

FILED
SUPREME COURT
STATE OF WASHINGTON
3/5/2019 2:14 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
3/13/2019
BY SUSAN L. CARLSON
CLERK

No. 91615-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT INGERSOLL and CURT FREED,
Plaintiffs-Respondents,

v.

ARLENE'S FLOWERS, INC., dba ARLENE'S FLOWERS AND GIFTS,
and BARRONELLE STUZMAN,
Defendants-Appellants.

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

ARLENE'S FLOWERS, INC., dba ARLENE'S FLOWERS AND GIFTS,
and BARRONELLE STUZMAN,
Defendants-Appellants.

**BRIEF OF WASHINGTON BUSINESSES AND BUSINESS
ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-RESPONDENTS**

Bruce E. H. Johnson, WSBA # 7667
Kenneth E. Payson, WSBA # 26369
Jennifer K. Chung, WSBA #51583
Davis Wright Tremaine LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206-622-3150 Phone
206-757-7700 Fax

Amanda Beane, WSBA # 33070
Nitika Arora, WSBA # 54084
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
206-359-8000 Phone
206-359-9000 Fax

Counsel

Amici

Business Associations:

Broadway Business Improvement Area
Capitol Hill Chamber of Commerce
Economic Development Alliance of Skagit County
Greater Seattle Business Association
Seattle Metropolitan Chamber of Commerce

Businesses:

98point6 Inc.
Adrift Hotel & Spa
Amazon.com, Inc.
Brooks Sports, Inc. (dba Brooks Running Company)
Elliott Bay Book Company
Expedia Group
Kaiser Foundation Health Plan of Washington (“Kaiser
 Permanente Washington”)
Microsoft Corporation
RealNetworks, Inc.
Recreational Equipment, Inc.
Salesforce.com, Inc.
Starbucks Coffee Company
Zillow

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	1
II. INTRODUCTION	2
III. STATEMENT OF THE CASE.....	4
IV. ARGUMENT	4
A. Appellants’ Amorphous Exemptions Would Undermine the Benefits that Diversity and Inclusion Bring to Washington’s Businesses and Economy.	4
1. Washington Businesses Benefit from Diversity and Inclusion.	4
2. Washington Businesses Also Recognize the Importance of Supplier and Customer Outreach.....	9
3. Appellants’ Vague Exemptions Would Undermine Washington Businesses’ Ability to Recruit and Retain a Diverse Employee Base.....	10
4. Appellants’ Ill-Defined Exemptions Would Undermine Washington Businesses’ Ability to Sell Their Services and Products to a Diverse and Expansive Customer Base.	13
B. Appellants’ Formless Exemptions Would Create a Catch-22 for Washington Businesses Seeking to Avoid Liability Under Non-Discrimination Laws.....	16
C. Appellants’ Exemptions Would Affect Other Protected Classes and Activities Well Beyond Same-Sex Marriage.....	20
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Floeting v. Grp. Health Coop.</i> , No. 95205-1, 434 P.3d 39, 2019 WL 406923 (Wash. Jan. 31, 2019).....	18
<i>Gifford v. McCarthy</i> , 137 A.D.3d 30, 23 N.Y.S.3d 422 (2016)	12, 19
<i>Grutter v. Bollinger</i> , 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).....	7
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).....	13
<i>Katzenbach v. McClung</i> , 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964).....	14
<i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014)	5
<i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n</i> , 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).....	2, 13
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).....	13
<i>Peterson v. Hewlett-Packard Co.</i> , 358 F.3d 599 (9th Cir. 2004)	19
<i>State v. Arlene’s Flowers, Inc.</i> , 187 Wn.2d 804, 389 P.3d 543 (2017), <i>cert. granted</i> , <i>judgment vacated</i> , 138 S. Ct. 2671 (2018).....	2
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 50, 309 P.3d 326, 337 (2013), <i>abrogated on other grounds by City of Seattle v.</i> <i>Erickson</i> , 188 Wn.2d 721, 398 P.3d 1124 (2017).....	5

Walden v. Centers for Disease Control,
669 F.3d 1277 (11th Cir. 2012)17, 18

Statutes

RCW 49.60.0105, 20

Legislative History

Hearing on S. 1732 Before the Comm. on Commerce, 88th
Cong. 623–630, 695–700, 1384–1385 (1963)14

