No. 91615-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ARLENE'S FLOWERS, INC., d/b/a/ ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,
Appellants.

INGERSOLL and FREED,
Respondents,
v.
ARLENE'S FLOWERS, INC., d/b/a/ ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,
Appellants.

BRIEF OF AMICUS CURIAE ADAM J. MacLEOD

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I. IDENTITY AND INTEREST OF AMICUS

Adam J. MacLeod is Associate Professor at Faulkner University, Thomas Goode Jones School of Law. An expert on common law rights and duties, he is the author of PROPERTY AND PRACTICAL REASON from Cambridge University Press (2015) and academic articles in peer-reviewed journals and law reviews in the United States, United Kingdom, and Australia. Amicus has reviewed the briefs of the parties in this case and the ruling of the Superior Court below and is familiar with the issues. Amicus has researched and written about the nondiscrimination norm in civil rights laws such as the Washington laws at issue.

II. ISSUE ADDRESSED

The issue is whether this Court should preserve the ancient, Anglo-American right not to be discriminated against with a particularly-proscribed intention—for a particularly-prohibited reason—rather than render the moral judgment that unintentionally stigmatizing a person is an unfair and discriminatory act.

III. INTRODUCTION

For centuries, Anglo-American law has prohibited acting in some commercial contexts with a particular proscribed *intention*, for particular prohibited *reasons*. Washington law codifies that ancient rule. The Superior Court's ruling below substitutes for this established civil liberty a

calculation of stigmatic harm. Its innovation replaces law with moral judgment. Ratifying that innovation would launch Washington's judicial branch into uncharted waters full of unnecessary conflicts between and among civil and constitutional rights.

This Court should preserve the rule against unlawful discriminatory intention. In keeping with centuries of Anglo-American jurisprudence, Washington law prohibits exclusion from a public accommodation only for particular, enumerated reasons. In respect of other motivating reasons—distinctions between status and conduct and between different religious and moral beliefs—Washington law follows the common-law practice of leaving those matters to local law and institutions of private ordering such as contract, license, and the civil jury.

IV. STATEMENT OF THE CASE

Robert Ingersoll and Curt Freed (hereinafter, Private Plaintiffs) and the Washington Attorney General initiated lawsuits against the Appellants after the Appellants declined to produce flowers for a same-sex wedding between the Private Plaintiffs. The Superior Court below found that the Appellants, under the direction of the owner Baronelle Stutzman, willingly served the Private Plaintiffs on approximately 20 occasions "knowing both that Ingersoll was gay and that the arrangements were for Ingersoll's same-sex partner." It also found that Stutzman employed a man who identifies as

same-sex attracted. And uncontroverted testimony established that the Appellants remained willing to provide other goods and services to Appellants, all on equal terms consistent with Appellants' religious conviction that marriage is a man-woman union.

Nevertheless, the Superior Court ruled that Stutzman and the other Appellants discriminated against the Private Plaintiffs "because of... sexual orientation," under the Washington Law Against Discrimination (WLAD), RCW 49.60.030, though Stutzman did not deny service to the Private Plaintiff because of their sexual orientation. To reach this result the lower court reimagined the centuries-long corpus of nondiscrimination law as a security against "stigmatizing" injury, or dignitary harm.

V. ARGUMENT

A. Several Fundamental Civil Rights Are at Stake

A statute must be read not to abrogate common law rights and duties absent a clear expression of legislative intent to do so. Thus, declaratory statutes are to be construed broadly while statutes that might abrogate rights and duties are to be construed strictly. *Potter* v. *Washington State Patrol*, 165 Wash. 2d 67, 76-77 (2008). WLAD should be read to declare and codify the common-law property rights of licensors and licensees rather than to abrogate them. *Phillips* v. *Pembroke Real Estate, Inc.*, 819 N.E.2d 579, 584-85 & n. 12 (Mass. 2004). Fortunately, WLAD

does declare and codify long-standing common law rights, while it extends them by adding a few prohibited reasons for action.

