual Plaintiff's Action it violates Article 1, Section 5); 3) the AG's decision to bring this action constitutes selective enforcement in violation of the Fourteenth Amendment to the United States Constitution; and 4) justification. Specifically, the AG alleges that Stutzman's conceded statement to Ingersoll that she couldn't do the flowers for his wedding on March 1, 2013 on the premises of Arlene's Flowers constitutes an admission to committing a violation of the WLAD in trade or commerce, and as such is a *per se* violation of the CPA as a matter of law. Further, the AG argues that the courts have routinely rejected Defendants' affirmative defenses for the following reasons: one cannot escape a claim of discrimination by seeking to distinguish between status and conduct of the protected party; entry into the state-licensed commercial arena imposes limits on religiously motivated conduct (as opposed to belief); and defining one's commercial activity as expressive does not change the propriety of that regulation.

The Individual Plaintiffs, in Benton County Cause Number 13-2-00953-3, have also moved for partial summary judgment, also arguing that Defendants have admitted acts that constitute a violation of the WLAD in trade or commerce, and thus constitute a *per se* violation of the CPA as a matter of law, with the exception of the issue of damages.[4] Further, the Individual Plaintiffs join in the AG's arguments with respect to the aforementioned constitutional affirmative defenses.

The Defendants respond and allege material factual disputes about what Stutzman did on March 1, 2013, and the motivation behind her actions. The Defendants argue Stutzman simply declined to participate in a gay wedding, and that compelling her participation in this event violates her rights of free speech and free

[4] As indicated below and in this Court's prior Order, unlike the AG, the Individual Plaintiffs must satisfy additional elements of damage (injury) and causation to sustain their CPA claim. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (further citation omitted).

exercise of religion under both the First Amendment to the United States Constitution as well as Article 1, Section 11 and Section 5 of the Washington State Constitution. For the reasons set out below, the Court concludes that to accept any the Defendants' arguments would be to disregard well-settled law and therefore grants the AG's and Individual Plaintiffs' motion.[5]

II. FACTUAL BACKGROUND[6]

Defendant Barronelle Stutzman is the president, owner and operator of Defendant Arlene's Flowers, Inc. d/b/a Arlene's Flowers and Gifts. This closely-held Washington for-profit corporation has Stutzman and her husband as the sole corporate officers. From its retail store in Richland, Washington, it advertises and sells flowers and other goods to the public. The corporation sells flowers for events including, among others, weddings. For the five-year period before March of 2013, weddings constituted approximately three percent of the corporation's business. The corporation, originally incorporated in 1989, was previously owned and operated by Stutzman's mother, from whom she purchased the corporation almost 13 years ago. The corporation was and is licensed to do business in the State of Washington.

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[5] In reaching this conclusion, the Court reviewed and considered the Plaintiff State of Washington's Motion For Partial Summary Judgment On Liability And Constitutional Defenses, filed November 21, 2014 (along with the Declaration of Kimberlee Gunning and attachments thereto), Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment And Memorandum Of Authorities, filed November 21, 2014 (along with the Declaration of Jake Ewart and attachments thereto), the Defendants' Response To Plaintiffs' Two Motions For Partial Summary Judgment On Liability, filed December 8, 2014 (along with the Declarations of Kristen K. Waggoner, Nickole Perry, Barronelle Stutzman, David Mulkey, Dr. Mark David Hall, Professor Dennis Burk and Jennifer Robbins and any attachments thereto), as well as Plaintiff State of Washington's Reply (along with the Declaration of Michael R. Scott and attachments thereto) and the Reply In Support of Plaintiffs Ingersoll and Freed's Motion (along with the Declaration of Todd Bowers and attachments thereto), both filed December 15, 2014. As to all pending motions, the Court has also reviewed and considered Defendants' Supplemental Summary Judgment Briefing On Four Non-Constitutional Affirmative Defenses, filed on February 13, 2015, Plaintiffs' Notice Of Supplemental Authority, filed February 12, 2015 (along with the attachment thereto), and Plaintiff Robert Ingersoll And Curt Freed's Brief Regarding Procedural Posture Of Four Remaining Non-Constitutional Affirmative Defenses In Individual Actions, filed February 13, 2015.

[6] In a stipulation between the parties on October 18, 2013, the parties agreed, pursuant to the order consolidating the cases for pre-trial purposes, that the record of the AG's case should be made part of the Individual Defendant's case.

Stutzman has a firmly held religious belief, based on her adherence to the principals of her Christian faith, that marriage can only be between a man and a woman. Specifically, as part of the Southern Baptist tradition, Stutzman asserts that she is compelled to follow Resolutions of the Southern Baptist Convention Resolutions (hereinafter Resolutions of SBC). Those resolutions include both a definition of marriage that excludes same-sex marriage, and an explicit rejection of same-sex marriage as a civil right.[7] As a result, Stutzman asserts that she cannot participate in a same-sex wedding.

Stutzman draws a distinction between the provision of raw materials for such an event (or even flower arrangements that she receives pre-made from wholesalers) and the provision of flower arrangements that she has herself arranged for the same event. Said more precisely, Stutzman does not believe that she can, consistent with tenets of her faith (as expressed in the Resolutions of the SBC), use her professional skill to make an arrangement of flowers and other materials for use at a same-sex wedding. That which she believes she cannot do directly she also believes she cannot allow to occur on the premises of her company with her knowledge. Therefore she believes she cannot allow others in her employ to prepare such arrangements in her company's name. Stutzman believes that such participation would constitute a demonstration of approval for the wedding itself.

Plaintiff Robert Ingersoll is a gay man who was an established customer of Arlene's Flowers. During the approximately nine years leading up to the present action, Stutzman, on behalf of Arlene's Flowers, regularly designed and created flower arrangements for Ingersoll. Ingersoll estimated that, with respect to the purchase of flowers only, Stutzman had served him approximately 20 times or more

[7] The relevant Resolution of the SBC, "On 'Same-Sex Marriage' And Civil Rights Rhetoric" New Orleans – 2012, resolves that Southern Baptists express "love of those who struggle with same-sex attraction" and condemns "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" toward gay men or women.

and that he had spent in the range of $4,500 at Arlene's Flowers. Stutzman prepared these arrangements knowing both that Ingersoll was gay and that the arrangements were for Ingersoll's same-sex partner, Curt Freed for occasions such as birthdays, anniversaries and Valentine's Day.

On November 6, 2012, the voters confirmed, through Referendum 74, the Legislature's earlier enactment of same-sex marriage. *See* Revised Code of Washington (hereinafter RCW) 26.04.010(1) (*as amended by* Laws of Washington 2012, Ch. 3, § 1(1)); *see also*, Referendum Measure 74, approved Nov. 6, 2012. Shortly thereafter, Ingersoll and Freed were engaged to be married. Ingersoll and Freed had selected a date in September of 2013 for the wedding and anticipated inviting approximately 100 people to the ceremony and reception to be held at an established wedding venue. Ingersoll and Freed anticipated a wedding with all of the customary trappings thereof: invitations, guestbook, a photographer, a licensed or ordained officiant, a catered dinner at the reception, and a cake. Ingersoll and Freed planned to buy flowers for the wedding, including boutonnieres, from Stutzman and Arlene's Flowers.

On February 28, 2013, Ingersoll drove to Arlene's Flowers to inquire about having Stutzman do the flowers for his and Freed's wedding. Stutzman was not present. An employee who spoke with Ingersoll communicated the request to Stutzman, and stated he would return the next day. That employee advised Stutzman that Ingersoll "would be in to talk about wedding flowers."

After speaking with her husband, Stutzman decided that she could not create arrangements for Ingersoll and Freed's wedding without violating her beliefs. On March 1, 2013, Ingersoll left from his place of employment during his lunch hour and drove to Alrene's Flowers, where Stutzman informed Ingersoll that because of her

beliefs, she could not do the flowers for his wedding. In deposition testimony Stutzman described the encounter as follows:

Q: Tell me what you remember about your conversation with [Ingersoll].

A: He came in and we were just chitchatting and he said that he was going to get married. Wanted something really simple, khaki I believe he said. And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.

Q: Did you tell him that before he finished telling you what he wanted?

A: He said it was going to be very simple.

Q: Did he tell you what types of flowers he would want?

A: We didn't get into that.

There was no discussion between the parties about any particulars regarding whether Defendants were being asked to deliver flowers to the wedding (as opposed to picking them up from the store) or whether Stutzman was being asked to attend the wedding. Stutzman's position was that she "chose not to be part of his event," because she believed that Ingersoll "wanted me to do his wedding flowers which would have been part of the event." Stutzman did state in her deposition testimony that had Ingersoll communicated to her that he wanted to purchase raw materials (variously described as "stems" and "branches" throughout the depositions and declarations), she would have provided those items.

Ingersoll's recollection of the interaction is not materially different. In deposition testimony, when asked what he had contemplated having Stutzman provide for his wedding, he indicated:

A: Just some sticks or twigs in a vase and then we were going to do candles. We wanted to be very simple and understated.

Q: Did you tell Barronelle that you wanted to do sticks or twigs?

A: Barronelle never gave me the opportunity to discuss the flower arrangements.

Ingersoll left Arlene's Flowers shortly thereafter, upset because he had thought Stutzman would "do my flowers." This interaction effectively severed the relationship between the parties and ultimately gave rise to the present actions. Ingersoll and Freed were married during the pendency of this action in a much smaller ceremony in their home, with 11 attendees, friends taking pictures, and a flower arrangement from another florist. The Ingersoll and Freed alleged $7.91 in out-of-pocket expenses (mileage at the U.S. Internal Revenue Service rate) relating to finding an alternative source of flowers for their wedding.

Prior to March 1, 2013, and presumably continuing up to this day, Arlene's Flowers has had a written nondiscrimination policy that prohibits discrimination or harassment "based on race, color, religion, creed, sex, national origin, age, disability, marital status, veteran status or any other status protected by applicable law." Stutzman was aware of the voter's passage of Referendum Measure 74 in the fall of 2012, approving same sex marriage as the law in Washington. That said, following the events of March 1, 2013, Stutzman instituted an unwritten policy at Arlene's Flowers that "we don't take same sex marriages."

Efforts toward a negotiated resolution between the AG and Defendants proved fruitless in March and April of 2013. The AG sought to have Defendants sign an Assurance of Discontinuance (hereinafter AOD), stipulating that the conduct at issue here occurred and would not be repeated. While the AOD indicated it did not constitute an admission of a violation, it did not limit the rights or remedies of other persons, i.e., the Individual Plaintiffs, against Defendants. Defendants refused to sign the AOD, taking a position consistent with their past and present arguments in this action.

The AG then commenced its action in Benton County Cause Number 13-2-00871-5 by the filing of a Complaint on April 9, 2013. Therein, the AG alleged a violation of the CPA, both under the Act itself, and pursuant to the WLAD, a violation of which is a *per se* violation of the CPA. Defendants' Answer, containing the affirmative defenses that are the subject of one of these pending motions, was filed on May 16, 2013.

A Complaint by the Individual Plaintiffs, Robert Ingersoll and Curt Freed, in Benton County Cause Number 13-2-00953-3 was filed nine days later, on April 18, 2013. The Individual Plaintiffs alleged three causes of action, two of which survived a prior motion for summary judgment: 1) Violation of the WLAD; and 2) Violation of the CPA. Defendants answered on May 20, 2013, also asserting affirmative defenses at issue here. The cases were consolidated for consideration of these motions by the previously assigned judicial officer.

