

No. 91615-2

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

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

Defendants/Appellants.

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ROBERT INGERSOLL and CURT FREED,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law and a supporting organization to Washington State Association for Justice, and has an interest in the proper interpretation of the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD), and the impact of state and federal constitutional provisions on its enforcement.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This appeal arises out of two separate superior court actions brought against Arlene's Flowers, Inc., d/b/a Arlene's Flowers and Gifts (Arlene's) and Barronelle Stutzman (Stutzman), one by the State of Washington (State) and the second by Robert Ingersoll (Ingersoll) and Curt Freed (Freed). The underlying facts are drawn from the parties' briefing. See Arlene's/Stutzman Br. at 1-3, 4-14 & Appendix; State Br. at 1-7; Ingersoll/Freed Br. at 1-2, 3-7; Arlene's/Stutzman Reply Br. at 1-3. The following facts are relevant: Stutzman and her husband are the sole officers of Arlene's, a flower shop in Richland, Washington. Arlene's is a for-profit business with no ties to a church or religious organization. It sells flowers and other goods to the public, and provides floral arrangements for weddings and other events. In March of 2013, Ingersoll, a gay man, spoke to Stutzman on behalf of himself and Freed about Arlene's providing floral arrangements for their upcoming same-sex wedding in Washington. See

RCW 26.04.010, and related Code Reviser's note. Stutzman refused, as her religious beliefs limit marriage to a union between a man and a woman.

The State sued Arlene's and Stutzman for damages and injunctive relief under Washington's Consumer Protection Act, Ch. 19.86 RCW (CPA), alleging that the refusal constituted an unfair act or practice. See RCW 19.86.020; RCW 49.60.030(3). Ingersoll and Freed separately sued Arlene's and Stutzman under both the WLAD and CPA for refusal to provide floral arrangements for their wedding, also seeking damages and injunctive relief. See id.; RCW 19.86.093. These actions were consolidated and, following discovery, the court granted the State's motion for summary judgment under the CPA and Ingersoll/Freed's motion for partial summary judgment under the WLAD and CPA. It concluded that Arlene's and Stutzman's conduct constituted sexual orientation discrimination in violation of the WLAD public accommodation provisions. A judgment and order providing injunctive relief was entered in each action. These orders prohibit Arlene's and Stutzman from engaging in sexual orientation discrimination and require Arlene's to offer the same goods and services for same-sex weddings and commitment ceremonies as it offers to opposite sex couples. See Arlene's/Stutzman Br. at Appendix (reproducing orders).<sup>1</sup>

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<sup>1</sup> There appears to be an unresolved (immaterial) dispute as to whether Arlene's denial was categorical and occurred before details of the request for floral arrangements were revealed. See Arlene's/Stutzman Br. at 12-13 & n.5; State Br. at 4; Ingersoll/Freed Br. at 4; Arlene's/Stutzman Reply Br. at 33-34. Given the nature of the injunctions, this brief assumes the full scope of floral services, including designed arrangements and wedding services, are the focus of this review. See Arlene's/Stutzman Reply Br. at 46 (indicating willingness to provide Ingersoll and Freed "uncut flowers and premade arrangements").

### III. ISSUES PRESENTED

- 1) What is the proper interpretation and application of the WLAD public accommodation provisions, RCW 49.60.030(1)(b) and RCW 49.60.215, including whether a business owner's subjective beliefs are relevant to determining liability, and whether liability may turn on a balancing of rights as between a business owner and its customer?
- 2) Whether state or federal constitutional protections based on freedom of religion, speech or association, or a “hybrid rights” analysis, operate to excuse any WLAD public accommodations liability of Arlene’s and Stutzman under these circumstances, particularly with regard to Washington Constitution Art. I § 11, governing religious freedom?

### IV. SUMMARY OF ARGUMENT

#### *Arlene’s Violated the WLAD Public Accommodation Provisions.*

Arlene's violated RCW 49.60.030(1)(b) and RCW 49.60.215(1) of the WLAD by refusing to provide floral arrangements for the Ingersoll-Freed same-sex wedding, because this refusal constituted sexual orientation discrimination. This protected characteristic was a substantial factor in the refusal to provide the requested services, resulting in Ingersoll and Freed being treated as unwelcome and unaccepted. Whether Arlene's conduct was motivated by a sincere religious belief free of “animus” is irrelevant. Subjective intent to discriminate is not an element of liability under the public accommodation provisions, and a good faith subjective belief in the rightness of the conduct is not a defense.

Because these plain and unambiguous provisions protect the rights of *customers*, there is no textual basis for balancing a business owner's religious freedom claim against a customer’s right to be free from discrimi-

nation based on sexual orientation. Nor should any such balancing be read into the WLAD. The right of customers to be free from discrimination is the focus of these provisions.

***No Constitutional Grounds Exist that Excuse Arlene's WLAD Violation.***

Arlene's violation of the WLAD is not excused under Washington Constitution Art. I § 11. Under a strict scrutiny analysis, the WLAD does not impose a “substantial burden” on Arlene’s sincerely-held religious beliefs. Moreover, even if such a burden exists, enforcement of these provisions is justified because they serve a compelling state interest that is achieved by the least restrictive means. The result is the same under a textual analysis of Art. I § 11, as the WLAD does not infringe on Arlene’s “absolute freedom of conscience,” and permitting Arlene’s discriminatory conduct would be “inconsistent with the peace and safety of the state.”<sup>2</sup>

**V. ARGUMENT**

**A. Arlene's Refusal To Provide Floral Arrangements For The Ingersoll-Freed Wedding Constituted Sexual Orientation Discrimination Under WLAD Public Accommodation Provisions.**

**1. Overview of the WLAD public accommodation provisions.**

The WLAD was enacted to eliminate discriminatory conduct that “threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.”