The common law has long prohibited acting in certain public contexts for particular discriminatory reasons. The right of the owner of a public accommodation to exclude for any valid reason, and the correlative privilege of a customer or other licensee to be excluded only for a valid reason related to the purpose of the license, are not privileges recently invented by the Washington legislature. They are common law rights of ancient origin. *Bell* v. *Maryland*, 378 U.S. 226 (1964), at 254 (Douglas, concurring) and at 293-94 (Goldberg, concurring); Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 MICH. STATE L. REV. __ (forthcoming) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810161). Among those ancient civil rights which nondiscrimination laws declare is the right not to be discriminated against in a place of public accommodation for the reason of one's race. *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); *Coger* v. *Northwestern Union Packet Co.*, 37 Iowa 145 (1873); *Donnell* v. *State*, 48 Miss. 661, 682 (1873); *Messenger* v. *State*, 41 N.W. 638 (Neb. 1889); *Ferguson* v. *Gies*, 46 N.W. 718 (Mich 1890); Alfred Avins, *What Is a Place of "Public" Accommodation*, 52 MARQ. L. REV. 1, 2-4 (1968).

The law does not recognize a universal right to be served. Rather, the common law recognizes a variety of customer licenses. Note and Comment, *Revocability of Licenses: The Rule of Wood v. Leadbitter*, 13 MICH. L. REV. 401 (1915). At one end of the spectrum, a license created by *contract*, such as an entrance ticket, is determined according to the terms of the contract and can be terminated without reason. *Wood* v. *Leadbitter*, 13 M. & W. 838 (1845); *Marrone* v. *Washington Jockey Club*, 227 U.S. 633 (1913). At the other end, *common carriers* and *public utilities*, who enjoy a monopoly position or state-conferred advantage, bear a general duty to serve. Public accommodations on *private property* fall between those two extremes, vesting in the public a qualified privilege to enter, though not an absolute right to be served.

William Blackstone explained, "[A] man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 212 (1769). The public's license is not the creation of positive law. Rather, it is carved out of the owner's estate with the owner's consent and shaped by the owner's purposes. And it is not an absolute right to enter or remain on the premises. It is a privilege to be admitted except for relevant reasons. An

"inn-keeper, or other victualler," impliedly engages passers-by and can be held liable "for damages, if he without good reason refuses to admit a traveler." Id at 164. The touchstone is the validity of the owner's reason—her purpose or intention—not the effects of her decision.

What counts as a good reason is determined first by the purposes for which the owner holds open to licensees. *State* v. *DeCoster*, 653 A.2d 891, 893–94 (Me. 1995); Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON JOURNAL WATCH 255, 260 (2011); ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 38 (2015). In case of dispute, the validity of an owner's reason is a fact question to be resolved by a jury, with one exception: The racial identity of the would-be licensee is per se *not* a valid reason. In an exemplary decision, the Supreme Court of Michigan explained that to refuse service to a person "for no other reason than" that person's race is contrary to "absolute, unconditional equality of white and colored men before the law." *Ferguson* v. *Gies*, 46 N.W. 718, 719, 720 (Mich. 1890). Discrimination on the basis of race is "not only not humane, but unreasonable." *Id.* at 721. That is why racial discrimination in public accommodations is contrary to the common law and nondiscrimination statutes that prohibit racial discrimination in public accommodations are not novel innovations but are "only declaratory of the common law." *Id.* at 720.

Yet valid reasons other than race may be offered for an exclusion or a refusal of service, and no principle or rule of law excludes moral and religious reasons. Apart from a reason that is per se invalid, the validity of an owner's reason for excluding or refusing service to a potential patron is a fact question. *Fell* v. *Spokane Transit Authority*, 128 Wash. 2d 618, 642-43 (1996). Thus, "the ultimate issue of discrimination is to be treated by courts in the same manner as any other issue of fact." *Lewis* v. *Doll*, 53 Wash. App. 203, 206-07 (1989). The validity of a licensor's reasons for exclusion is settled on a case-by-case basis by the common law's institutions of private ordering: first by the purpose for the license and, where necessary, by a civil jury.

A license to access one's business premises does not entail a duty to provide any particular services. *Fell*, 128 Wash. 2d at 638-39. While the privilege to enter a business is a property license, the terms of service, if any, are determined by the express or implied agreement between the parties. 3 BLACKSTONE, COMMENTARIES, at 164.