III. LEGAL BACKGROUND

A. The Consumer Protection Act (CPA)

The CPA provides:

> [u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.020. The CPA, "on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (italics in original).

In enacting the CPA, the Legislature sought "to protect the public and foster fair and honest competition." RCW 19.86.920. Consistent with its purpose, the Legislature has directed that the CPA "shall be liberally construed that its beneficial

purposes may be served." *Id.* This statement from the Legislature "is a command that the coverage of [the CPA's] provision in fact be liberally construed and that its exceptions be narrowly confined." *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). The statute's purpose statement concludes as follows:

> [*i*]*t is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices* which are reasonable in relation to the development and preservation of business or *which are not injurious to the public interest, nor be construed to authorize those acts or practices which* unreasonably restrain trade *or are unreasonable per se.*

RCW 19.86.920 (italics added).

Actions for alleged violations of the CPA may be commenced by an individual or individuals. RCW 19.86.093. Individual plaintiffs must establish the following elements to prove their case: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to business or property, and (5) causation." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (further citation omitted). While undefined in the CPA, "[w]hether a particular act or practice is 'unfair or deceptive' is a question of law," to be determined by the Court. *Panag*, 166 Wn.2d at 47; *see also State v. Schwab*, 103 Wn.2d 542, 546, 693 P.2d 108 (1985). That said, certain acts or practices have been declared by the Legislature to be *per se* violations of the CPA, and "private litigants are empowered to utilize the remedies provided them by the act." *Schwab*, 103 Wn.2d at 546-7.

Actions alleging violations of the CPA may also be brought by the AG. RCW 19.86.080(1). The scope of the AG's authority to act under the statute is broad:

> [t]he attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, *against any person* to restrain and *prevent the doing of any act* herein prohibited or declared to be unlawful…

Id. (italics added). Unlike an individual plaintiff, the AG must establish only three elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011). In bringing actions under the CPA, the AG's role is different than that of the private litigants:

> [t]he Attorney General's responsibility in bringing cases of this kind is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.

Seaboard Surety Co. v. Ralph Williams' NW Chrysler Plymouth (hereinafter Ralph Williams' (I)), 81 Wn.2d 740, 746, 504 P.2d 1139 (1973). The Legislature's declaration of *per se* violations of the CPA "authorize[s]" the AG to bring actions under the CPA for these acts or practices the Legislature declares as *per se* unfair or deceptive. *Schwab*, 103 Wn.2d at 546-7.

B. The Washington Law Against Discrimination (WLAD)

The WLAD provides:

> (1) [*t*]*he right to be free from discrimination because of* race, creed, color, national origin, sex, honorably discharged veteran or military status, *sexual orientation…is recognized as and declared to be a civil right*. This right shall include, but not be limited to:
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> …
>
> (b) *The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation*, assemblage, or amusement…

RCW 49.60.030(1)(b) (italics added). The purpose statement for the law states:

> [the WLAD] is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, in the fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation…are a matter of state concern, that such discrimination

> threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state....

RCW 49.60.010. As with the CPA, the Legislature has directed this Court that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. The statute specifically prohibits discrimination as follows:

> (1) [*i*]*t shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination...or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, staying, or lodging in any place of public resort, accommodation*, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, *regardless of race, creed, color, national origin, sexual orientation...*

RCW 49.60.215(1) (italics added).

C. Violation Of The Washington Law Against Discrimination (WLAD) As A *Per Se* Violation of the Consumer Protection Act (CPA)

The WLAD explicitly provides that a violation of the WLAD is a *per se* violation of the CPA:

> ...any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

RCW 49.60.030(3). Therefore, in addition to an individual's WLAD right of action, both the AG and private individuals are authorized by the Legislature's designation of a WLAD violation as *per se* violations of the CPA to file a CPA action. *Schwab*, 103 Wn.2d at 546-7 (listing "discriminatory practices" under the WLAD (RCW 49.60.030(3)) as example of violations of other statutes that constitute *per se* violations of the CPA).

D. United States Constitution, Amendment I

The Free Exercise Clause provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…

U.S. Const., amend. I. Free exercise is not, however, without its limits. Religious motivation does not excuse compliance with the law because:

> [l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices….Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. United States, 98 U.S. 145, 166-167, 25 L. Ed. 244 (1878) (prosecution under Utah Territory bigamy law). Free exercise does not relieve an individual from the obligation to comply with a valid and neutral law of general applicability that forbids conduct that a religion requires. *Employment Division, Department of Human Resources Of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (religious use of Peyote does not entitle individual to exemption from state unemployment laws which prohibit granting benefits to individual who is fired for drug use). Consistent with the rationale of *Reynolds*, requiring any form of justification for such a law greater than rationale basis inquiry, when a law is challenged under free exercise, "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 884-85.[8] This is the case because:

> [t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."

Id. at 885 (further citation omitted).

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[8] Justice Scalia, writing for the majority, relied on *Reynolds* to hold the "compelling governmental interest" balancing test in *Sherbert v. Verner*, 374 U.S. 398 (1963) is inapplicable to a free exercise challenge to an across-the-board criminal prohibition of a particular form of conduct.

In particular, with respect to participation in commerce, the Supreme Court has stated:

> [w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption…operates to impose [the follower's] religious faith on the [person sought to be protected by the law].

United States v. Lee, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Amish employer must collect social security tax for those in their employ).

E. Washington State Constitution, Article I, Section 11

Article I, Section 11 of the Washington State Constitution provides as follows:

> [a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Wash. Const. Article 1, Section 11. Article I, Section 11 provides "broader protection than the first amendment to the federal constitution." *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009). A party challenging government action under Article I, Section 11 must show both a sincere belief and a substantial burden upon free exercise as a result of the government action. *City of Woodinville*, 166 Wn.2d at 642-43. Where a substantial burden exists, the government must show that its action is "a narrow means for achieving a compelling goal." *Id.* All burdens are evaluated "in the context in which [they] arise. *Id.* at 644. As the Court has indicated by way of analogy, while healing the sick may be connected to worship, "a church must still comply with reasonable permitting process if it wants to operate a hospital or clinic." *Id.* This limitation is consistent with the final clause of Article I, Section 11, providing that "the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify

practices inconsistent with the peace and safety of the state." In this regard, "the key question is not whether a religious practice is inhibited, but whether a religious tenet can still be observed." *State v. Motherwell*, 114 Wn.2d 353, 362-63, 788 P.2d 1066 (1990) (non-clergy counselors required to report suspected child abuse).

The Legislature's invocation of its police power to prohibit conduct on grounds that a law is necessary to protect Washington citizens from harm and to promote public health and welfare has withstood prior challenges based on Article I, section 11. *State v. Balzer*, 91 Wn.App. 44, 60-61, 91 P.2d 931 (1998) (Rainbow Tribe and Rastafarian beliefs with respect to Marijuana did not prevent state from placing Marijuana in Schedule I). When the legislature acts under its police power and constrains individual freedom, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints." *Balzer*, 91 Wn.App. at 60-61 (*citing State v. Smith*, 93 Wn.2d 329, 338, 610 P.2d 869 (1980)).

Article I, Section 11 is also not a bar to regulation of commerce, such as where a physician objects on religious grounds to being required to purchase professional liability insurance as a condition of being granted privileges at a hospital. *Backlund v. Board Of Commissioners Of King County Hospital District 2*, 106 Wn.2d 632, 724 P.2d 981 (1986). As the Court observed in the context of the hospital's administrative action:

> Dr. Backlund freely chose to enter the profession of medicine. Those who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity.

Backlund, 106 Wn.2d at 648.

IV. ANALYSIS

A. Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing

In both Benton County Cause Numbers 13-2-00871-5 and 13-2-00953-3 Defendants have moved for summary judgment, asking this Court to dismiss all claims brought against them by both the AG and the Individual Plaintiffs as moot. Defendants argue that the actual interaction that occurred on March 1, 2013 between Stutzman and Ingersoll was the result of a misunderstanding. The misunderstanding resulted from the fact that Ingersoll asked to speak with Stutzman personally and from the fact that Stutzman normally designed and created custom flower arrangements for Ingersoll. As a result, Stutzman reasonably assumed that was what Ingersoll wanted on this occasion. Had Stutzman known that Ingersoll would have been satisfied with the provision of raw materials for his wedding, she would have provided them. But for the fact that Ingersoll and Freed are now married, Defendants assert she would provide them today. The only way the controversy could reoccur, Defendants argue, would be if Ingersoll and Freed were to divorce and remarry. Thus, an injunction would serve no purpose. While the Defendants acknowledge that injunctions are appropriate for matters of continuing and substantial public interest, they argue that what other individuals may want from Defendants in the future is purely speculative. Thus Defendants assert that there is no live controversy. They argue that the matter is moot, none of the Plaintiffs have standing, and the matter should be dismissed on summary judgment.

Either party may move for summary judgment. Superior Court Civil Rule (hereinafter CR) 56(a-c). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Ward v.*

Coldwell Banker/San Juan Properties, Inc., 74 Wn.App. 157, 161, 872 P.2d 69 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See State Farm Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984); *see also Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) ("A material fact is one upon which the outcome of the litigation depends."). To the extent that there are disputes between the parties, they are disputes as to which facts are to be applied to decide the issue. The matter is appropriate for summary judgment.

1. Lack Of Standing On The Part of Both Plaintiffs

The Defendants posit the case as one based on a mistake of fact, or as they term it a "misunderstanding." As indicated above, they argue that had Stutzman known that Ingersoll would have been satisfied with something other than what she customarily provided, that is to say arranged flowers, she would not have immediately told him that she couldn't "do his wedding." Defendants thus argue that Plaintiffs are asking the Court to decide the case based on what they term a "hypothetical 'expectancy.'"

On March 1, 2013, Stutzman, who had provided the service of flower arranging to Ingersoll in the past, refused, albeit politely, to provide that service. She did so because she believed Ingersoll wanted her to create flower arrangements for his wedding. The Defendants assert in their reply brief regarding the motions that follow that Stutzman "could hardly think otherwise" based on their lengthy prior personal and commercial relationship. As a result, Stutzman refused before Ingersoll could explain precisely what he wanted.

The hypothetical facts are those things that might have, could have, or would have had happened, but didn't. The actual facts are the things that did happen. While

the Court is required for the purposes of the motion to view "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party," here the facts are reasonably susceptible to only one construction, an actual refusal to provide services on the part of Stutzman. *Ward*, 74 Wn.App. at 161.

"One who is not adversely affected by a statute may not question its validity." *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987), *as amended by*, 750 P.2d 254 (1988). The basic rule of standing "prohibits a litigant…from asserting the legal rights of others," and requires that a party have a "real interest therein." *Dean v. Lehman*, 143 Wn.2d 12, 18-19, 18 P.3d 523 (2001) (internal citations and quotation marks omitted).

In support of its position that it has standing in its own right, the AG points to RCW 19.86.080(1), which authorizes the AG under the CPA to:

> bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful…"

RCW 19.86.080(1). Further, in support of the position that it has a real interest, separate and apart from the Individual action under the CPA, there is *Ralph Williams' (I)*, which provides:

> [t]he Attorney General's responsibility in bringing cases of this kind is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.

Ralph Williams' (I), 81 Wn.2d at 746. The AG is correct. It has a real interest and meets the basic test for standing. Any lingering doubt as to whether the requirement of standing is subsumed within the elements of the CPA action itself, as to both the AG and Individual action, is removed by *Panag*, where the Court, discussing the five-part test for individual actions, states as follows:

> [w]e will not adopt a sixth element, requiring proof of a consumer transaction between the parties, under the guise of a separate standing inquiry.