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<sup>2</sup> As to Arlene's remaining federal constitutional arguments, the State and Ingersoll/Freed correctly contend that enforcement of the WLAD public accommodation provisions against Arlene's does not violate First Amendment protections based upon freedom of religion, freedom of speech, freedom of association, or under a hybrid rights analysis.

RCW 49.60.010.<sup>3</sup> This law is expressly grounded in both the legislative police power for the protection of the public peace and safety and in fulfillment of the Washington Constitution provisions concerning civil rights. See id. Generally, the Legislature condemns discriminatory acts or practices because of "race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability...." Id.<sup>4</sup> The provisions of the WLAD must be "construed liberally for the accomplishment of the purposes thereof," with the understanding that they "shall not be construed to endorse any specific belief, practice, behavior, or orientation." RCW 49.60.020.

Discrimination is declared unlawful in a number of specific contexts, including public accommodations. The right of persons to be free from unlawful discrimination includes "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement...."

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<sup>3</sup> For simplicity, Arlene's and Stutzman are collectively referred to as "Arlene's" in this argument. Also, because RCW 49.60.030(1)(b) & (3) provide that a violation of a WLAD public accommodation provision in the course of trade or commerce constitutes a per se unfair or deceptive act or practice under the CPA, this brief focuses upon whether the WLAD was violated. The State separately argues Arlene's is liable for an independent violation of the CPA. See Arlene's/Stutzman Br. at 24 n.15; State Br. at 8-9, 18-22; Arlene's/Stutzman Reply Br. at 43-44.

<sup>4</sup> As used in the WLAD, "creed" refers to "a system of religious beliefs." Short v. Battle Ground Sch. Dist., 169 Wn. App. 188, 201 n.18, 279 P.3d 902 (2012), *overruled on other grounds by* Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 500-01, 325 P.3d 193 (2014).

RCW 49.60.030(1)(b). "Full enjoyment" includes the right to purchase any services or goods offered by an establishment open to the public "without acts directly or indirectly causing persons of any [enumerated protected class] to be treated as not welcome, accepted, desired, or solicited." RCW 49.60.040(14) (brackets added). Further, RCW 49.60.215(1) declares it to 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...in any place of public resort, accommodation, assemblage or amusement...." Both RCW 49.60.040(14) and RCW 49.60.215(1) list "sexual orientation" among the protected classes, but do not list "marital status."<sup>5</sup>

Under these statutory provisions, a business owner is liable for public accommodation discrimination upon proof that:

- (1) The customer is a member of an enumerated protected class; and
- (2) The business owner purposefully refuses to provide the customer a public accommodation and the protected characteristic is a substantial factor in the refusal; and
- (3) The customer is denied full enjoyment of the accommodation, resulting in being treated as not welcome, accepted, desired, or solicited.

See Fell v. Spokane Transit Auth., 128 Wn.2d 618, 637-42, 911 P.2d 1319 (1996) (discussing proof requirements for public accommodation

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<sup>5</sup> The current versions of RCW 49.60.010, .020, .030, .040, and .215 are reproduced in the Appendix to this brief.

discrimination claims based upon disability). Although some WLAD case law speaks of an intent to discriminate or discriminatory motive, see id., 128 Wn.2d at 642-43, a claim is established by proof that the conduct was purposeful, and that the protected characteristic was a substantial factor in the outcome. See E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 910, 726 P.2d 439 (1986) (purposeful); Scrivener v. Clark College, 181 Wn.2d 439, 444-47, 334 P.3d 541 (2014) (substantial factor; citing Fell). Proof of a public accommodation discrimination claim does not require evidence of ill will or a specific intent to discriminate, nor does a benign good faith belief serve to excuse liability. See Fell, 128 Wn.2d at 642 n.30 (majority opinion), and 649-51 (Madsen, J., dissenting); Lewis v. Doll, 53 Wn. App. 203, 210, 765 P.2d 1341, *review denied*, 112 Wn.2d 1027 (1989).

**2. Arlene's purposeful conduct constituted sexual orientation discrimination because Ingersoll and Freed's protected status was a substantial factor in the refusal to provide the requested services, resulting in them being treated as unwelcome and unaccepted.**

Arlene's refusal to accommodate Ingersoll and Freed was based on sexual orientation, which was a substantial factor in them being treated as unaccepted and unwelcome. See RCW 49.60.030(1)(b); RCW 49.60.215(1); RCW 49.60.040(14); Fell at 637-42. However, Arlene's contends that no public accommodation discrimination occurred because the only conceivable basis for the State and Ingersoll/Freed claims

is "marital status" discrimination, a category not included in the public accommodation provisions, RCW 49.60.030(1) & .215. See Arlene's/Stutzman Br. at 19-21. In a related vein, Arlene's argues that its concern is with the same-sex wedding itself, not the sexual orientation of the participants. See Arlene's/Stutzman Reply Br. at 32-36.

It is the sexual orientation of Ingersoll and Freed and their same-sex relationship, not marital status, that is the crux of Arlene's refusal. "Marital status" is now defined in RCW 49.60.040(17) as "the legal status of being married, single, separated, divorced or widowed." Compare Waggoner v. Ace Hardware Corp., 134 Wn.2d 748, 756, 953 P.2d 88 (1998) (noting that once "marital status" was defined by statute in 1993 "by the plain meaning of the definition the Legislature has limited protected status exclusively to that which is included within the definition..."), with Magula v. Benton Franklin Title Co., 131 Wn.2d 171, 181, 930 P.2d 307 (1997) (resolving case based upon more expansive court interpretation of "marital status" *before* 1993 statutory definition). Arlene's stated objection is to an otherwise lawful event, a same-sex wedding, which would change the status of Ingersoll and Freed from "single" to "married." Arlene's/Stutzman Reply Br. at 33. However, Arlene's did not refuse services on this basis. Had Ingersoll or Freed changed his "marital status" by marrying a female, Arlene's would not have refused service. The refusal was — at least indirectly, if not directly



— because of Ingersoll and Freed's sexual orientation, as gay men wanting to marry.<sup>6</sup>

**3. Arlene's religious beliefs are irrelevant to determining liability under the WLAD.**

Arlene's suggests that there can be no WLAD public accommodations liability here because its conduct "does not reflect any animus based upon sexual orientation," implying that absent proof of subjective ill will, no discrimination may be found. Arlene's/Stutzman Br. at 9. Similarly, it contends that its "sincere religious convictions" should exempt it from liability. Arlene's/Stutzman Reply Br. at 2; see also id. at 32-36; Arlene's/Stutzman Br. at 20-21.