Other References

Aaron Weinberg, *Latino business owners get boost from EDASC program*, GoSkagit.com (Sept. 20, 2016), https://www.goskagit.com/news/latino-business-owners-get-boost-from-edasc-program/article_e7341176-89f5-558e-b98e-9ff7046e1337.html.....10

Andrew Bender, *Indiana’s Religious Freedom Act Cost Indianapolis \$60 Million in Lost Revenue*, Forbes (Jan. 31, 2016), <https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/#657464c72e2aa>.....15

Bob Segall, *State releases e-mails revealing RFRA damage*, WTHR (Sept. 17, 2015), <https://www.wthr.com/article/13-investigates-state-releases-e-mails-revealing-rfra-damage>.....15

Dorie Clark, *Making the Business Case for Diversity*, Forbes (Aug. 21, 2014), <https://www.forbes.com/sites/dorieclark/2014/08/21/making-the-business-case-for-diversity/>6

Dwight Adams, *RFRA: Why the ‘religious freedom law’ signed by Mike Pence was so controversial*, Indy Star (Apr. 25, 2018), <https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002/>.....14

Egencia, *Why people, and women particularly, say Expedia is the best place to work* (Feb. 22, 2017),
<https://www.egencia.com/public/uk/why-people-and-women-particularly-say-expedia-is-the-best-place-to-work>9

Emery P. Dalesio, *'Bathroom bill' to cost North Carolina \$3.76B*, Associated Press (Mar. 30, 2017),
<https://www.apnews.com/e6c7a15d2e16452c8dcbc2756fd67b44>16

Great Place to Work, *Best Workplaces for Diversity 2018*,
<https://www.greatplacetowork.com/best-workplaces/diversity/2018>8

Heidrick & Struggles, *Women in leadership: From backcountry to boardroom*, at 2, 5-6 (2018),
<https://camberoutdoors.org/wp-content/uploads/2018/01/Women-in-Leadership-from-Backcountry-to-Boardroom.pdf>.....10

James Briggs, *A year after RFRA, Angie's List's east-side expansion is still off*, *Indy Star* (July 8, 2016),
<https://www.indystar.com/story/money/2016/07/08/year-after-rfra-angies-lists-east-side-expansion-still-off/86435652/>.....15

Jeff Green, *LGBT Purchasing Power Near \$1 Trillion Rivals Other Minorities*, *Bloomberg* (July 20, 2016),
<https://www.bloomberg.com/news/articles/2016-07-20/lgbt-purchasing-power-near-1-trillion-rivals-other-minorities>7

Jon Miller & Lucy Parker, *Open for Business: Report Highlights*, at 8, 12, *Open for Business* (Jan. 2018), *link available at* <https://open-for-business.org/reports>8

Juliet Bourke, *Innovation, high performance and diversity*, Deloitte,
<https://www2.deloitte.com/au/en/pages/human-capital/articles/creating-high-performing-leadership-teams.html>.....5, 6

M.V. Lee Badgett, *The Business Impact of LGBT-Supportive Workplace Policies*, at 1, Williams Inst. (May 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf>.....6, 8

Michael Gordon, *Understanding HB2: North Carolina’s newest law solidifies state’s role in defining discrimination*, Charlotte Observer (Mar. 26, 2016)16

Paolo Guadiano, *Hiring for Diversity Is Like Paying Your Customers to Grow Revenues*, Forbes (Jan. 6, 2018), <https://www.forbes.com/sites/paologuadiano/2018/01/06/hiring-for-diversity>12

RealNetworks, Supplier Diversity Program, <https://www.realnetworks.com/supplier-diversity-program>).....9

Rod Robinson, *Supply Chain Diversity: More than Quotas*, Wharton Mag. (Feb. 12, 2016), <http://whartonmagazine.com/blogs/supply-chain-diversity-more-than-quotas/>.....7

Sarah Treuhaft, *The Equity Solution: Racial Inclusion Is Key to Growing a Strong New Economy*, at 2, PolicyLink (Oct. 22, 2014), https://www.policylink.org/sites/default/files/Equity_Solution_Brief.pdf.....8

Seattle Gay News, Winter Wedding Special, at 7 (Dec. 20, 2013), http://www.sgn.org/sgnnews41_51/pdf/Section3_12-20-13WEB.pdf.....10

Shawn Achor, *Positive Intelligence*, Harvard Business Review (Jan. 2012), <https://hbr.org/2012/01/positive-intelligence>.....12