B. This Court Can Avoid Unnecessary Moral Conflict

This Court can avoid moral conflict by upholding the long-standing rule against acting with a discriminatory intention. The Superior Court below construed WLAD, the alleged violation of which predicated the Attorney General's action under Washington's Consumer Protection Act

(CPA), to prohibit actions whose consequence is that same-sex couples are stigmatized. Avoiding stigma and promoting dignity are admirable moral objectives. But in elevating the dignity of one party over the dignity of another, the Superior Court elevated one party's dignity at the expense of others' equal dignity. The lower court stigmatized a lady who served all persons regardless of sexual orientation, equating her with racists and holding her liable for her religious conviction about what marriage is.

That ruling threatens to create unnecessary, avoidable conflicts. And it disfigures the civil rights at stake. To affirm the Superior Court's interpretation of WLAD and CPA would transform long-standing nondiscrimination law; embroil this Court and lower courts in novel and intractable civil-rights conflicts; and require the assessment of various stigmatic harms to religious and non-religious people and communities, business owners and customers, employers and employees, and other groups of Washington citizens.

The Superior Court's novel reading of WLAD is, in jurisprudential terms, consequentialist. Rather than reading WLAD within its textual and historical contours to prohibit acting with an invalid *intention— because of* another person's race, religious beliefs, etc.—the Superior Court reimagined WLAD to prohibit nondiscriminatory actions that have some undesired *consequence*. The Superior Court is not entirely clear about what

that consequence is. Perhaps it is a disproportionate effect on persons with same-sex attractions who want to marry. Maybe it is stigmatic injury or dignitary harm. Neither of those propositions can be found in WLAD itself.

Nondiscrimination laws such as WLAD refer to wrongful discriminatory intention because it is the intention to act for a prohibited reason that is wrongful, regardless of consequences. Harm is neither a necessary nor a sufficient condition to make discrimination unlawful because harm is not what makes wrongful discrimination illicit. "The wrongness of the act is not contingent on its consequences." Adam Slavny and Tom Parr, *Harmless Discrimination*, __ LEGAL THEORY 14 (2016) (available at http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=10182417&fulltextType=RA&fileId=S1352325215000130). An employer or business owner who acts for wrongful, racist motivations should be liable even if the employee or customer was better off as a result (because, e.g., she found a better job or superior service elsewhere). *Id.* at 5-13. For the same reason, an employer or business owner, such as Stutzman, who acts from pure motivations, untainted by any of the wrongful grounds of action enumerated in law, should not be liable even if her actions left an employee or customer feeling worse about themselves.

C. WLAD is Neutral Concerning Moral Beliefs

The Superior Court's novel interpretation of WLAD opens up new hazards for the courts of Washington. Indeed, the Superior Court collided with some hazards of its own design. Its decision is both operationally and logically self-refuting.

On the Superior Court's reasoning, the Superior Court itself has unlawfully discriminated. See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) (a judicial ruling is state action for equal protection purposes). No matter which unitary standard the Superior Court has used to measure the offensive harm, the Superior Court's decision causes that harm to Jews, Christians, Muslims, and other theists who hold the historic and theologically-grounded conviction that marriage is a man-woman union. If the measure is discriminatory effect then the disproportionately-deleterious effect of the Superior Court's *decision* on traditional theists renders the Court's decision an act of discrimination on the basis of religion. If the measure is dignitary harm then the Superior Court's premise equating traditional theistic convictions with unlawful discrimination, which demeans those who hold those convictions by equating them with bigots and racists, renders the Superior Court's *reasoning* an act of discrimination on the basis of religion. Either way, the Superior Court has violated the same absolute, nondiscrimination norm that is essential to its holding. Its reasoning is operationally self-refuting.

The Superior Court justifies its discriminatory ruling on the premises that its holding is necessary to prevent stigmatic harm to Private Plaintiffs, and the nondiscrimination norm in Washington law admits no exceptions for speech or religious belief. But that is an incoherent argument. The premise that the Private Plaintiffs' dignity interest trumps religious believers' civil rights nullifies the premise that the nondiscrimination requirement is absolute. If it were absolute then nothing could justify discrimination against traditional theists. There is no stigma exception to the law forbidding religious discrimination by courts.