It is irrelevant whether Arlene's conduct was motivated by a sincere religious belief or was free of "animus." Subjective intent to discriminate is not an element of liability under the WLAD public accommodation provisions. See Fell, 128 Wn.2d at 642 n.30 (confirming WLAD public accommodation liability turns on the unlawful act, and "has

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<sup>6</sup> Arlene's also argues that its refusal to serve Ingersoll and Freed is not based on sexual orientation because other types of sexual orientation would not result in a refusal of services, so long as the partners marrying are of the opposite sex. See Arlene's/Stutzman Reply Br. at 34 (allowing that "[i]f a bisexual man chooses to marry a straight or bisexual woman, Mrs. Stutzman will create expression celebrating that marriage"; footnote omitted). Here, the targeted conduct — a same-sex wedding — is closely correlated with the protected status of being gay, and the Court should not encourage this kind of parsing in interpreting the WLAD. See State Br. at 12-14; see also Elane Photography, LLC v. Willock, 309 P.3d 53, 61-63 (N.M. 2013) (interpreting similar New Mexico public accommodation statutes), *cert. denied*, 134 S. Ct. 1787 (2014); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 280-81 (Colo. App. 2015) (similar), *review denied*, 2016 WL 1645027 (2016); Gifford v. McCarthy, 137 A.D.3d 30, 23 N.Y.S.3d 422, 428-29 (2016) (similar); cf. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (upholding federal constitutional challenge to state law prohibiting same sex marriage, recognizing that a liberty interest "includes certain specific rights that allow persons, within a lawful realm, to define and express their identity").

nothing to do with the subjective intent of the defendant"); Doll, 53 Wn. App. at 210 (fact that business owner did not intend race-based discriminatory effect is irrelevant). While WLAD case law may speak in terms of "discriminatory motive," Shannon v. Pay 'n Save Corp., 104 Wn. 2d 722, 733, 709 P.2d 799 (1985), or "discriminatory animus," Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 359, 172 P.3d 688 (2007), discrimination exists when a defendant acts purposely and the protected characteristic is a substantial factor in the outcome. See supra at § A.1.

Nor does a benign subjective intent, such as a sincere religious belief, serve to excuse otherwise unlawful discrimination in violation of the public accommodation provisions. See Doll, 53 Wn. App. at 210. This type of argument has been repeatedly rejected in other WLAD contexts. See Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 328-29, 646 P.2d 113 (1982) (upholding county's liability for sex discrimination in hiring, notwithstanding its benign intent to achieve gender balance in its workforce, absent a bona fide occupational qualification defense); Xieng v. Peoples Nat'l Bank, 120 Wn.2d 512, 518-22, 844 P.2d 389 (1993) (similar); Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 499, 859 P.2d 26, 865 P.2d 507 (1993) (similar); Blackburn v. State, \_\_\_ Wn.2d \_\_\_, 375 P.3d 1076, 1080-81 (2016) (similar).<sup>7</sup>

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<sup>7</sup> Cf. International Union v. Johnson Controls, Inc., 499 U.S. 187, 199-200 (1991) (recognizing under Title VII, 42 U.S.C.A. § 2000e *et seq.*, that an employer's benign motive did not alter the discriminatory nature of its policy).

**4. The WLAD public accommodation provisions do not allow for a “balancing” of the interests of business owners against their customers; rather, these provisions focus on providing equal access to public accommodations for all enumerated protected classes.**

Arlene's further contends that the WLAD public accommodation provisions allow for a balancing of rights between its religious beliefs and Ingersoll and Freed's sexual orientation, and that under such a balancing it should prevail. See Arlene's/Stutzman Br. at 21-24; Arlene's/Stutzman Reply Br. at 42-43. This argument is unsupported by the text of the WLAD, which focuses on preserving the rights of *customers*. Business owners choosing to enter the marketplace must comply with the law, with only two express limitations. See RCW 49.60.215 (provisos limiting obligation of owner to modify the place of accommodation to assure accessibility for disabled persons, and allowing for refusal of public accommodation when customer behavior poses a risk to persons or property); cf. RCW 49.60.030(1)(f) (protecting those engaged in commerce from discriminatory boycotts or blacklists).

There is no room for balancing in either the letter or spirit of the WLAD. See State Br. at 17-18. Under this analysis, the same result would occur if the roles here were reversed: If Ingersoll and Freed, as gay business owners, operated a similar business and refused to provide Stutzman floral arrangements because she belonged to a church that

denigrated the rights of gays and lesbians, they would be liable for discrimination based upon creed.<sup>8</sup>

**B. Arlene's Violation Of WLAD Public Accommodation Provisions Is Not Excused Under Washington Constitution Art. I § 11, Or The First Amendment.**

Arlene's claims its Art. I § 11 free exercise rights entitle it to an exemption from the WLAD public accommodation provisions here. This requires the Court to identify the balance struck by Art. I § 11 between the rights of religious observers and the State's use of its police power to ensure peace and safety. While this issue is undoubtedly complex, both the Court's Art. I § 11 jurisprudence and the text of this provision offer a relatively clear guiding principle: Core values of religious belief receive "absolute freedom," but practices inconsistent with the peace and safety of the State may be restricted in order to protect the public from harm.