Panag, 166 Wn.2d at 33. Individual CPA actions establish standing through public interest impact and injury: the AG proves it through public interest alone. *Id.* at 38; *see also* RCW 19.86.080(1); *and see State v. Kaiser*, 161 Wn.App. at 719.

Here, the WLAD, a violation of which is alleged in the CPA action, carries with it its own "specific legislative declaration of public interest impact." *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company*, 105 Wn.2d 778, 791, 719 P.2d 531 (1986). Further, public interest may be satisfied by actions having a potential to injure others in the course of a defendant's business. *Hangman Ridge*, 105 Wn.2d at 790-91. Plaintiffs point out that Defendants have an unwritten policy that they will refuse to provide arranged flowers to the next same-sex couple that requests this service of them. Also, as indicated above, the Individual Plaintiffs have alleged damages in mileage traveled to secure flowers from another vendor. Both the AG and Individual Plaintiffs have established standing in the first instance in their respective CPA actions.

The Individual Plaintiffs, addressing standing in their WLAD and CPA actions, make two points. First, they point out that under the CPA, nominal economic damages are sufficient to support standing. *Smith v. Stockdale*, 166 Wn.App. 557, 565, 271 P.3d 917 (2012) ($5 claim of economic damages sufficient to support claim of injury in CPA claim). Second, as to the WLAD action, the Individual Plaintiffs note that courts have "long recognized damage is inherent[9] in a discriminatory act." *Negron v. Snoqualmie Valley Hospital*, 86 Wn.App. 579, 587, 936 P.2d 55 (1997). For a WLAD claim, nominal damages are established "merely by showing a

[9] That said, the Individual Plaintiffs affirm that, outside of the standing context, they are not asserting or seeking actual damages with respect to non-economic harms.

deprivation of a civil right." *Minger v. Reinhard Distribution Company, Inc.*, 87 Wn.App. 941, 947, 943 P.2d 400 (1997) (quotation omitted).

Defendants have misapprehended what actually happened on March 1, 2013. On that day, Stutzman refused to provide to Ingersoll a service she provided to others. While it is certainly true that a case is moot if a court "cannot provide the basic relief originally sought...or can no longer provide effective relief," that is not the case here. *Darkenwald v. Employment Security Department*, 182 Wn.App. 157, 165, 328 P.3d 977 (2014) (internal citation omitted). Should all of the elements of Plaintiff's claims be proven, based on this refusal to provide services, the Court may order relief, including injunctive relief.[10]

As to the Defendants' contention that the case is moot because Ingersoll and Freed are now married, both Plaintiffs counter that case law holds otherwise. The idea that an individual plaintiff can only enjoin future actions as to themselves is contrary to the purpose of the CPA, which is preventing the practice in the future. *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973) ("This broad public policy [the purpose of the CPA] is best served by permitting an injured individual to enjoin future violations of RCW 19.86, *even if such violations would not directly affect the individual's own private rights*.") (emphasis added).

The AG also points to *Ralph Williams' (III)*, where the defendant car dealership, having been found to have violated the CPA with respect to advertising and sales practices, appealed the trial court's granting of broad injunctive relief preventing those practices in the future. *State v. Ralph Williams' North West Chrysler Plymouth Inc.(Ralph Williams' (III))*, 87 Wn.2d 298, 553 P.2d 423 (1976). The defendant dealership argued that there was no basis for injunctive relief. The business

[10] Defendants argue that these actions are not justiciable under the Uniform Declaratory Judgment Act (hereinafter UDJA), RCW 7.24. While both the AG and Individual Plaintiffs make well-reasoned arguments to the contrary, as they point out, these actions were not brought under the UDJA.

had closed, thus any future violations were unlikely. It is true that an injunction may be moot if a defendant can demonstrate that "events make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Ralph Williams' (III)*, 87 Wn.2d at 312 (internal quotations omitted). That said, "[c]ourts must beware efforts to defeat injunctive relief by protestations of reform." *Id.* In that case, because the practices were discontinued only after institution of the suit and the business was free to reenter the market and continue its past practices, an injunction was proper. *Id.* Here, the practice complained of by Plaintiffs will be continued by way of an unwritten but acknowledged policy of the Defendants. If the past violation of a shuttered business, not specifically disclaimed, supports a finding of a danger of future violation to substantiate an injunction in *Ralph Williams' (III)*, Defendants' action, now made policy[11] of Arlene's Flowers, an active business, would support an injunction if the Plaintiffs prove their CPA claim.

Defendants point to *Orwick v. City of Seattle* in support of their position that the matter is moot, arguing that the exception for mootness for "matters of continuing and substantial public interest," only applies to "cases which became moot...after a hearing on the merits of the claim," *i.e.*, when "the facts and legal issues had been fully litigated by parties with a state in the outcome of a live controversy." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984) (*en banc*) (quotations removed). Defendants state that there has been no hearing on the merits, any inconvenience to Ingersoll and Freed cannot be corrected, and thus it is a waste of resources to continue to address a case that has not been fully litigated.

[11] In point of fact, the totality of the current anti-discrimination policy of Arlene's Flowers is internally inconsistent. The written policy purports to comply with the WLAD and CPA, by including within its prohibition, "any other status protected by applicable law." The unwritten policy creates an exception for same sex marriage. Defendants' assertion that the business is not doing weddings during the pendency of this case, i.e. "voluntary cessation," does not change the analysis under *Ralph Williams' (III)*. *Ralph Williams' (III)*, 87 Wn.2d at 272.

As the Individual Plaintiffs note, Defendants misread *Orwick*. A finding of a hearing on the merits is not mandatory. It is a fourth, *optional*, factor in determining whether the public importance exception is to be applied.[12] The reason it is optional, is made clear in subsequent case law. A hearing on the merits is shorthand for the Court's concern regarding "the level of genuine adverseness and the quality of advocacy of the issues." *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994) (*quoting Hart v. Department of Social & Health Services*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). An issue not properly developed and presented, even if it is of public importance, cannot be properly decided.

Defendants' own diligence and that of the AG and Individual Plaintiffs works against Defendants on this point. The briefing in this matter is voluminous, thorough and of excellent quality. The briefing for this summary judgment motion alone consists of 63 pages of briefing by the parties, with 176 pages of declarations and attachments thereto. The briefing for the last six summary judgment motions in this case total 443 pages of briefing by the parties, with 2,202 pages of declarations and attachments thereto. The briefing does not lack for citation to authority. The attachments include the depositions of the parties, as well as declarations of the parties and experts, and supporting source material. Oral argument was had for a total of a full court day on the motions, spread out over two days. These motions are being resolved on summary judgment because only issues of law remain, and the legal issues have been well argued by zealous advocates representing genuinely adverse parties. *See Westerman*, 125 Wn.2d at 287 (reviewing bail issue where bail order had

[12] The first three factors are: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Westerman*, 125 Wn.2d at 286 (*quoting Hart*, 111 Wn.2d at 448). As indicated above, the Legislature has, in the purpose and statements regarding construction of the CPA and WLAD indicated that the elimination of discrimination in trade or commerce is of public importance. *See e.g.*, RCW 49.60.010, "discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state...."

been replaced by another order, in part because "the briefs before this court are of good quality").

Further, even if the Court were to find that the matter was otherwise moot, a fifth optional factor would weigh heavily in favor of the public importance exception. The Court may consider "the likelihood that the issue will escape review because the facts of the controversy are short-lived." *See Id.* at 286-87 (*citing with approval Seattle v. State*, 100 Wash.2d 232, 250, 668 P.2d 1266 (1983) (Rosellini, J., dissenting)). As the Court indicated above, the matter is not moot in light of the basic rules of standing, the nature of the causes of action themselves, the harms alleged and remedies available, and the Court's injunctive power as made clear in *Ralph Williams' (III)*. But even if the case were otherwise moot, *Orwick* is no bar to hearing the case in light of *Westerman* and *Hart*, above.

Finally, common sense dictates that the Defendants' position, however analyzed, must be rejected. Otherwise, a funeral parlor could counter that any CPA or WLAD claim against it was moot, as the deceased would presumably be interred or cremated during the initial pleading of the case. This, despite a policy, written or unwritten, that they would repeat their conduct in the future.

Neither the CPA nor the WLAD actions are moot and Plaintiffs have standing. Even if the matters were moot, they are matters of important public interest that due to their nature would otherwise escape review. The Defendants' motion for summary judgment on Plaintiffs' standing is denied.

B. Plaintiff's Motion For Partial Summary Judgment On Liability And Constitutional Defenses (Considered With Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment)[13]

[13] While the above motions were filed separately, they are substantially similar in their arguments: so much so that Defendants responded to the motions in a single filing. The Court will consider and resolve the motions together.

In Benton County Cause Number 13-2-00871-5, the AG has moved for partial summary judgment, arguing that Defendants have admitted acts that constitute a violation of the WLAD in trade or commerce, and thus constitute a per se violation of the CPA as a matter of law. Further, the AG argues that the Defendants' four remaining constitutional affirmative defenses in their Answer fail as a matter of law. The Individual Plaintiffs, in Benton County Cause Number 13-2-00953-3, have also moved for partial summary judgment, also arguing that Defendants have admitted acts that constitute a violation of the WLAD in trade or commerce, and thus constitute a *per se* violation of the CPA as a matter of law, with the exception of the issue of damages. Further, the Individual Plaintiffs join in the AG's arguments with respect to the aforementioned constitutional affirmative defenses.

Either party may move for summary judgment. CR 56(a-c). Where there is a factual dispute that is material to the resolution of the motion, the Court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Ward*, 74 Wn.App. at 161 (1994). Where there are no disputed facts, or the factual dispute is not material and only issues of law remain to be determined, summary judgment is appropriate. *See Emerson*, 102 Wn.2d at 480; *see also Clements*, 121 Wn.2d at 249 ("A material fact is one upon which the outcome of the litigation depends."). While the Defendants argue that there are material factual disputes, the Court concludes otherwise. As indicated above, the material facts are what actually happened, not what would have happened. Further, the distinction drawn by Defendants as to conduct (same sex marriage) and status (being gay), as it relates to what Defendants actually did on March 1, 2013, has been rejected by the Supreme Court of the United States. As to why Defendants did what they did, other than the extent to which religious motivation may provide an affirmative defense,

Defendants' motivation is irrelevant under both the CPA and WLAD. Thus, the matter is appropriate for summary judgment.

1. Violation Of The CPA And WLAD As A Matter Of Law

a. Individual Plaintiffs' WLAD Claim Against Defendants

The WLAD specifically prohibits discrimination as follows:

> (1) [*i*]*t shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination…or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, staying, or lodging in any place of public resort, accommodation*, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, *regardless of race, creed, color, national origin, sexual orientation…*

RCW 49.60.215(1) (italics added). Defendants, in their Answer, admit that Arlene's Flowers is "a for-profit Washington corporation that sells goods and services to the general public" and admit that Stutzman is the "president, owner, and operator of Arlene's flowers." *Defendants' Answer* (13-2-00953-3), pg. 2, paras. 2-3. As indicated in this Court's prior Order, both Arlene's Flowers and Stutzman may be held liable for the actions of Stutzman under the clear meaning of the WLAD. *See* RCW 49.6.040(19) (defining "person" to include individuals and corporations); *see also Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 354-57, 20 P.3d 921 (2001) (individual supervisor and corporation liable based on supervisor's actions).