WLAD is neutral as between those who support same-sex marriage and those who hold theistic convictions about marriage. It expressly "shall not be construed to endorse any specific belief, practice, behavior, or orientation." RCW 49.60.020. The Superior Court rushed to moral judgment without legal warrant, equating traditional, theistic beliefs with unlawful discrimination.

After creating this unnecessary moral conflict, the Superior Court left no way to resolve it without impugning someone's dignity. No standard exists for weighing the dignity of same-sex couples against the dignity of Southern Baptists, nor vice versa. No common standard of measurement

can compare one to the other.[1] The problem is not merely that it cannot lawfully be done; the problem is that any effort to do it is inherently nonsensical, and its resolution arbitrary.

The Superior Court contradicts itself in another respect as well. It both rejects and relies upon the status-conduct distinction. It ruled that Private Plaintiffs' conduct—getting married under Washington law—is fully reducible to and inseparable from their beliefs and identities as homosexuals. Yet to get around the obvious religious liberty problem raised by this ruling, it also ruled that Stutzman's own conduct—declining to participate in what she understands to be a falsehood about marriage—is *not* reducible to, and indeed *is* separable from, her religious beliefs and identity as a Southern Baptist. According to the Superior Court, one both *can* and *cannot* avoid discriminating unlawfully under Washington law "by seeking to distinguish between status and conduct of the protected party." This is logically self-refuting.

The simplest way to avoid endorsing the Superior Court's self-contradictory opinion is to interpret Washington's nondiscrimination laws

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[1] This problem is known in legal and moral philosophy as incommensurability. See JOSEPH RAZ, THE MORALITY OF FREEDOM 321-66 (1986); PHILIPPA FOOT, MORAL DILEMMAS AND OTHER TOPICS IN MORAL PHILOSOPHY 76–77 (2002); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 111-18 (2nd ed, 2011). One classic statement of incommensurability colorfully explains that the "injunction to maximize net good is senseless, in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book." FINNIS, NATURAL LAW AND NATURAL RIGHTS, at 113.

as nondiscrimination laws have been interpreted throughout Anglo-American jurisprudence and as the appellate courts of Washington have consistently read Washington's own Law Against Discrimination: as prohibitions against acting with an *intention* or *purpose* or *reason* to discriminate on a prohibited basis. *Scrivener* v. *Clark College*, 181 Wash. 2d 439, 444-48 (2014); *Hollingsworth* v. *Washington Mutual Savings Bank*, 37 Wash. App. 386, 394 (1984) ("intent at the time of the challenged act... is the critical inquiry."), abrogated on other grounds, *Allison* v. *Housing Authority of City of Seattle*, 59 Wash. App. 624, 626 (1990). That interpretation of WLAD is also most lawful for the additional reasons set out below.

D. The Superior Court Ignored the Law

The Superior Court ignored all of this. It mistakenly treated the nondiscrimination rule codified in WLAD as if it were invented by the Washington legislature. But the Washington legislature merely declared what was already the law, that exclusion from a public accommodation must be for some valid reason.

This explains why the Superior Court also misstated the law concerning the status-conduct distinction. The status-conduct distinction is not settled the same way for all purposes in all areas of law. Some constitutional rules refer to status and not conduct, such as the right to vote

whatever one's race.[2] Others refer to conduct and not status or belief, such as the right of free exercise of religion.[3] But otherwise constitutions leave the decision whether to distinguish between status and conduct to those with authority to promulgate particular policies—universities and non-profit organizations, business owners, local governments, common-interest communities and neighborhood associations—and to those with authority to render judgment about the reasonableness of any distinction, especially the civil jury. Adam J. MacLeod, *Universities as Constitutional Lawmakers*, 17 U. PENN. J. CONST. L. ONLINE 1 (2014).

The Superior Court's neglect of this point seems to have been the source of its confusion about *Christian Legal Society* v. *Martinez*, 561 U.S. 661 (2010). The Superior Court read *Martinez* to abolish the distinction between status and conduct for equal protection and nondiscrimination purposes. But the *Martinez* ruling did no such thing. Justice Ginsburg writing for the Court expressly grounded the University of California's right to conflate status and conduct not in Equal Protection, civil rights statutes, or any other generally-applicable laws but rather in the University's "right to preserve the property under its control for the use to

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[2] The Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[3] The Free Exercise Clause of the First Amendment provides, "Congress shall make no law... prohibiting the free exercise [of religion]."

which it is lawfully dedicated." *Martinez*, 561 U.S. at 679. Because the University of California owns its campuses in fee simple absolute, it has the power to choose to abolish the distinction between status and conduct, subject to its constitutional obligations as a state actor. Arlene's Flowers and Baronelle Stutzman enjoy an even more robust property right to choose because they are not state actors and have no duties under the United States Constitution.