**1. Overview of Art. I § 11 and the free exercise of religion.**

Art. I § 11 provides, in relevant part:

Absolute 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 as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

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<sup>8</sup> Arlene's also urges that in balancing the interests here the Court should take into account that its sincere religious beliefs are of constitutional origins, while protections afforded sexual orientation are not. See Arlene's/Stutzman Br. at 23. Assuming for purposes of argument this is true, the protections afforded under the WLAD stem from *both* the state constitution and the Legislature's general police power. See RCW 49.60.010. As Arlene's otherwise acknowledges, there is no hierarchy of rights in the WLAD with respect to the protected classes. See Arlene's/Stutzman Br. at 22.

Despite the distinct text of Art. I § 11,<sup>9</sup> for many years this Court did not set out an independent approach to state free exercise claims. See e.g. State ex rel. Holcomb v. Armstrong, 39 Wn.2d 860, 864, 239 P.2d 545 (1952) (applying federal analysis to deny university students exemption from tuberculosis test); State v. Verbon, 167 Wash. 140, 149-50, 8 P.2d 1083 (1932) (relying on state and federal constitutional analysis to deny Art. I § 11 exemption); State v. Neitzel, 69 Wash. 567, 569, 125 P. 939 (1912) (relying on federal constitutional analysis to deny exemption).<sup>10</sup>

Later, when the U.S. Supreme Court adopted strict scrutiny for analyzing First Amendment free exercise claims, see Sherbert v. Verner, 374 U.S. 398 (1963), this Court followed suit, employing federal strict scrutiny analysis and treating state free exercise claims as equivalent to those under federal law. See e.g. State v. Motherwell, 114 Wn.2d 353, 368-69, 788 P.2d 1066 (1990) (holding that child abuse reporting statute satisfied federal strict scrutiny, and declining to examine Art. I § 11 claims in absence of distinct state analysis); Backlund v. Bd. of Comm'rs of King Cy. Hosp. Dist. 2, 106 Wn.2d 632, 639-45 & n.3, 724 P.2d 981 (1986) (similar); Sumner v. First Baptist Church, 97 Wn.2d 1, 5-10, 639 P.2d 1358 (1982)

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<sup>9</sup> The full text of Art. I § 11 is reproduced in the Appendix.

<sup>10</sup> In resolving constitutional claims raised in *other* Art. I § 11 contexts, the Court has tended to employ a textual analysis. See Calvary Bible Presbyterian Church v. Bd. of Regents, 72 Wn.2d 912, 436 P.2d 189 (1967) (religious study at public school); Visser v. Nooksack Valley Sch. Dist. No. 506, 33 Wn.2d 699, 207 P.2d 198 (1949) (use of public transportation for religious institutions); Mitchell v. Consol. Sch. Dist. No. 201, 17 Wn.2d 61, 135 P.2d 79 (1943) (same).

(applying strict scrutiny to church free exercise challenge of zoning ordinance, making no distinction between federal and state analysis).

In 1990, in its opinion in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 885 (1990), the U.S. Supreme Court retreated from its application of strict scrutiny to most free exercise claims asserted under the First Amendment, concluding that strict scrutiny afforded excessive protection to religious observers at the expense of the exercise of state police power. Under Smith, federal free exercise doctrine applicable to the states is the “neutral and generally applicable” standard, which would subject neutral and generally applicable laws only to rational basis review. 494 U.S. at 878-79.<sup>11</sup>

The Smith decision provided this Court with the opportunity to review the substantive differences between state and federal free exercise protections and to reexamine its approach. One year before Smith, this Court had struck down a Seattle ordinance that designated a church as a historical landmark, based upon federal strict scrutiny analysis. First Covenant Church v. City of Seattle, 114 Wn.2d 392, 787 P.2d 1352 (1990) (First Covenant I), *vacated and remanded*, 499 U.S. 901 (1991).

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<sup>11</sup> After the retreat from strict scrutiny in Smith, Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb *et seq.* (RFRA), which imposes a strict scrutiny standard as a matter of statutory law. The U.S. Supreme Court has since declared RFRA unconstitutional as applied to the states. See City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997). Notably, RFRA, as amended, has an expansive definition of “exercise of religion,” with its own rule of construction. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761-62, 2767 (2014). The U.S. Supreme Court has observed that “there is no reason to believe . . . [RFRA] was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases.” *Id.* at 2767 n.18 (brackets added). Given that RFRA is inapplicable here, it has no place in this constitutional analysis.

On remand, for the first time this Court undertook a comprehensive examination of the text and history of the free exercise clause of Art. I § 11. See First Covenant Church v. City of Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992) (First Covenant II). The Court identified key distinctions between the free exercise clauses of Art. I § 11 and the First Amendment. See id., 120 Wn.2d at 224-26. It also looked to state case law, including free exercise cases assessed under both state and federal analysis that had applied the strict scrutiny test established in the U.S. Supreme Court's opinion in Sherbert, supra. See First Covenant II, 120 Wn.2d at 226. Based primarily on *differences* between the state and federal free exercise clauses, First Covenant II applied to Art. I § 11 the strict scrutiny test that had been abandoned in Smith:

State action is constitutional under the free exercise clause of article 1 if the action results in no burden of a citizen's right or if a compelling state interest justifies any burden on the free exercise of religion. . . . The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available.

120 Wn.2d at 226-27 (internal citations omitted); see also City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 644, 211 P.3d 406 (2009) (clarifying First Covenant II test requires the religious observer to prove a "substantial burden on the exercise of religion").<sup>12</sup>

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<sup>12</sup> This Court has also stated that strict scrutiny is proper "[s]ince free exercise of religion is a fundamental right." First United Methodist Church of Seattle v. Hearing Examiner, 129 Wn.2d 238, 246, 916 P.2d 374 (1996) (brackets added). The U.S. Supreme Court had previously articulated the same principle, but ultimately concluded in Smith that while strict scrutiny is proper where other constitutional rights are at stake, it is too expansive in the religious freedom context. See 494 U.S. at 886.