Sylvia Ann Hewlett, *Why LGBT Employees Need Workplace Allies*, Harv. Bus. Rev. (June 20, 2013), <https://hbr.org/2013/06/the-power-of-out>6, 7, 12

Tim Smedley, *The evidence is growing—there really is a business case for diversity*, FT.com (May 14, 2014), <https://www.ft.com/content/4f4b3c8e-d521-11e3-9187-00144feabdc0>.....6

UW News, *UW School of Law’s Gregoire Fellows Program to advance diversity in the legal profession* (Apr. 15, 2015), <http://www.washington.edu/news/2015/04/15/uw-school-of-laws-gregoire-fellows-program-to-advance-diversity-in-the-legal-profession/>.....9

Yuriy Boykiv, *Multicultural Marketing: No Longer an Option, But a Necessity*, Inc. (May 16, 2016), <https://www.inc.com/yuriy-boykiv/multicultural-marketing-no-longer-an-option-but-a-necessity.html>.....7

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are 13 businesses and five business associations in Washington State that value equality, diversity, and inclusion in their workplaces and communities. *Amici* range from small local businesses, such as Adrift Hotel in Long Beach and Elliott Bay Book Company in Seattle, to large national and international businesses, such as Expedia Group, RealNetworks, and Starbucks, and include two of the largest companies in the world, Amazon and Microsoft. *Amici*'s member business associations support and represent many additional businesses that operate throughout Washington.¹

Amici recognize the benefits of a diverse workforce and spend considerable efforts and resources recruiting and retaining diverse employees through pipeline initiatives, community partnerships, hiring practices, affinity groups, and other programs designed to ensure *Amici* remain competitive. *Amici* also value a diverse customer base, and *Amici*'s members include businesses and business associations that benefit from LGBT tourism in Washington State. *Amici* have a strong interest in

¹ These associations include Broadway Business Improvement Area and Capitol Hill Chamber of Commerce (supporting a welcoming economy and community in Capitol Hill), Economic Development Alliance of Skagit County (advancing Skagit County's economy and quality of life), Greater Seattle Business Association (representing over 1,300 LGBTQ and allied business members), and Seattle Metropolitan Chamber of Commerce (representing 2,400 companies and a regional workforce of about 750,000).

ensuring that Washington State remains a welcoming and inclusive place to work, live, and visit so their efforts will not be frustrated.

II. INTRODUCTION

“This case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches.” *State v. Arlene’s Flowers, Inc.*, 187 Wn.2d 804, 851, 389 P.3d 543, 566 (2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018). Protecting the Washington Law Against Discrimination (WLAD) from carve-outs that would threaten its broad societal purpose of “eradicating barriers to the equal treatment of all citizens in the commercial marketplace,” *id.*, remains as important today as when this Court issued its original decision in this case.² Appellants’ proposed amorphous exemption would subject the Washington residents who most need the WLAD’s protections to discrimination based on others’ private religious beliefs. “Were [this Court] to carve out a patchwork of exceptions for ostensibly justified discrimination, [the WLAD’s] purpose would be fatally undermined.” *Id.* at 851-52.

Amici are Washington businesses and business associations that have experienced firsthand the benefits of creating a diverse and inclusive workforce and society. These benefits include increased creativity,

² *Amici* understand the U.S. Supreme Court’s remand order to be limited to the issue in *Masterpiece Cakeshop*—that is, whether the adjudicators’ “consideration of this case was inconsistent with the State’s obligation of religious neutrality.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723, 201 L. Ed. 2d 35 (2018). But in light of Appellants’ attempt to raise the substantive legal issues involving WLAD, *see* App. Br. at 4, *Amici* provide this brief to fully inform the Court as to the adverse effects reversing its original decision would have on Washington’s businesses and economy.

productivity, and innovation; more perspectives; better decision-making; access to a broader talent pool; better customer service; new business opportunities and growth; and happier employees who are more engaged and less likely to leave their companies. *Amici* urge this Court to reaffirm its original decision, for at least these reasons:

First, a strong public accommodations law creates an environment that welcomes LGBT and other diverse employees to work in Washington State, and welcomes LGBT and other diverse customers to visit and stimulate the Washington economy. *Amici* have spent considerable resources on diversity and inclusion initiatives designed to recruit and retain the best and brightest employees. This in turn allows *Amici* to remain competitive by harnessing the benefits of a diverse employee base. *Amici* have also spent considerable resources promoting their products and services to a broad audience to remain competitive by accessing the larger market share of a diverse customer base. This Court should not weaken the WLAD and, by extension, Washington's businesses and economy, by adopting Appellants' vague and formless exemption.