It bears emphasis that Washington law neither requires nor forbids property owners to make these distinctions. In *Waggoner* v. *Ace Hadrware Corp.*, 134 Wash. 2d 748 (1998) and *McFadden* v. *Elma Country Club*, 26 Wash. App. 195 (1980), Washington's courts recognized that denying privileges to someone who is engaged in nepotistic dating or unmarried cohabitation is not discrimination because of marital status, even though Washington law no longer maintains criminal sanctions for unmarried cohabitation. And in *Leskovar* v. *Nickels*, 140 Wash. App. 770 (2007), rev. denied 163 Wash.2d 1043 (2008), a city's decision to extend marital benefits to same-sex couples was held not to violate the Defense of Marriage Act, which defined marriage as a man-woman union. These rulings show that the blunt instruments of generally-applicable public laws do not resolve the status-conduct distinction for all purposes.

The religious liberty declared and secured by Washington's Constitution, Article 1 Section 11, is an "[a]bsolute freedom of conscience" except to perform "acts of licentiousness" and "practices inconsistent with the peace and safety of the state." By contrast, the right codified in WLAD is a contingent right not to be excluded for an invalid reason. It is determined by the owner's intention. WLAD prohibits acting *because of* one or more of the prohibited categories of discrimination. In order to act because of something, one's choosing and action must follow after and be motivated by that something. The prohibited category must be the (or a) *reason* for the defendant's choice and conduct. It must both precede and motivate the defendant's choice and action.

The Superior Court read the decision in *Lewis* v. *Doll*, 53 Wash. App. 203 (1989) for the proposition that "only discriminatory impact, not motivation, need be shown" to make out a case under WLAD. That is quite opposite the holding and reasoning of *Doll*. Jill Doll instituted a business policy excluding all blacks from her store *as blacks*, that is, quite apart from conduct or any considerations other than race. And Doll's employee expressly excluded Lewis *because he was black*. Furthermore, the court observed that any intended or unintended "discriminatory effect" is *irrelevant* under WLAD. *Doll*, 53 Wash. App. at 210. Ms. Doll's policy violated the statute "for the words of the store clerk were that *all* blacks

would not be served" and Mr. Lewis "was denied service solely because of his race." *Id.* at 210-11. This Court explained that discriminatory effect might be relevant insofar as it could be evidence of "racial motivation." *Id.* at 211. The Superior Court read the case backwards.

Nondiscrimination laws govern an actor's reasons for decision. Consequences or side effects of the actor's decision are often unforeseen and generally not intended. Any effort to adjudicate those side effects will lead courts into moral judgments that also have unintended consequences and side effects. See John Finnis, *Equality and Differences*, 56 AM. J. JURIS. 17, 27-32 (2011). For example, a court that holds liable a business owner because her actions had the consequence of casting moral doubt on same-sex marriage would cause the further consequence of casting *both* moral *and* legal doubt on monotheistic beliefs concerning the nature of marriage.

VI. Conclusion

Racial discrimination in access to publicly-available resources is prohibited by law because race is irrelevant to the purposes for which the resources are held open. Similarly, a customer's sexual orientation is generally irrelevant to the purposes of a public accommodation.[4] By contrast, differing conceptions of marriage *are* relevant to a business owner

[4] But consider that it might not be irrelevant in particular cases, as where a bar or nightclub holds itself out as serving those with same-sex attraction.

whose business consists in part of creative participation in weddings. What similarities and differences are between man-woman marriage, man-man marriage, and woman-woman marriage, involve moral, philosophical, and religious questions that this Court would do well to avoid.

Fortunately, WLAD does not require the Court to wade into the metaphysical waters of moral or theological judgment. The Court should construe WLAD as nondiscrimination laws have been construed for centuries, as a rule governing intention, and should reverse on that ground.

Respectfully submitted this 30th day of September, 2016.

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