Since First Covenant II, the free exercise cases reaching the Court have not been brought by individuals, but by religious institutions. These opinions reflect deference to churches and religious institutions, frequently granting them the requested exemption. See e.g. Woodinville, 166 Wn.2d at 644-45 (granting church an exemption from permit requirement for homeless encampment); Munns v. Martin, 131 Wn.2d 192, 930 P.2d 318 (1997) (granting exemption from permit ordinance); First United Methodist, 129 Wn.2d at 252-53 (similar); First Covenant II, 120 Wn.2d at 226-28 (similar); but see Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 995 P.2d 33 (2000) (finding conditional use permit requirement not a substantial burden on church's free exercise rights). Similar deference is apparent in pre-First Covenant II cases. See e.g. First Covenant I, 114 Wn.2d at 392; Sumner, 97 Wn.2d at 7-10.<sup>13</sup>

Significantly, the deference to free exercise claims brought by religious institutions is not found in cases involving *individual* free exercise claims decided prior to First Covenant II.<sup>14</sup> To the extent the strict scrutiny

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<sup>13</sup> Legislative enactments reflect similar respect for religious institutions and other private religious organizations. See e.g. RCW 26.04.010(4)-(6) (permitting religious officials and organizations to refuse participation in weddings); RCW 49.60.040(11) (excluding non-profit religious and sectarian organizations from WLAD definition of employer).

<sup>14</sup> Two considerations may help explain this disparity. First, as noted in Smith, the reach of individual free exercise claims is potentially so expansive it risks “every citizen becom[ing] a law unto himself.” 494 U.S. at 879 (brackets added). Affording exemptions to religious institutions is more limited in scope. Second, the Court’s Art. I § 11 analysis of free exercise claims made by religious institutions appears to reflect an establishment-type concern about State interference with the independence of these institutions. See e.g. First Covenant I, 114 Wn.2d at 408 (the challenged ordinance “creates unjustified governmental interference in religious matters of the Church and thereby creates an infringement on the Church’s constitutional right of free exercise”); see also First United Methodist, 129 Wn.2d at 252 (finding a substantial burden where the challenged ordinance impedes “religious mission” of the church); Munns, 131 Wn.2d at 208 (similar).



analysis in these pre-First Covenant II cases remains relevant, it is notable that the Court generally rejected individual free exercise challenges to laws enacted under the police power bearing on health and safety. See e.g. Motherwell, 114 Wn.2d at 365-66 (regarding mandatory child abuse reporting statute); Backlund, 106 Wn.2d at 642-44 (regarding mandatory professional liability insurance); State v. Meacham, 93 Wn.2d 735, 740-41, 612 P.2d 795 (1980) (regarding paternity test for putative fathers). Court of Appeals opinions using pre-Smith analysis reached similar results. See State v. Norman, 61 Wn. App. 16, 808 P.2d 1159 (regarding parents' refusal to provide medical care), *review denied*, 117 Wn.2d 1018 (1991); State v. Clifford, 57 Wn. App. 127, 787 P.2d 571 (regarding driver's license requirement), *review denied*, 114 Wn.2d 1025 (1990).

This Court has not had the opportunity to address an *individual* free exercise claim since it adopted the strict scrutiny standard for Art. I § 11 in First Covenant II.<sup>15</sup> Given that prior individual free exercise cases were analyzed under pre-Smith federal strict scrutiny, and that cases since First Covenant II have involved institutional claims, it is unclear to what degree these prior decisions should guide the analysis here.

The role of constitutional text is also unclear. Since First Covenant II, the Court has recognized the importance of text in guiding Art. I § 11

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<sup>15</sup> One Court of Appeals opinion has addressed an individual free exercise challenge based upon a post-First Covenant II Art. I § 11 strict scrutiny analysis. See State v. Balzer, 91 Wn. App. 44, 52-57, 954 P.2d 931 (denying a religious observer an exemption to smoke marijuana, concluding state's interest in regulating illegal drug use justified the asserted religious burden), *review denied*, 136 Wn.2d 1022 (1998)).

analysis: “Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.” Malyon v. Pierce County, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997) (interpreting chaplaincy provision). The Court has not fully examined the relationship between strict scrutiny and constitutional text in resolving an individual free exercise claim, nor indicated which approach would prevail in the event they urge different results. It has, however, turned to text to inform its strict scrutiny analysis. See Woodinville, 166 Wn.2d at 644; Open Door, 140 Wn.2d at 152. Arlene’s Art. I § 11 claim is evaluated with this background in mind.<sup>16</sup>

**2. Under a strict scrutiny analysis (or textual analysis), Arlene’s discriminatory conduct is not excused under Art. I § 11.**

Under strict scrutiny as adopted by this Court, a party invoking Art. I § 11 protections must demonstrate the government requirement substantially burdens a sincerely-held religious belief. See Munns, 131 Wn.2d at 199-200. If this element is satisfied, “the burden of proof shifts to the government to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective.” First United Methodist, 129 Wn.2d at 246. Arlene’s Art. I § 11 claim fails each prong of this test.

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<sup>16</sup> Given the clarity of the text of Art. I § 11, the Court may ultimately choose to reexamine whether the strict scrutiny test significantly aids the constitutional analysis in free exercise cases. See First Covenant II, 120 Wn.2d at 234-35 (Utter, J., concurring) (noting the “rich language of Const. Art. 1, § 11,” and offering “an alternative to the majority’s analysis of Const. Art. 1, § 11 which focuses on the unique text of that provision”).