Defendants admit in their Answer and in deposition testimony, that Stutzman denied[14] services to Ingersoll on March 1, 2013, for religious reasons. *See Stutzman Deposition* (….And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.).

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[14] As the Court has indicated previously, while the Defendants in their answer use the word "declined" in place of "denied," both in argument and in its Answer, for the purposes of this motion, it is a distinction without a difference. *See Defendants' Answer* (13-2-00871-5), pg. 4, para. 5.4 ("….It is ADMITTED that Arlene's Flowers declined to design and create floral arrangements to decorate and beautify Mr. Ingersoll's upcoming wedding.").

Because Defendants have admitted to a prima facie case[15] of discrimination pre-trial, this motion is controlled by *Lewis v. Doll*. Lewis, a young black man, sued Doll, the owner of a 7-Eleven store, for discrimination under the WLAD. *Lewis v. Doll*, 53 Wn.App. 203, 765 P.2d 1341 (1989). The testimony at trial was that, upon orders of Doll, because of past instances of shoplifting at the store attributed to black patrons, Lewis was denied the ability to purchase "a couple of [S]lurpees" by the store's clerk.[16] *Lewis*, 53 Wn.App. at 204. This occurred despite the fact that Lewis was not identified as a suspected shoplifter, and white patrons entered and were served during this refusal. *Id.* at 205. Lewis' motion for a directed verdict at the close of the evidence was denied, and the jury returned a verdict for the defendant business owner, Doll. *Id.* at 204. The Court reversed, granted the motion for a directed verdict in favor of Lewis (finding a violation of the WLAD as a matter of law), and remanded the matter for a trial on damages only. *Id.*

The Court, citing with approval findings of discrimination based on sexual orientation by another state court,[17] stated "[a]fter establishing a prima facie case [of discrimination under the WLAD] the burden of going forward shifts to the defense which must attempt to justify the alleged discriminatory policy." *Id.* at 208. The Court pointed out that only discriminatory impact, not motivation, need be shown, stating "[n]or is the fact Ms. Doll did not intend a discriminatory effect relevant." *Id.*

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[15] While not specifically addressed by the parties, the elements of the WLAD claim alleging discrimination against an individual in a public accommodation are as follows: "1) the plaintiff is a member of a protected class; 2) the defendant's establishment is a place of public accommodation; 3) the defendant discriminated against plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class; and 4) the protested status was a substantial factor causing the discrimination." *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 525, 20 P.3d 447 (2001).

[16] The 7-Eleven clerk told Lewis at the time of the refusal, "[n]o, we have a policy. Boss left strict orders not to serve any blacks." The clerk further indicated, "[w]e have been having problems with blacks coming in shoplifting." *Id.*

[17] Those two cases are significant in that they sustained findings of discrimination based on sexual orientation, and that one of the cases upheld application of Minneapolis anti-discrimination ordinance against the club owner, a born-again Christian's, free exercise claim as the ordinance applied to his religious freedom in the operation of his business. *See Potter v. LaSalle Sports & Health Club*, 368 N.W.2d 413 (Minn.Ct.App. 1985), *affirmed by*, 384 N.W.2d 873 (Minn. 1986) (affirming Civil Rights Commission finding of discrimination); *see also Blanding v. Sports & Health club, Inc.*, 373 N.W.2d 784, 789 (Minn.Ct.App. 1985), *affirmed by*, 389 N.W.2d 205 (Minn. 1986) ("...the Minneapolis ordinance as applied does not impose a burden upon the principals' free exercise of religion.").

at 210. The Court found that this policy, denying service to all black potential patrons did not constitute a legitimate business policy, as allowed under RCW 49.60.215. *Id.* at 209-12. The Court concluded:

> [t]hus, after viewing the evidence and all reasonable inferences drawn therefrom in favor of Ms. Doll, we conclude as a matter of law, the defense raised was without a legal foundation. The court erred when it submitted the question of discrimination to the jury.

Id. at 211-12. Defendants do not claim that their refusal falls under the final clause of RCW 49.60.215, which provides that "behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice."

Defendants admit that Ingersoll was denied the right to purchase a service, and freely admit that their unwritten policy will result in a future denial should another gay or lesbian couple seek their services. Defendants defend their action as one aimed at opposition to conduct (same sex-marriages), rather than opposition to or discrimination against gay or lesbian individuals generally (the status of sexual orientation). As indicated above, a tenet of Stutzman's faith makes precisely this distinction. *See* Resolution of SBC, "On 'Same-Sex Marriage' And Civil Rights Rhetoric" New Orleans – 2012. The Individual Plaintiffs do not accuse Stutzman of acting inconsistently with this tenet of her faith, they instead counter that this distinction between conduct and status has previously been rejected in discrimination claims. The Individual Plaintiffs are correct.

The United States Supreme Court has long held that discrimination based on conduct associated with a protected characteristic constitutes discrimination on the basis of that characteristic. *Bob Jones University v. United States*, 461 U.S. 574, 605, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (Defendant could not avoid result by allowing all races to enroll, subject to conduct restrictions regarding interracial association and marriage because "discrimination on the basis of racial affiliation and

association is a form of racial discrimination"); *see also Christian Legal Society Chapter of the Univ. of Cal., hasting Coll. of the Law v. Martinez*, 561 U.S. 661, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (University student group's claim that it did not prohibit gay members, only those who engaged in or supported same-sex intimacy rejected because prior decisions "have declined to distinguish between status and conduct in this context."). Further, as the Individual Plaintiffs correctly observe, there is no authority for the proposition that substantial compliance with discrimination laws excuses any individual act of discrimination. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013), *cert. denied*, __ U.S. __, 134 S. Ct. 1787, 188 L. Ed. 2d 757 (2014) ("For example, if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women even if it will serve them appetizers."). In fact, in *Elane Photography*, under a cognate New Mexico anti-discrimination law, the Court held, "when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct [such as marriage] that is inextricably tied to sexual orientation." *Elane Photography*, 309 P.3d at 62. While Defendants at oral argument argued that *Elane Photography* was wrongly decided, it is consistent with existing case law and construes a state statute that is not meaningfully different than the WLAD. *Id.* at 61 (Construing provision of New Mexico Human Rights Act (hereinafter NMHRA), which, in relevant part, prohibits "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services…because of …sexual orientation."); *compare*, WLAD, RCW 49.60.215(1) (prohibiting "any person…to commit an act which directly or indirectly results in…the refusing or withholding from any person…patronage…in any place of public…accommodation…regardless of…sexual orientation…."). *Elane Photography* did not allow a wedding photographer to make Defendants' conduct versus status distinction on religious grounds with respect to

photographing a same sex marriage in the face of an anti-discrimination law. Defendants have offered no reason for a different result here. Defendants' additional arguments to the contrary, based on examples of radio contests and movie plots, cannot be seriously considered as a legal argument by the Court. Defendants' refusal to "do the flowers" for Ingersoll and Freed's wedding based on her religious opposition to same sex marriage is, as a matter of law, a refusal based on Ingersoll and Freed's sexual orientation in violation of the WLAD.[18]

In *Lewis*, it was error for the trial court to fail to grant a directed verdict based on a trial record of an act that constituted discrimination within the meaning of the WLAD without valid excuse under the statute. Defendants have similarly admitted to conduct that constitutes a violation of the statute, and provide no legally cognizable defense to their actions. *Lewis*, 53 Wn.App at 212. While *Lewis* involved a motion for a directed verdict (as well as a later motion for a judgment notwithstanding the verdict), because there are no disputed material facts, Individual Plaintiffs are, consistent with *Lewis*, entitled to summary judgment on liability. Actual damages are not an element of a WLAD claim, and, as indicated below, Defendants' other affirmative defenses that are the subject of this motion fail as a matter of law.

Because the Individual Plaintiffs have not sought actual damages under the WLAD, the only remaining matters are remedies to be determined by the Court: nominal damages, injunctive relief,[19] attorney's fees, and costs. *Minger*, 87 Wn.App. at 946-47.

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[18] A violation of the WLAD can additionally be shown by "any distinction, restriction, or discrimination" based on a protected class. RCW 49.60.215(1). The Individual Plaintiffs pled this case as a "refusal." *See, e.g., Individual Plaintiffs' Complaint* (13-2-00953-3), pg. 5, para. 26.

[19] Defendants assert that additional fact-finding is necessary for the Court to fashion injunctive relief. Defendants are mistaken. As the Individual Plaintiffs observe, an injunction in this context would not prescribe or proscribe the nature of the goods or services to be sold by a business (it would not order a Kosher deli to stock bacon or not stock matzah), it would simply require a business to offer its customarily provided services on a non-discriminatory basis (it would require in practice that the Kosher deli make *all of the products or services that business chose to sell* available for purchase by everyone without discrimination). While Defendants assert that there are additional levels of involvement in weddings that Stutzman finds fulfilling and religiously significant which create a factual dispute, the issue in an

b. Individual Plainiffs' CPA Claim Against Defendants

The Individual Plaintiffs point out that, having established their WLAD action, little more is required to establish their CPA action, because a violation of the WLAD "committed in the course of trade or commerce" is a *per se* violation of the CPA where the violation causes injury to business or property. *See* RCW 49.60.030(3); *see also Panag*, 166 Wn.2d at 37. Both Stutzman and Arlene's Flowers are liable under the CPA, with Stutzman being personally liable in both her individual and corporate capacity. *See* RCW 19.86.010(1) ("'Person' shall include, where applicable, natural persons, corporations…"); *see also Ralph Williams' (III)*, 87 Wn.2d at 322 ("If a corporate officer participates in the wrongful conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties.").

The Individual Plaintiffs must establish five elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to business or property, and (5) causation." *Id.* (further citation omitted). The uncontested material facts demonstrate that the events of March 1, 2013 occurred in trade or commerce, in particular inside the Arlene's Flowers, in Richland, Washington. *See* RCW 19.86.010(2) ("'Trade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington."). This satisfies the second element of their CPA claim. Because the Individual Plaintiffs have demonstrated a violation of the WLAD in trade or commerce, the violation is, for the purpose of applying the CPA, "a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or

injunctive context is simply whether the involvement is a service provided for a fee, in which it must be offered on a non-discriminatory basis under the WLAD.

commerce." RCW 49.60.030(3). This satisfies the first and third elements of the CPA claim.

As to the fourth and fifth element, the judicial officer previously assigned to these matters addressed this issue in a prior summary judgment motion by Defendants. As part of that judicial officer's ruling, two orders were entered following a hearing on October 4, 2013. Both orders make clear that the Court was reviewing the facts, the Individual Plaintiffs' claimed mileage of $7.91 as economic damages caused by Defendants' refusal to provide services, in the light most favorable to the non-moving party. The first Order, entered on October 7, 2013, indicated that "this Court concludes that the fourth and fifth elements as required by *Hangman Ridge* are established." The Amended Order, entered on December 17, 2013, makes clear that the Court was not making a finding as a matter of law regarding the establishment of elements four and five. The Amended Order removes the language above and replaces it with the following: "this Court concludes that the facts are sufficient to defeat Defendants' Motion for Partial Summary Judgment." It is therefore clear that the prior judicial officer did not, due to the nature of prior summary judgment (and lack of a cross motion), make a determination regarding the sufficiency of the claimed loss of $7.91 to establish the fourth and fifth elements of the Individual Plaintiffs' CPA claim as a matter of law.