**a. No proof of “substantial burden.”**

The sincerity of Arlene’s beliefs is not at issue. The question is whether requiring compliance with the WLAD imposes a substantial burden on Arlene’s religious freedom. See State Br. at 27. Arlene’s asserts a religious burden exists because it is required to create “floral designs celebrating marriages that are not between a man and a woman or forego all weddings.” See Arlene's/Stutzman Br. at 33.<sup>17</sup> However, because Arlene’s conduct arises in the context of 1) voluntary commercial activity that 2) significantly impacts third parties, this Court should hold that the WLAD does not constitute a substantial burden on Arlene’s religious freedom.<sup>18</sup>

Since First Covenant II, the Court has indicated a willingness to more closely evaluate the burden prong of Art. I § 11 strict scrutiny analysis, and has identified factors that are relevant in evaluating an asserted religious burden. See Open Door, 140 Wn.2d at 168-71 (finding no substantial burden on church's free exercise rights by application of county zoning code requiring church to seek a conditional use permit); Wood-

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<sup>17</sup> Arlene’s argues that WLAD enforcement imposes a financial burden because it must forego wedding revenue and referrals therefrom. See Arlene's/Stutzman Br. at 34 n.26. However, only “gross” financial burdens implicate constitutional concerns. First Covenant II, 120 Wn.2d at 219-20. Weddings apparently constitute only 3% of Arlene’s business, see State Br. at 31, and it does not appear Arlene’s provides specific evidence of the potential for lost referrals in an effort to meet its burden. See Arlene’s/Stutzman Br. at 34 n.26.

<sup>18</sup> Arlene’s further asserts that it believes God requires application of religious faith to all aspects of life. See Arlene’s Br. at 9. However, it does not contend that its religious beliefs obligate it to engage in the floral business. Rather, Arlene’s appears to argue that it is compelled to live out its religious convictions in all contexts, including its floral business, and that enforcement of the WLAD impairs its ability to do so. This should not be sufficient to establish a substantial burden. See Motherwell, 114 Wn.2d at 363 (noting that “free exercise claimants do not meet their burden of proof merely by showing that the government’s actions have impeded their ability to practice their religion”).

inville, 166 Wn.2d at 644 (relevance of context); Munns, 131 Wn.2d at 204-05 (relevance of commercial purposes). In Woodinville, this Court explained that substantial burden “must be evaluated in the context in which it arises.” 166 Wn.2d at 644. It instructs that contextual analysis examines whether the conduct is at the “core of protected worship,” and “necessarily encompasses impact on others....” Id. Analysis of these considerations demonstrates that Arlene's cannot meet the substantial burden requirement.

First, Arlene's decision to deny the requested services does not involve a "core" religious practice.<sup>19</sup> While the Court has not explicitly analyzed what constitutes a “core” religious practice, it indicated in First Covenant II and Munns that the presence of commercial purposes is relevant in evaluating the nature of the asserted burden. In First Covenant II, the Court struck down a landmark preservation ordinance restricting the use of First Covenant's church building. In so doing, it rejected a federal circuit court analysis that had *upheld* a similar ordinance, in part, because the church there “sought an exception to use its property for commercial purposes.” First Covenant II, 120 Wn.2d at 215-16 (distinguishing Rector,

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<sup>19</sup> Art. I § 11 generally protects both belief and religiously motivated conduct. See First Covenant II, 120 Wn.2d at 224, & id. at 235 (Utter, J., concurring). However, the Court has also emphasized that a distinction may be drawn between acts involving “core” worship, like prayer or services, and those that “may be a part of religious belief or practice.” Woodinville, 166 Wn.2d at 644. The text of Art. I § 11 itself distinguishes “absolute freedom of conscience” from “acts” or “practices” that may impact third parties. Thus, while conduct may be entitled to protection in some instances, both this Court's jurisprudence and the text of Art. I § 11 support the conclusion that *core* religious activity is the touchstone for constitutional protection.

Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348 (2nd Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)). In Munns, the Court revisited First Covenant II, clarifying the relevance of “commercial purposes” in evaluating an asserted *religious* burden:

[T]he Free Exercise Clause did not trump the landmark ordinance in *St. Bartholomew's* because the proposed new building was *intended solely for a commercial purpose*, and was to be used to generate additional revenue to expand the church's programs. Here, there is no dispute that while the pastoral center the Bishop wishes to build will not be strictly a house of worship, *its use will be primarily for religious, not commercial purposes*.

131 Wn.2d at 204-05 (emphasis added; internal citations and quotations omitted). First Covenant II and Munns confirm that when a religious observer acts, at least in part, for commercial purposes, such purposes are relevant in evaluating the asserted burden. See also Backlund, 106 Wn.2d at 642 (quoting United States v. Lee, 455 U.S. 252, 261 (1982), recognizing under a pre-Smith First Amendment analysis that “[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”; brackets added).

Second, Woodinville instructs that impact of religious practice on others is relevant in evaluating the context of an asserted religious entitlement. See 166 Wn.2d at 644. Here, Arlene's requested exemption not only arises in a commercial context, it also collides with the rights of others

seeking the benefit of a public accommodation. The WLAD provides customers protection from being “treated as not welcome, accepted, desired, or solicited.” RCW 49.60.040(14). Those business owners choosing to operate a business receive the economic benefits of commercial activity, knowing that “with these benefits come corresponding burdens.” Backlund, 106 Wn.2d at 648 (applying pre-Smith federal strict scrutiny analysis). Permitting Arlene’s an exemption under the WLAD that would allow it to selectively deny services in public accommodations would impose an inordinate impact on others, while not otherwise implicating a core aspect of its religious freedom, such as the right to worship or an equivalent practice. Under this analysis, any burden on Arlene's religious freedom is incidental, not substantial.<sup>20</sup>

This Art. I § 11 substantial burden analysis is wholly consistent with the *text* of Art. I § 11, which affords “absolute freedom of conscience in all matters of religious sentiment, belief and worship,” but limits the reach of this freedom when it involves practices that are “inconsistent with the peace and safety of the state.” Here, Arlene’s conduct does not involve