While the supporting legal authority appears in a footnote, and the Individual Plaintiffs indicate that the "extent of Plaintiff's damage will be presented to the court at another time," they indicate they were injured by Defendants' actions and that they are seeking summary judgment on liability under the CPA claim. Because a ruling on damage and causation, the fourth and fifth element, are necessary to resolve the issue of liability, the Court will address these elements as well. Defendants do not contest in their response the assertion by the Individual Plaintiffs that they incurred costs of

$7.91 in mileage, as a result of Defendants' denial of services (which they term declining and referring) in securing alternate replacement services for their wedding. In point of fact, Defendants' characterization of Stutzman's act as a declination and referral impliedly admits that additional cost and effort would be required to secure alternate services. Under the CPA, nominal economic damages are sufficient to support standing. *Smith v. Stockdale*, 166 Wn.App. at 565 ($5 entry fee sufficient to support claim of injury to property in CPA claim); *see also Amback v. French*, 167 Wn.2d 167, 171, 216 P.3d 405 (2009) (quoting *Hangman Ridge* for proposition that injury does not need to be great or quantifiable). Simply put, if a $5 entry fee is sufficient to satisfy the element of injury to property, the greater (albeit only slightly greater) amount of $7.91 in mileage must be sufficient as a matter of law. Causation is not contested, satisfying the fifth element. On their CPA claim, Individual Plaintiffs are also entitled to summary judgment on liability.

c. *AG's CPA Claim Against Defendants*

The AG is only required to prove three elements in a CPA claim: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. at 719. Defendants, both in their Answer and in deposition testimony, assert and/or admit a course of conduct on the part of Stutzman that legally constitutes a refusal to provide services to Ingersoll on March 1, 2013, for religious reasons. *See Defendants' Answer* (13-2-00871-5), pg. 3, para. 4.4 ("....Ms. Stutzman informed Robert Ingersoll that her religious convictions precluded her from designing and creating floral arrangements to decorate a same-sex wedding"); *see also Stutzman Deposition* (....And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.).

As indicated above, the uncontested material facts establish a violation of the WLAD in trade or commerce, and thus a *per se* violation of the CPA. *See* RCW 49.60.030(3); RCW 19.86.010(2). Also, as indicated above, both Stutzman and Arlene's Flowers are liable under the CPA, with Stutzman being personally liable in both her individual and corporate capacity. *See* RCW 19.86.010(1); *see also Ralph Williams' (III)*, 87 Wn.2d at 322.

The AG makes one additional point with respect to the conduct (same sex marriage) versus status (being gay) distinction Defendants seek to make with respect to Stutzman's actions under the WLAD, which provides the predicate for the *per se* CPA claim. This is that, assuming for the purposes of argument that the Courts have allowed such a distinction (and they have not), it would make no difference regarding the Defendants' liability under the WLAD. This is because the WLAD does not require the distinction, restriction or discrimination to be the direct result of Stutzman's actions. *See* RCW 49.60.215 ("[i]t shall be an unfair practice for any person or the person's agent or employee *to commit an act which directly or indirectly results in any distinction, restriction, or discrimination*…"). The indirect discriminatory result flowing from Stutzman's actions satisfies the WLAD and constitutes a violation. On the *per se* CPA claim, the AG is entitled to summary judgment on liability.

This does not end the Court's analysis. As previously indicated, the AG pled its CPA claim in the alternative: both as a *per se* CPA violation and as a generic CPA violation. The AG moves for summary judgment on the alternative generic CPA violation as well. The elements remain the same: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. at 719. However, as

opposed to satisfying all three elements by showing a WLAD violation in trade or commerce, each element must be satisfied individually.[20]

As to the first element, while not defined in the statute, "[w]hether a particular act or practice is 'unfair or deceptive' is a question of law," to be determined by the Court. *Panag*, 166 Wn.2d at 47. The AG cites to *Blake v. Federal Way Cycle Center* which establishes criteria for determining whether an act or practice is "unfair" as follows:

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy, as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury to consumers…; (3) whether it cause substantial injury to consumers…

Blake v. Federal Way Cycle Center, 40 Wn.App. 302, 310, 698 P.2d 578 (1985) (further quotation omitted); *see, e.g., Demelash v. Ross Stores, Inc.*,[21] 105 Wn.App. 508, 523-524, 20 P.3d 447 (2001) (reversing grant of summary judgment for defendant, an Ethiopian immigrant with limited English skills, where store refused to return his coat and accused Plaintiff of shoplifting even after he provided receipt, and holding that plaintiff successfully established, among others, first element of "unfair or deceptive act or practice" on prima facie basis). Even in the absence of the WLAD's declaration, the Court finds that treating a customer differently because of their membership in a protected class is unfair as a matter of law pursuant to the first listed criteria in *Blake*. Any other result would be inconsistent with Washington law. *See* RCW 26.04.010(1) (defining marriage to include same-sex couples); *see also*,

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[20] The Defendants describe these means of proof as "co-extensive," to which the AG takes exception. Whatever Defendants mean by "co-extensive," it is clear that the three elements of a CPA claim brought by the AG can be satisfied by showing a *per se* violation of a qualifying predicate statute occurring in trade or commerce, or by proving qualifying acts independent of a *per se* violation of a qualifying predicate statute.

[21] *Demelash* comes close to resolving the issue, in that in discussing the WLAD claim therein, it is clear that it is based on race and national origin as the protective classes at issue. That said, the discussion of the CPA claim makes no mention of the protective class at issue in the CPA claim. Inferentially, they have to have the same basis, but in an abundance of caution, the Court does not rely on this inference.

RCW 9A.36.078[22] (legislative finding in criminal malicious harassment statute). The first element is satisfied.

Defendants' argument that Stutzman was acting within the bounds of public policy because she and Arlene's Flowers do or should fit within the exclusions for ministers and religious organizations under RCW 26.04.010(4-6) is unconvincing. First, as the AG rightly points out, the statutes address *conduct*, not beliefs, so the fact that the law makes a distinction between her actions in a public accommodation and that of a minister or priest in a house of worship is in no way unfair. Further, Stutzman is not a minister, nor is Arlene's Flowers a religious organization when they sell flowers to the general public in trade or commerce from a public accommodation. *See* RCW 26.04.010(4). Defendants advance a construction by which the exception defeats the purpose of the rule: it also makes a trifle of the profound distinction between the clergy and the laity. This must be considered an absurd result. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 778, 280 P.3d 1078 (2012) (court to avoid absurd results in construing any statute).

The second element is also satisfied, as the uncontested material facts demonstrate that the events of March 1, 2013 occurred in trade or commerce. *See* RCW 19.86.010(2) (defining "trade" and "commerce"). As to the third element, public interest impact, the Court believes the AG reads too much in *Lightfoot v. MacDonald*, an individual CPA action, when it asserts that the case clearly establishes a presumption that the element is established when the AG acts. *Lightfoot v.*

[22] The first full paragraph of the legislative finding reads as follows: "The legislature finds that crimes and threats against persons because of their race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicaps are serious and increasing. The legislature also finds that crimes and threats are often directed against interracial couples and their children or couples of mixed religions, colors, ancestries, or national origins because of bias and bigotry against the race, color, religion, ancestry, or national origin of one person in the couple or family. The legislature finds that the state interest in preventing crimes and threats motivated by bigotry and bias goes beyond the state interest in preventing other felonies or misdemeanors such as criminal trespass, malicious mischief, assault, or other crimes that are not motivated by hatred, bigotry, and bias, and that prosecution of those other crimes inadequately protects citizens from crimes and threats motivated by bigotry and bias. Therefore, the legislature finds that protection of those citizens from threats of harm due to bias and bigotry is a compelling state interest."

MacDonald, 86 Wn.2d 331, 335, 544 P.2d 88 (1976). The Court reaches this conclusion based on the current briefing: the AG has cited no case law subsequent to *Lightfoot* that says this is what the case means. That said, the uncontested material fact of the unwritten policy to refuse to provide services to any future same-sex wedding establishes the third element as it would in an individual action, as the practice "has the capacity to injure other persons." RCW 19.86.093(3)(c). On the alternative generic CPA claim, the AG is also entitled to summary judgment on liability.

2. Preemption Of CPA And WLAD As Applied To Defendants' Conduct Under First Amendment To United States Constitution

In both actions, Defendants assert the affirmative defense of preemption under the United States Constitution. In the Answer to the AG's action, the affirmative defense is listed as follows:

> 6.6 As applied preemption under the First Amendment to the United States Constitution.

Defendants' Answer (13-2-00871-5) (AG Action), pg. 6, para. 6.6. In the Individual Plaintiffs' action, the same affirmative defense is raised, but the defense is more specifically delineated:

> 32. Preemption: As applied violation of the Free Speech, Free Exercise and Free Association provisions of the First Amendment to the United States Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 32. While the Defendants have vigorously contested all aspects of these actions, their primary defense to both actions appears to be that a central tenet of Stutzman's firmly-held religious belief is in direct conflict with the Laws of the State of Washington, and that her religious beliefs should prevail. Her beliefs include both a definition of marriage that excludes same-sex marriage and an explicit rejection of same-sex marriage as a

civil right. *See* Resolution of SBC, "On 'Same-Sex Marriage' And Civil Rights Rhetoric" New Orleans – 2012. The State of Washington has declared discrimination against individuals on the basis of sexual orientation to be a menace to "the institutions and foundations of a free democratic state," and has included same-sex marriage as one of the civil rights accorded to gay and lesbian residents. *See* RCW 49.60.010 (purpose statement of WLAD); *see also* RCW 26.04.010(1) (*as amended by* Laws of Washington 2012, Ch. 3, § 1(1)); *see also* Referendum Measure 74, approved Nov. 6, 2012. Because Stutzman owns and operates a Washington State corporation that provides arranged flowers for weddings, the conflict between Stutzman's religiously motivated conduct in commerce and the law is insoluble.

a. Free Speech

Defendants argue that the act of arranging flowers is inherently artistic and expressive and thus protected speech. Stutzman asserts that, after consulting with her customers, she creates floral arrangements that are designed to communicate the couple's vision or theme for the event. Defendants have attached to their declaration materials in support of this proposition, including reference material explaining the religious significance of flower arrangement dating back to the ancient Egyptians and instructional material on flower arranging. They argue that this artistic expression is protected speech.[23] *See, e.g., Hurley v. Irish-American Gay, Lesbian And Bisexual*

[23] Stutzman also claims that other aspects of her involvement in weddings are speech, including singing, standing for the bride, clapping to celebrate the marriage, and in one instance counseling the bride. Tellingly, Stutzman does not claim that she was being paid to do any of these things. Said another way, she does not claim that these are services that she is providing for a fee to her customers such that they would be covered by an injunction. The degree to which she voluntarily involves herself in an event outside of the scope of services she must provide to all customers on a non-discriminatory basis (if she provides the service in the first instance) is not before the Court. This is not to ignore Stutzman's objection to involvement through mere presence at an event and how that presence is seen as an expressive act validating the event itself: the deposition testimony makes clear that Stutzman and Arlene's Flowers customarily provided services include preparing wedding flowers for pickup as well as delivering the flowers to the event, including set up. This same objection was considered and rejected in *Elane Photography*, where the argument of validation through involvement on the part of a wedding photographer, who must actively participate in the event to ply her trade, was even stronger. *Elane Photography*, 309 P.3d at 63-72 (N.M. 2013) (discussing Free Speech claim).

Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed.2d 487 (1995) (explaining that "a narrow, succinctly articulable message is not a condition of constitutional protection" and citing example of Jackson Pollock painting). They therefore assert that Stutzman and Arlene's Flowers cannot be compelled to "speak" through arranged flowers at a same-sex wedding.

The AG counters with *Rumsfeld*, which holds:

> it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.

Rumsfeld v. Forum For Academic & Institutional Rights, Inc., 547 U.S. 47, 62, 126 S. Ct. 1297, 164 L. Ed.2d 156 (2006) (Congress may require law schools to provide equal access to military recruiters) (*quoting Giboney v. Empire Storage & Ice. Co*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed.2d 834 (1949)). As the Supreme Court further explained, Congress can prohibit racial discrimination in employment and:

> [t]he fact that this will require an employer to take down a sign reading "White Applicants Only" *hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.*

Id. (italics added). Because anti-discrimination laws by their nature require equal treatment, they cannot be defeated by the claim that equal treatment requires communication or expression of a message with which the speaker disagrees. The Defendants offer no persuasive authority in support of a free speech exception (be it creative, artistic, or otherwise) to anti-discrimination laws applied to public accommodations. *See Elane Photography*, 309 P.3d at 72 ("Even if the services it offers are creative or expressive, Elane Photography must offer its services to customers without regard for…sexual orientation…") (no violation of Free Speech when required to comply with NMHRA). The existing jurisprudence on this issue,

including the most recent and comparable case, *Elane Photography*,[24] is soundly against the Defendants.

b. Free Exercise

As indicated above, the Free Exercise Clause is not without its limits. Religious motivation does not excuse compliance with the law. *Reynolds,* 98 U.S. at 166-167 (prosecution under Utah Territory bigamy law). An individual may be made to comply with a valid and neutral law of general applicability that forbids conduct that an individual's religion requires. *Smith*, 494 U.S. at 879 (religious use of Peyote). Such laws are subject to a rational basis inquiry only, because the government's ability to prohibit socially harmful conduct "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 884-85 (further citation omitted); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Haialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed.2d 472 (1993) (Even where it burdens religious practice "a law that is neutral and of general applicability need not be justified by a compelling government interest."). The Supreme Court has clearly stated:

> [w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption…operates to impose [the follower's] religious faith on the [person sought to be protected by the law].

United States v. Lee, 455 U.S. at 261 (Amish employer must collect social security tax for those in their employ).

[24] In *Elane Photography*, the Court addressed and ultimately rejected in detail a Free Speech challenge including sub-challenges that New Mexico's anti-discrimination law (the NMHRA) violated the right to refrain from speaking the Government's message and that the NMHRA compelled Elane Photography to host or accommodate the message of another speaker. *Elane Photography*, 309 P.3d at 63-72.

To pass constitutional muster against a free exercise challenge, a law must be both neutral and generally applicable. Because infringement or restriction upon a religiously motivated practice (conduct) is implicit in the challenge, the focus when addressing neutrality is as follows: "if the object of a law is to infringe upon or restrict practices *because* of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533 (emphasis added). The WLAD looks to discriminatory impact and the CPA prohibits acts because of unfairness or capacity to deceive a consumer. *Lewis*, 53 Wn.App. at 208 (WLAD prohibits discriminatory impact and discriminatory motivation is irrelevant); *see also, Kaiser*, 161 Wn.App. at 719 ("To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the *capacity* to deceive a substantial portion of the public.") (emphasis in original). The motivation for discrimination or for unfair or deceptive conduct is limited only by the human condition, but is ultimately irrelevant. Neither the WLAD nor the CPA restrict conduct because of motivation, religious or otherwise.

"A law is not generally applicable when the government, 'in a selective manner[,] imposes[s] burdens only on conduct motivated by religious belief." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (*quoting Lukumi*, 508 U.S. at 543). For the same reasons, because the WLAD and the CPA apply to relevant conduct in reference to its effect, not the motivation of the actor, both are generally applicable. *See* RCW 49.60.010 (WLAD purpose statement), *see also Parker v. Hurley*, 514 F.3d 87, 96 (1st Cir. 2008) ("The fact that a school promotes tolerance of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting" of the religious groups), *cert. denied*, 555 U.S. 815 (2008). The provisions of the WLAD and the CPA are clearly rationally related to their goals of eliminating discrimination and preventing unfair or

deceptive practices in commerce. *Compare* RCW 49.60.010 (WLAD purpose statement), *with* RCW 49.60.215(1) (WLAD prohibitions creating right of action); *and compare* RCW 19.86.920 (CPA purpose statement), *with* RCW 19.86.020, 080(1) and .093 (CPA prohibitions creating right of action for AG and Individual Plaintiffs respectively). The argument to the contrary is foreclosed by *Burwell*, where, Justice Scalia, writing for the majority, found that the interest of combatting discrimination in the area of race to meet an even higher level of scrutiny as follows:

> [t]he principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post*, at 2804-2805. Our decision today provides no such shield. *The 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.*

Burwell v. Hobby Lobby Stores, Inc., __ U.S. __, 134 S. Ct. 2751, 2783, 189 L. Ed.2d 675 (2014) (italics added). This is the latest in a long line of cases that found the eradication of discrimination to be a compelling state interest. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed.2d 474 (1987) (finding state public accommodation laws that combat gender discrimination serve "compelling interest of the highest order.") (internal quotation and citation omitted).

Defendants' argument that the WLAD is not neutral or generally applicable because it is "riddled" with religious exemptions and because marriage laws contain an exemption for ministers and religious organizations with respect to same sex marriage is unconvincing. RCW 26.04.010(4) and (5) simply say a minister does not have perform a same sex wedding, nor does a religious organization have to host one. RCW 26.04.010(4) and (5). It does not say that ministers or religious organizations are, if they get a business license and run a public accommodation, are immune from the WLAD. The WLAD exempts a "bone fide religious or sectarian institution" when

it runs an "educational facility," but not a flower shop. RCW 49.60.040(2). These exemptions for the clergy and religious organizations are required, and the WLAD remains neutral and generally applicable with them. *See Elane Photography*, 309 P.3d at 74-75 (rejecting same argument); *see also Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. __, 132 S. Ct. 694, 181 L. Ed.2d 650 (2012) (Religious organizations exempt from some anti-discrimination laws so that they may choose own leaders). The same is true of other exceptions, simply by way of example, the fact that colleges may designate dorms for members of one sex only do not show hostility to or targeting of religiously motivate conduct. *See* RCW 49.60.222(3); *see also Elane Photography*, 309 P.3d at 74-75. Defendant again mixes the distinction between belief and conduct, clergy and laity, and the distinction between accommodation and public accommodation, and as a result cites to cases that are distinguishable on their facts.

c. ***Free Association***

The result is no different if the asserted interest is freedom of association. Even in private organizations:

> [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Hishon v. King & Spalding, 467 U.S. 69, 104 S. Ct. 2229, 81 L. Ed.2d 59 (1984) (*quoting Norwood v. Harrison*, 413 U.S. 455, 470, 93 S. Ct. 2804, 37 L. Ed.2d 723 (1973)).

d. ***Hybrid Right***

Where a neutral and generally applicable law applies not only to the Free Exercise Clause, but also to other constitutional protections, such as freedom of

speech, a "hybrid rights" claim is presented, and any such law must satisfy strict scrutiny. *See Smith*, 494 U.S. at 881 (*citing Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed.2d 1292 (1943) (invalidating flat tax on solicitation as applied to the dissemination of religious ideas)). Just as no such claim was raised in *Smith*, there is no such claim here. The WLAD in combination with the CPA does not compel Stutzman or Arlene's Flowers to offer any goods or services, expressive or otherwise in trade or commerce, it simply requires that any services provided to one from a public accommodation be provided to all. As the Court observed in *Smith*:

> [o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.

Smith, 494 U.S. at 882 (*quoting Gillette v. United States*, 401 U.S. 437, 461, 91 S. Ct. 828, 28 L. Ed.2d 168 (1971)). For a free exercise claim to be subject to strict scrutiny on a "hybrid rights" claim, the proponent must show "a likelihood…of success on the merits" of the free speech claim. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). As indicated above, this the Defendants have not done, the cases they cite are distinguishable: they do not deal with public accommodations or for the two public accommodation (albeit non-profit) cases cited, they are distinguishable on their facts. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed.2d 554 (2000) (New Jersey could not force group to admit members they did not desire (gay members) to join group); *see also Hurley*, 515 U.S. at 566 (State could not force parade organizers to include gay-rights organization in parade but could not prevent gays or lesbians from marching in parade). Further, both cases are distinguished by the later decided cases of *Rumsfeld*[25] and *Martinez*.[26]

[25] *See Rumsfeld*, 547 U.S. at 69 (Holding that Congress may require law schools to provide equal access to military recruiters and distinguishing *Dale* as an instance where the State was forcing Defendants "to accept members they did not desire.")

However, as indicated below, even if strict scrutiny applied to their First Amendment claim, the WLAD and CPA would survive. None of the claims in these two actions offend free speech, free exercise or free association under the First Amendment to the United States Constitution, and thus the Defendants' affirmative defense fails as a matter of law.

3. Violation Of Article I, Section 11 and Section 5 of Washington State Constitution As Applied To Defendants' Conduct Through Application of CPA And WLAD

Also both actions, Defendants assert as an affirmative defense that the claims violate the Washington Constitution. In the Answer to the AG's action, the affirmative defense is listed as follows:

> 6.7 As applied violation of Article I Section 11of the Washington State Constitution.

Defendants' Answer (13-2-00871-5) (AG Action), pg. 6, para. 6.7. In the Individual Plaintiffs' action, the affirmative defense is raised, but the defense includes two claims:

> 33. Justification: As applied violation of Article I Section 11 and Article I, Section 5 of the Washington State Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 33.

a. Free Exercise

While Article I, Section 11 provides broader protection than the First Amendment, it also is not without its limits. *City of Woodinville*, 166 Wn.2d at 642. As the AG and Individual Plaintiffs observe, the distinction between freedom to

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[26] *Martinez*, 561 U.S. at 689 (University student group's claim that it did not prohibit gay members, only those who engaged in or supported same-sex intimacy rejected because prior decisions "have declined to distinguish between status and conduct in this context.").

believe, which is absolute, and the freedom to act, which is not, is clear in the text of the Washington State Constitution itself:

> [a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; *but the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.*

Wash. Const. Article 1, Section 11 (italics added). Without explanation, the Defendants fail to include the complete text, stopping at the word "worship." Unlike religious belief, religiously motivated action (conduct) is subject to limitations when the state acts pursuant to its police power. When the state acts pursuant to its police power to prohibit conduct it deems harmful to its citizens, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints."[27] *Balzer*, 91 Wn.App. at 60-61 (*citing State v. Smith*, 93 Wn.2d 329, 338, 610 P.2d 869 (1980)).

A party challenging government action must show both a sincere belief and a substantial burden upon free exercise as a result of the government action. *City of Woodinville*, 166 Wn.2d at 642-43. The AG and Individual Plaintiffs do not contest that Stutzman has a sincerely-held religious belief, nor could they: the doctrinal statement of her church is clearly delineated in the record, her actions are entirely consistent therewith, and the Court should not inquire further in the matter. *See Backlund*, 106 Wn.2d at 640 ("Courts have nothing to do with determining the reasonableness of belief."). They argue in the alternative that the application of the WLAD and CPA to her conduct does not constitute a substantial burden on her exercise of religion, or if a substantial burden exists, the WLAD and the CPA are "a

[27] The parties do not agree on the scope of the problem of discrimination historically suffered by individuals as the result of sexual orientation. But as *Blazer* makes clear, this is an issue for the Legislative Branch.

narrow means for achieving [Washington's] compelling goal" of eradicating discrimination in public accommodations. *City of Woodinville*, 166 Wn.2d at 642-43.