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<sup>20</sup> In evaluating whether an asserted burden is substantial, this Court has also stated that government burdens religious free exercise if “the *coercive effect* of an enactment operates against a party *in the practice of his religion*.” First Covenant II, 120 Wn.2d at 226 (internal quotations omitted; emphasis added). As explained above, Arlene’s cannot make such a showing, as it does not assert that it is required to engage in the business of floral arrangements. The alleged abridgment of its religious freedom is predicated on its *choice* of operating a business. This voluntary undertaking should not be permitted to form the basis for a claimed “coercive effect” on Arlene's religious practice. In a related vein, the WLAD public accommodation laws at issue here do not operate against Arlene’s in the “practice of . . . religion,” but instead impact the practice of its business. Id.

a “core” religious activity that is solely a “matter of religious sentiment, belief [or] worship.” (Brackets added). Rather, it takes the form of a discriminatory commercial practice in public accommodations which, even assuming a religious component, is “inconsistent with the peace and safety of the state.” In sum, Arlene’s cannot demonstrate a substantial burden on its religious freedom, and this should end the Art. I § 11 inquiry.<sup>21</sup>

**b. A “compelling state interest” exists.**

Assuming a substantial burden on Arlene’s religious freedom, the WLAD goal of eradicating discrimination in public accommodations constitutes a compelling state interest. See RCW 49.60.010; State Br. at 32-33. “[C]ompelling interests are based in the necessities of national or community life such as clear threats to public health, peace, and welfare.” Munns, 131 Wn.2d at 200. This Court has recognized 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 of Fraternal Order of Eagles, 148 Wn.2d 224, 246, 59 P.3d 655 (2002).<sup>22</sup> The text of Art. I § 11 indicates that “absolute liberty of conscience” is not limitless, as the State may exercise its police power to

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<sup>21</sup> To the extent RFRA would arguably require a different result, as noted supra at n.11, it is inapplicable here. Some states have enacted their own version of RFRA. See e.g. Ark. Code. Ann. §§ 16-123-401 to 16-123-407; Ind. Code § 34-13-9. Washington has not.

<sup>22</sup> Arlene’s characterization of the State’s interest as “ensuring access to floral design services,” Arlene's/Stutzman Br. at 45, disregards the fundamental aim of the WLAD.

prohibit “practices inconsistent with the peace and safety of the state.” See Balzer, 91 Wn. App. at 57.<sup>23</sup>

**c. The “least restrictive means” was used.**

Once a compelling state interest is established, the State must demonstrate that “the means chosen to achieve its compelling interest are necessary and the least restrictive available.” First Covenant II, 120 Wn.2d at 227. Arlene’s characterizes the State’s asserted interest in enforcement of the WLAD as the “marginal interest in ensuring people may obtain artistic floral designs celebrating same-sex weddings,” and asserts that an exemption for “clearly artistic and expressive content decisions,” would both protect Arlene’s free exercise rights and ensure “the bare minimum of Mr. Ingersoll’s and Mr. Freed’s statutory rights would be impacted.” See Arlene’s/Stutzman Br. at 47. Again, Arlene’s argument ignores the fundamental purpose of the WLAD. When the effectiveness of the challenged law would be undermined by granting the requested exemption, it has been determined that enforcing the law as written *is* the least restrictive means of achieving the State’s interest. See Motherwell, 114 Wn.2d at 366 (applying pre-Smith federal analysis to conclude that because the requested exemption from the reporting statute would “unduly interfere” with the

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<sup>23</sup> Arlene’s argues that its conduct was not “invidious,” but was “simply remaining true to one’s faith.” Arlene’s/Stutzman Br. at 43. It further asserts that “[t]he State does not have a compelling interest in combating discrimination in general. Rather, the State has a compelling interest in combating *invidious* discrimination.” Id. at 41. As the State and Ingersoll/Freed correctly point out, there is no basis in constitutional analysis for distinguishing invidious discrimination from that motivated by “reasoned religious distinctions,” id. at 42. See also State Br. at 38-39; Ingersoll/Freed Br. at 32-33.



State's interest in protecting abuse victims, "the State has used the least restrictive means" of achieving its goal); Backlund, 106 Wn.2d at 646-47 (similar); see also Balzer, 91 Wn. App. at 64-65 (similar).

Granting Arlene's requested exemption would permit a wide variety of business owners asserting an expressive component to their businesses — whether florists, photographers, bakers or others — to avoid WLAD liability for discriminatory acts. See Americans United for Separation of Church and State Am. Br. at 2-5. This would dramatically undercut the State's goal of ensuring certain protected classes access to public accommodations. See Ingersoll/Freed Br. at 33-34.<sup>24</sup>

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief and uphold the superior court's judgments and orders.

DATED this 7th day of October 2016.

*Valerie D. Mcomie*      *Valerie D. Mcomie*  
For KELBY D. FLETCHER,      VALERIE D. MCOMIE  
*Valerie D. Mcomie*      *with authority*  
For BRYAN P. HARNETIAUX,      On Behalf of WSAJ Foundation  
*with authority*

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<sup>24</sup> WSAJ Foundation otherwise supports the State and Ingersoll/Freed arguments that imposing WLAD liability does not offend the First Amendment of the United States Constitution. Regarding compelled speech, see State Br. at 23-24 (arguing Arlene's conduct is not sufficiently expressive to qualify as speech); regarding free association, see State Br. at 47 (no cognizable free association claim where there is no pre-existing "expressive association"); regarding free exercise, see State Br. at 40-46 and Ingersoll/Freed Br. at 18-22 (WLAD does not target or selectively burden religion and is thus neutral and generally applicable, and has a rational basis); regarding hybrid rights doctrine, see State Br. at 48 and Ingersoll Br. at 40 (hybrid rights doctrine generally requires likelihood of success on the merits of the underlying constitutional claims, lacking here).

# Appendix



## RCW 49.60.010

### Purpose of chapter.

This chapter shall be known as the "law against discrimination." It 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, and in 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, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability 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 foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

[ **2007 c 187 § 1**; **2006 c 4 § 1**; **1997 c 271 § 1**; **1995 c 259 § 1**; **1993 c 510 § 1**; **1985 c 185 § 1**; **1973 1st ex.s. c 214 § 1**; **1973 c 141 § 1**; **1969 ex.s. c 167 § 1**; **1957 c 37 § 1**; **1949 c 183 § 1**; Rem. Supp. 1949 § 7614-20.]

### NOTES:

**Effective date—1995 c 259:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [ **1995 c 259 § 7.**]

**Severability—1993 c 510:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ **1993 c 510 § 26.**]

**Severability—1969 ex.s. c 167:** "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [ **1969 ex.s. c 167 § 10.**]

**Severability—1957 c 37:** "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [ **1957 c 37 § 27.**]

**Severability—1949 c 183:** "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [ **1949 c 183 § 13.**]

*Community renewal law—Discrimination prohibited: RCW **35.81.170.***



## RCW 49.60.020

### Construction of chapter—Election of other remedies.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights. This chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation. Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage.

[ 2007 c 187 § 2; 2006 c 4 § 2; 1993 c 510 § 2; 1973 1st ex.s. c 214 § 2; 1973 c 141 § 2; 1957 c 37 § 2; 1949 c 183 § 12; Rem. Supp. 1949 § 7614-30.]

### NOTES:

**Severability—1993 c 510:** See note following RCW 49.60.010.



## RCW 49.60.030

### Freedom from discrimination—Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

- (a) The right to obtain and hold employment without discrimination;
- (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;
- (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
- (d) The right to engage in credit transactions without discrimination;
- (e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, 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.

[ **2009 c 164 § 1**; **2007 c 187 § 3**; **2006 c 4 § 3**; **1997 c 271 § 2**; **1995 c 135 § 3**. Prior: **1993 c 510 § 3**; **1993 c 69 § 1**; **1984 c 32 § 2**; **1979 c 127 § 2**; **1977 ex.s. c 192 § 1**; **1974 ex.s. c 32 § 1**; **1973 1st ex.s. c 214 § 3**; **1973 c 141 § 3**; **1969 ex.s. c 167 § 2**; **1957 c 37 § 3**; **1949 c 183 § 2**; Rem. Supp. 1949 § 7614-21.]

## NOTES:

**Intent—1995 c 135:** See note following RCW **29A.08.760**.

**Severability—1993 c 510:** See note following RCW **49.60.010**.

**Severability—1993 c 69:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ **1993 c 69 § 17**.]

**Severability—1969 ex.s. c 167:** See note following RCW **49.60.010**.

**Severability—1957 c 37:** See note following RCW **49.60.010**.

**Severability—1949 c 183:** See note following RCW **49.60.010**.



## RCW 49.60.040

### Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:



(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of

personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW **41.04.007**; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

(18) "National origin" includes "ancestry."

(19) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

(25) "Sex" means gender.

(26) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

[ **2009 c 187 § 3**. Prior: **2007 c 317 § 2**; **2007 c 187 § 4**; **2006 c 4 § 4**; **1997 c 271 § 3**; **1995 c 259 § 2**; prior: **1993 c 510 § 4**; **1993 c 69 § 3**; prior: **1985 c 203 § 2**; **1985 c 185 § 2**; **1979 c 127 § 3**; **1973 c 141 § 4**; **1969 ex.s. c 167 § 3**; **1961 c 103 § 1**; **1957 c 37 § 4**; **1949 c 183 § 3**; Rem. Supp. 1949 § 7614-22.]

**NOTES:**

**Reviser's note:** The definitions in this section have been alphabetized pursuant to RCW **1.08.015(2)(k)**.

**Finding—2007 c 317:** "The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act." [ **2007 c 317 § 1.**]

**Retroactive application—2007 c 317:** "This act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after July 22, 2007." [ **2007 c 317 § 3.**]

**Effective date—1995 c 259:** See note following RCW **49.60.010**.

**Severability—1993 c 510:** See note following RCW **49.60.010**.

**Severability—1993 c 69:** See note following RCW **49.60.030**.

**Severability—1969 ex.s. c 167:** See note following RCW **49.60.010**.

**Construction—1961 c 103:** "Nothing herein shall be construed to render any person or corporation liable for breach of preexisting contracts by reason of compliance by such person or corporation with this act." [ **1961 c 103 § 4.**]

**Severability—1957 c 37:** See note following RCW **49.60.010**.

**Severability—1949 c 183:** See note following RCW **49.60.010**.



## RCW 49.60.215

### Unfair practices of places of public resort, accommodation, assemblage, amusement— Trained dog guides and service animals.

(1) It 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 requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, 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, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice.

(2) This section does not apply to food establishments, as defined in RCW 49.60.218, with respect to the use of a trained dog guide or service animal by a person with a disability. Food establishments are subject to RCW 49.60.218 with respect to trained dog guides and service animals.

[ 2011 c 237 § 1; 2009 c 164 § 2; 2007 c 187 § 12; 2006 c 4 § 13; 1997 c 271 § 13; 1993 c 510 § 16.  
Prior: 1985 c 203 § 1; 1985 c 90 § 6; 1979 c 127 § 7; 1957 c 37 § 14.]

#### NOTES:

**Severability—1993 c 510:** See note following RCW 49.60.010.

*Denial of civil rights: RCW 9.91.010.*

West's Revised Code of Washington Annotated  
Constitution of the State of Washington (Refs & Annos)  
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 11

§ 11. Religious Freedom

[Currentness](#)

Absolute 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 as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: **PROVIDED, HOWEVER,** That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

**Credits**

Adopted 1889. Amended by Amendment 4 (Laws 1903, p. 283, § 1, approved Nov. 1904); Amendment 34 (Laws 1957, S.J.R. No. 14, p. 1299, approved Nov. 4, 1958); Amendment 88 (Laws 1993, H.J.R. No. 4200, p. 3062, approved Nov. 2, 1993).

[Notes of Decisions \(167\)](#)

West's RCWA Const. Art. 1, § 11, WA CONST Art. 1, § 11  
Current through amendments approved 11-3-2015.