All burdens are evaluated "in the context in which [they arise]" which "necessarily encompasses impact on others." *Id.* at 644 (healing the sick may be connected to worship but "a church must still comply with reasonable permitting process if it wants to operate a hospital or clinic."). "[T]he key question is not whether a religious practice is inhibited, but whether a religious tenet can still be observed." *State v. Motherwell*, 114 Wn.2d 353, 362-63, 788 P.2d 1066 (1990) (non-clergy counselors required to report suspected child abuse); *see also Backlund*, 106 Wn.2d 632 (hospital may require physician to purchase professional liability insurance despite his religious objection). As the Court observed in *Backlund*:

> Dr. Backlund freely chose to enter the profession of medicine. *Those who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity.*

Backlund, 106 Wn.2d at 648 (italics added).

While the AG argues that neither the WLAD nor the CPA constitute substantial burdens upon Stutzman's exercise of her religion, given that she could simply have an employee perform the task, in light of *Burwell*, which supports proposition that a closely-held corporation can raise the free exercise claim, and *Backlund*, which assumes that a substantial burden exists when the exercise of a licensed profession is contingent on compliance with a rule requiring specific conduct, the Court will assume for the purposes of analysis that a substantial burden exists and the proposed alternative is not one Stutzman must avail herself of because her closely-held corporation may also advance her free exercise rights. *See Burwell*, 134 S. Ct. at 2769-2772 (business practices compelled or limited by tenets of a religious doctrine

fall within the understanding of the "free exercise of religion" under *Smith*);[28] *see also Backlund*, 106 Wn.2d at 647 ("Further, the facts demonstrate that the bylaw's purpose could not be achieved by any less drastic restriction of Dr. Backlund's First Amendment Rights.").[29] That said, the AG and the Individual Plaintiffs make a compelling case that the choice either to operate one's private business in a way inconsistent with one's religious beliefs, or forego 3% of gross profits is not the sort of "gross financial burden" that violates free exercise. *First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Board*, 129 Wn.2d 238, 249, 916 P.2d 374 (1996) (historic landmark designation would reduce value of church property by half). Without the implication of a substantial burden in *Backlund*, the AG and the Individual Plaintiffs would prevail on this point, and *Backlund* is not without its challenges in interpretation, given that First Amendment and Article I, Section 11 are analyzed in the same manner therein.

Even assuming a substantial burden, the AG and the Individual Plaintiffs are correct that the compelling interest test is met. Compelling interests are "those governmental objectives based upon the necessities of national or community life such as threats to public health, peace, and welfare." *Balzer*, 91 Wn.App. at 56 (*citing Munns v. Martin*, 131 Wn.2d 192, 200 (1997)). The Defendants' claim that "combatting discrimination" is too broad an interest to be compelling. The Defendants are incorrect. The State's compelling interest in combatting

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[28] The AG points out that Article I, Section 11 guarantees its protections to "every individual," but not to corporations, and that the Defendants have provided no *Gunwall* analysis in support of an expansion of the right from the individual to the closely-held corporation. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). While true, *Burwell* states that the "lawful purpose" which a corporation can pursue under a state's incorporation statues includes "pursuit of profit in conformity with the owners' religious principles." *Burwell*, 134 S. Ct. at 2772. Like Hobby Lobby, Arlene's Flowers is clearly a closely-held corporation. Elane Photography, decided before *Burwell*, assumed without deciding that the corporation could exercise first amendment rights. *Elane Photography*, 309 P.3d at 73.

[29] The Court in *Backlund* applies both State and Federal Constitutional protections of free exercise in the same manner, noting in a footnote that the parties did not argue persuasively for different applications, hence the reference to the First Amendment. *See Backlund*, 106 Wn.2d at 639, FN 3. Here, the parties have persuasively argued for different applications, starting with *City of Woodinville*, 166 Wn.2d at 642 (Article I, Section 11 provides "broader protection than the first amendment to the federal constitution").

discrimination in public accommodations is well settled. *Rotary*, 481 U.S. at 549 (finding this to be "compelling interest of the highest order.") (internal quotation and citation omitted). The Supreme Court stated over thirty years ago:

> acts of invidious discrimination in the distribution of publicly available goods, services and other advantages causes unique evils that government has a compelling interest to prevent.

Roberts v. U.S. Jaycees, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed.2d 462 (1984). The Court found that public accommodation laws protect a state's citizens from "a number of serious social and person harms," and characterized the injuries flowing therefrom as "stigmatizing." *Roberts*, 468 U.S. at 625; *see also Heckler v. Mathews*, 465 U.S.728, 739-40, 104 S. Ct. 1387, 79 L. Ed.2d 646 (1984)(discussing stigmatizing injury as casting disfavored group as "innately inferior.") The language is consistent with that of *Rotary* and *Burwell*, describing the goal of public accommodation laws seeking to eradicate discrimination as "plainly serv[ing] compelling interests of the highest order." *Roberts*, 468 U.S. at 628. The WLAD, which gives rise to its own claim, and the *per se* CPA claims here at issue, meets this test as well:

> [t]his court has held that the purpose of the WLAD – to deter and eradicate discrimination in Washington – is a policy of the highest order.

Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie Fraternal Order of Eagles, 148 Wn.2d 224, 246, 59 P.3d 655 (2002).

All of the above cases, save *Burwell*, precede both the 2006 amendment to the WLAD adding sexual orientation as a protected class and Referendum Measure 74 in 2012 approving same-sex marriage. That said, the Court concludes there is no compelling legal argument for a different result for the Legislature's decision to include the protected class of sexual orientation. The Supreme Court struck down a state's attempt to remove protections from discrimination based on sexual orientation as violating equal protection almost 20 years ago. *Romer v. Evans*, 517 U.S. 620, 629, 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996) ("Amendment 2 bars homosexuals from

securing protections against the injuries that these public accommodations laws address."). *Elane Photography*, the only other case to squarely address this fact pattern, held, "when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct [such as marriage] that is inextricably tied to sexual orientation." *Elane Photography*, 309 P.3d at 62. The case reached this result under a cognate New Mexico anti-discrimination law, which, as indicated above, is not meaningfully different than the WLAD.

The purpose statement of the WLAD invokes the police power of the state when it declares the law's purpose is to "protect the public welfare, health and peace of the people of this state," and further declares that discrimination, including discrimination based on sexual orientation "threatens not only the rights and proper privileges of its inhabitants, but menaces the institutions and foundations of a free democratic state." RCW 49.60.010. Free exercise expressly excludes "practices inconsistent with the peace and safety of the state." Wash. Const. Article 1, Section 11. In light of these legislative findings, "there is no realistic or sensible less restrictive means" to end discrimination in public accommodations than prohibiting the discrimination itself, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints."[30] *Balzer*, 91 Wn.App. at 65, 60-61 (*citing Smith*, 93 Wn.2d at 338).

The Defendants claim that the WLAD is not narrowly tailored because the State could achieve its goals in other ways. Defendants propose an approach to the issue of discrimination, where business would be allowed to deny goods and services on the basis of the sexual orientation, and such businesses would simply refer that person to a non-discriminating business. This rule would, of course, defeat the purpose of combatting discrimination, and would allow discrimination in public accommodations

[30] The parties do not agree on the scope of the problem of discrimination historically suffered by individuals as the result of sexual orientation. But as *Blazer* makes clear, this is an issue for the Legislative Branch.

based on all protected classes, including race, and thereby defeat the rule of *Heart of Atlanta Motel*, which applied the Civil Rights Act of 1964 to public accommodations under the Commerce Clause. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed.2d 258 (1964). Because the Court is not to determine the reasonableness of religious belief under *Backlund*, under Defendants' argument the "Curse of Canaan" would stand as equal justification[31] for racial discrimination as does Stutzman's adherence to the Resolutions of the SBC as a basis for refusing service to Ingersoll and Freed. The Defendants during argument asked the Court not to simply accept the "slippery slope" argument. But Defendants' own expert admits that their proposal allows for religiously based racial discrimination in public accommodations. Even without this admission, there is no slope, much less a slippery one, where "race" and "sexual orientation" are in the same sentence of the statute, separated by only by three terms: "creed, color, national origin…". RCW 49.60.215. As the Court in *Elane Photography* observed:

> [s]uch an exemption would not be limited to religious objections or to sexual orientation discrimination; it would allow any business in a creative or expressive field to refuse service on any protected basis, including race, national origin, religion, sex, or disability.

Elane Photography, 309 P.3d at 72. The WLAD is narrowly tailored to achieve its goals.

b. *Free Speech*

The Washington State Constitution provides as follows:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

[31] The Court intends no disrespect and does not mean to imply either that Stutzman possesses any racial animus, or that she has conducted herself in any way inconsistently with Resolutions of the SBC's direction to condemn "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" toward gay men or women.

Wash. Const. Article 1, Section 5. While the Federal and State Free Speech rights may be different in their scope, the party wishing to argue for greater protection under Article 1, Section 5 needs to make that case. *Bradburn v. North Central Regional Library District*, 168 Wn.2d 789 (2010). While it may be true that greater protection is available under the Washington State Constitution in some instance, "no greater protection is afforded to obscenity, speech in non-public forums, commercial speech, and false or defamatory statements." *Bradburn*, 168 Wn.2d at 800. Defendants have brought forward no argument as to why the result here should not be the same as that under the First Amendment, and thus the Court makes the same ruling.

The AG and the Individual Plaintiffs are correct: no Court has ever held that religiously motivated conduct, expressive or otherwise, trumps state discrimination law in public accommodations. The Defendants have provided no legal authority[32] why it should. The Defendants' affirmative defense fails as a matter of law.

4. Violation of Equal Protection By Selective Enforcement of CPA And WLAD Upon Defendants' Conduct

In the AG's action only, the Defendants assert an affirmative defense as follows:

> 6.8 Selective Enforcement in Violation of the Fourteenth Amendment to the United States Constitution.

Defendants' Answer (13-2-00871-5) (*AG Action*), pg. 6, para. 6.8. In a criminal context, a claim of selective prosecution "asks a court to exercise judicial power over a 'special province' of the executive." *United States v. Armstrong*, 517 U.S. 456, 464,

[32] All of the parties have cited to various administrative decisions addressing similar fact patterns, including the AG and Individual Plaintiffs' after-argument submission on February 12, 2015, of *In Re Klein (d/b/a Sweetcakes)*, OR Bureau of Labor and Industries, Case Nos. 44-14 and 45-14 (Interim Order – Respondents' Refiled Motion for Summary Judgment and Agency's Cross Motion for Summary Judgment, January 29, 2015 (available at http:/www.oregon.gov/boli/SiteAccess/pages/press/BOLI%20Sweet%20Cakes%20In). Rather than listing all such decisions cited by the parties, the Court would simply observe that those administrative agencies passing upon the merits of the claims ruled that violations of the applicable anti-discrimination laws had occurred and did not violate the rights of the business owner.

116 S. Ct. 1480, 134 L. Ed.2d 687 (1996) (*quoting Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 84 L. Ed.2d 714 (1985)). The AG, by citing to this authority, asserts same is true here, where the AG is authorized to act in the name of the people in a civil context to prevent conduct. RCW 19.86.080(1) (AG authority to act under the CPA). Defendants do not assert otherwise in their response. A strong presumption of regularity supports the AG's actions and "in the absence of clear evidence to the contrary, courts presume that [the AG has] properly discharged [his or her] official duties." *Armstrong*, 517 U.S. at 464 (further quotation omitted).

Such a due process violation requires a defendant to show "discriminatory effect and discriminatory purpose." *State v. Terrovonia*, 64 Wn.App. 417, 423, 824 P.2d 537 (1992) (defendant did not show prima facie evidence of unconstitutional selective or vindictive prosecution in for unlawful possession of marijuana by a prisoner). Specifically, for selective prosecution, a defendant must show "(1) disparate treatment, *i.e.*, failure to prosecute those similarly situated, and (2) improper motivation for the prosecution." *Terrovonia*, 64 Wn.App. at 422 (*quoting Wayte v. United States*, 470 U.S. 598, 602-03, 105 S. Ct. 1524, 84 L. Ed.2d 547 (1985) (emphasis in original)). Improper motive means "selection deliberately based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (*quoting State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)). The Defendants simply cannot meet this demanding standard. The first burden they face is that, at the time of the filing of this action, the fact pattern was novel: same-sex marriage had only been the law, and thus part of the "bundle of rights" that related to sexual orientation, for approximately 4 months as of March 1, 2014. It is by definition difficult to make a selective prosecution argument when you allege that you are the "test case" for the application of new law. Someone is always first and "selectivity" in itself is not a constitutional violation: it is part of the AG's discretion to choose

when to act. *See, e.g., Terrovonia*, 64 Wn.App. at 422 (*quoting Oyler v. B*oles, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed.2d 446 (1962)). As to improper motive for selection, it would defeat the very purpose of statutes aimed at combatting discrimination if the motivation behind alleged discriminatory act supported a selective prosecution claim. Everyone against whom the AG institutes an action is "selected" in some sense, but here no legally improper motive has been shown.

Defendants assert throughout their briefing that they are only here because a then newly-elected Attorney General saw an opportunity to make an example out of Stutzman and Arlene's Flowers by pursuing this action. This is a political question, not a question of fact material to the issue of selective prosecution. Therefore, the Court finds that the Defendants' affirmative defense fails as a matter of law, and that the AG is entitled to summary judgment.

5. Application of Defense of Justification To Claims Under CPA And WLAD As Applied To Defendants' Conduct

In both actions, Defendants assert an affirmative defense titled "Justification." The content is, however, quite different between them. In the Answer to the AG's action, the affirmative defense is listed as follow:

> 6.9 Justification.

Defendants' Answer (13-2-00871-5) (*AG Action*), pg. 6, para. 6.9. In the Individual Plaintiff's action, additional context is provided:

> 33. Justification: As applied violation of Article I Section 11 and Article 1, Section 5 of the Washington State Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 33. As the AG correctly observes with respect to the proffered affirmative defense in its action, the defense of justification is a general term limited to criminal prosecutions, containing within it the three justification defenses of self-defense, duress, and necessity. *See*

e.g., State v. Turner, 167 Wn.App. 871, 881, 275 P.2d 356 (2012) (self-defense); *see also, State v. Healy*, 157 Wn.App. 502, 513, 237 P.3d 360 (2010) (duress); *State v. Gallegos*, 73 Wn.App. 644, 650, 871 P.2d 621 (1994) (necessity). In response, Defendants do not provide any authority that the defense of necessity has any application in a civil context. Given the Defendants' affirmative defense in the individual action, where Defendants are represented by the same counsel, it appears that, by justification, Defendants mean that their actions are justified by the listed sections of the Washington State Constitution. Therefore, the Court finds that the Defendants' affirmative defenses in both actions fail as a matter of law, and that the AG and Individual Plaintiffs are entitled to summary judgment because either: 1) Justification is not an available defense in a civil action; or 2) as applied to Defendant's conduct, this these actions do not violate either Article I, Sections 11 or 5 of the Washington State Constitution, as indicated above.

6. Four Remaining Non-Constitutional Defenses In Individual WLAD And CPA Actions

Many of the affirmative defenses pled by Defendants were raised in both actions, using substantially similar language. These actions having been consolidated for pre-trial motion practice, both Individual Plaintiffs and the AG are entitled to the benefit of rulings. While not specifically addressed by the parties, both parties in the Individual WLAD and CPA claims appeared to assume the remainder of the Defendants' affirmative defenses are resolved by the Court's rulings in these and prior summary judgment motions by the parties. For a total of four of these affirmative defenses, it was not absolutely clear to the Court as to whether this is the case. (*Defendants' Answer* (13-2-00953-3), pg. 6, paras. 34-37) (listing affirmative defenses of Failure to Mitigate Damages, Estoppel, Waiver and Ratification, and Lack of

Standing in regard to Curt Freed). Therefore, the Court called for additional briefing from Defendants and the Individual Plaintiffs. Both parties have responded.

The Individual Plaintiffs in their briefing agree that neither party addressed either of the four remaining affirmative defense in motion practice to date. They argue, by analogy to Federal Civil Rule 56, and case law interpreting it, that by moving for summary judgment on liability, affirmative defenses not specifically asserted by the Defendants are thereby abandoned. Thus, as to the three affirmative defenses not relating to a determination of damages ("Failure to Mitigate Damages") the Individual Plaintiffs assert that they are entitled to summary judgment. *United States v. Mottolo*, 26 F.3d 261, 263 (1st Cir. 1994) (*citing United Mine Workers of America 1974 Pension v. Pittson Co.*, 984 F.2d 469, 478 (D.C. Cir. 1993)); *Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076 (D. Del. 1990), *affirmed by*, 932 F.2d 959 (3rd Cir. 1991). Both parties agree that the affirmative defense of "Failure to Mitigate Damages," is not before the Court, because the case has not yet reached the damages phase. The Court agrees as well, and will not address it. While the Individual Plaintiffs make a compelling analogy to the federal rule, the Court will nonetheless address the remaining three affirmative defenses on the merits.

a. Estoppel

The affirmative defense includes additional explanation:

35. Estoppel: Plaintiff's [sic] actions and omissions negate the relief requested. (*Defendants' Answer* (13-2-00953-3), pg. 6, para. 35). Defendants cite to an unpublished case, which this Court may not consider. *City of Cheney v. Bogle*, 144 Wn.App. 1022 (2008) (*unpublished*). The Individual Plaintiffs correctly list the elements of equitable estoppel: (1) an admission, statement, or act inconsistent with the claims afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing

the first party to contradict or repudiate such admission, statement, or act. *Dobrosky v. Farmers Insurance Company of Washington*, 84 Wn.App. 245, 256, 928 P.2d 1127 (1996). Defendants' argument, without supporting authority, seems to be that because Stutzman was often asked to design arrangements for Ingersoll, Ingersoll had an obligation to commit to asking for only "sticks and twigs" at the outset of the request for goods and services and communicate that specifically up front, to prevent Stutzman from discriminating against him. The Court believes that in this fact pattern, the Individual Plaintiffs' understanding of collateral estoppel, that it would address the consequences of an action taken by Ingersoll or Freed after the refusal by Stutzman, is the more reasonable interpretation. The Court finds this affirmative defense fails as a matter of law, and grants summary judgment in favor of the Individual Plaintiffs.

b. Waiver and Ratification

The affirmative defense is pled as it is in the caption above:

36. Waiver and Ratification.

(*Defendants' Answer* (13-2-00953-3), pg. 6, para. 36). The Defendants state they "no longer pursue this defense." Because it is in fact abandoned, the Court grants summary judgment in favor of the Individual Plaintiffs.

c. Lack Of Standing In Regard To Plaintiff Curt Freed

The affirmative defense is again pled as it is in the caption above:

37. Lack of Standing in regard to Plaintiff Curt Freed.

(*Defendants' Answer* (13-2-00953-3), pg. 6, para. 37). Defendants confirm that their arguments here are those they made above: 1) that the case is the result of a misunderstanding, and thus the refusal by Stutzman should be discarded in favor of

what she might have done had she not immediately refused to provide services for Ingersoll and Freed's wedding, and 2) that Ingersoll and Freed are now married, and thus the case is moot. For the reasons listed above in the Court's discussion of Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing, the Court finds this affirmative defense fails as a matter of law, and grants summary judgment in favor of the Individual Plaintiffs.

V. CONCLUSION

On the evening of November 5, 2012, there was no conflict between the WLAD or the CPA and the tenets of Barronelle Stutzman's Southern Baptist tradition. The following evening, after the passage of Referendum 74, confirming the enactment of same-sex marriage, there would eventually be a direct and insoluble conflict between Stutzman's religiously motivated conduct and the laws of the State of Washington. Stutzman cannot comply with both the law and her faith if she continues to provide flowers for weddings as part of her duly-licensed business, Arlene's Flowers. While the percentage of her business at issue is small, approximately three percent, the AG and the Individual Plaintiffs do not gainsay the fact of her religious convictions in relation to these activities. The Defendants argue that these causes of action on behalf of the Individual Plaintiffs and the AG are novel and improper abridgements of their right to free exercise of religion.

For over 135 years, the Supreme Court of the United States has held that laws may prohibit religiously motivated action, as opposed to belief. In trade and commerce, and more particularly when seeking to prevent discrimination in public accommodations, the Courts have confirmed the power of the Legislative Branch to prohibit conduct it deems discriminatory, even where the motivation for that conduct is grounded in religious belief. The Washington Legislature properly invoked the

police power of the State in drafting the WLAD, a violation of which is a *per se* violation of CPA in trade or commerce. Article I, Section 11 of the Washington State Constitution expressly states that religiously motivated conduct is limited by the police power of the state. In so doing, the Legislature drafted a law that does not violate either the United States Constitution or the Washington State Constitution. Ingersoll and Freed and the AG are entitled to rely upon these laws passed by the Legislature of the State of Washington, and confirmed through the vote of its citizens, to bring their actions against the Defendants.

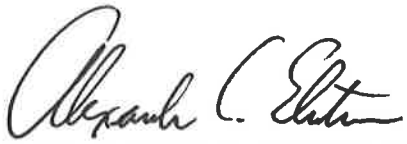
The Individual Plaintiffs and the AG have standing to bring their actions based on the past actions of the Defendants and the potential for future violations. Defendants remaining affirmative defenses fail as a matter of law, and their admitted conduct establishes their liability under the WLAD and CPA as a matter of law. The Individual Plaintiffs and the AG are therefore entitled to summary judgment on their claims to the extent they have requested.

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendants' Motion For Summary Judgment Based On Plaintiff's Lack Of Standing is **DENIED**.
2. Plaintiff State Of Washington's Motion For Partial Summary Judgment On Liability And Constitutional Defenses is **GRANTED**.
3. Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment is **GRANTED**.
4. Summary Judgment in the remaining Non-Constitutional Defenses in the Individual WLAD and CPA actions are **GRANTED IN FAVOR OF PLAINTIFFS INGERSOLL AND FREED**, with the exception of the Affirmative Defense of Failure to Mitigate Damages, upon which **RULING IS DEFERRED**.

IT IS SO ORDERED.

DATED this 18th day of February, 2015.



ALEXANDER C. EKSTROM
Benton County Superior Court Judge