Second, a WLAD carve-out based on Appellants' exemption could expose *Amici* to lawsuits from both customers and employees. *Amici's* employees could use their personal religious beliefs to discriminate against customers, subjecting *Amici* to liability under the WLAD's public

accommodations provision. But *Amici's* attempts to mitigate this risk and prevent employees' religiously based discrimination against customers could expose *Amici* to lawsuits for religious discrimination by their employees. The ill-defined nature of Appellants' proposal will make it impossible to implement workable practices that avoid this catch-22.

Third, the implications of this case extend far beyond the issues of marriage equality or sexual-orientation discrimination. The WLAD does not single out sexual orientation for lesser protection, and persons with other protected attributes—race, creed, color, national origin, sex, military status, or disability—are equally vulnerable to a religious-based carve-out. This Court should resist Appellants' attempts to attack Washington's public accommodations laws and reaffirm its original decision.

III. STATEMENT OF THE CASE

Amici accept the Statement of the Case in the Brief of Plaintiffs-Respondents Ingersoll and Freed.

IV. ARGUMENT

A. Appellants' Amorphous Exemptions Would Undermine the Benefits that Diversity and Inclusion Bring to Washington's Businesses and Economy.

1. Washington Businesses Benefit from Diversity and Inclusion.

Courts and lawmakers have long recognized the benefits of diversity and inclusion. "The lessons of our constitutional history are clear: inclusion

strengthens, rather than weakens, our most important institutions.” *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Taylor v. Louisiana*, 419 U.S. 522, 535–37, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); and *Witt v. Dep’t of Air Force*, 527 F.3d 806, 821 n.11 (9th Cir. 2008)). In critical decision-making scenarios, such as jury deliberations, this Court has recognized that “heterogeneous groups outperformed homogeneous groups.” *State v. Saintcalle*, 178 Wn.2d 34, 50, 309 P.3d 326, 337 (2013) (citing Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, 6, 40–41 (Aug. 2010)), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). In contrast, “discrimination threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010.

The business community has also recognized these benefits. A diverse workforce brings diversity of thought and approach, which drives creativity, innovation, and ideas—necessary features for businesses that must stay competitive in today’s global marketplace by understanding the demands of an increasingly diverse consumer populations.³ Diverse

³ Juliet Bourke, *Innovation, high performance and diversity*, Deloitte, <https://www2.deloitte.com/au/en/pages/human-capital/articles/creating-high-performing-leadership-teams.html> (last visited Feb. 14, 2019).

perspectives help businesses make better decisions by challenging pre-conceived ideas.⁴ “LGBT-supportive policies and workplace climates are linked to greater job commitment, improved workplace relationships, increased job satisfaction, and improved health outcomes among LGBT employees.”⁵ Inclusion leads to happier employees, who are more productive, engaged, and willing to speak up and bring in new ideas, and less likely to quit their jobs.⁶

Additionally, inclusion gives businesses access to a broader talent pool and unique skills, including access to new markets, better customer service, and better understanding of the needs of diverse customers.⁷ One study found that a team with at least one member representing a target end-user was up to “158 percent more likely to understand that target end-user and innovate accordingly.”⁸ Businesses with stronger supplier diversity programs—for instance, including women- and minority-owned businesses in their procurement plans—have greater return on investment, lower

⁴ *Id.*

⁵ M.V. Lee Badgett, *The Business Impact of LGBT-Supportive Workplace Policies*, at 1, Williams Inst. (May 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf>.

⁶ Sylvia Ann Hewlett, *Why LGBT Employees Need Workplace Allies*, Harv. Bus. Rev. (June 20, 2013), <https://hbr.org/2013/06/the-power-of-out>.

⁷ Dorie Clark, *Making the Business Case for Diversity*, Forbes (Aug. 21, 2014), <https://www.forbes.com/sites/dorieclark/2014/08/21/making-the-business-case-for-diversity/>.

⁸ Tim Smedley, *The evidence is growing—there really is a business case for diversity*, FT.com (May 14, 2014), <https://www.ft.com/content/4f4b3c8e-d521-11e3-9187-00144feabdc0>.

operating costs, higher profits, and access to new products and opportunities for expansion.⁹ What was true about the competitive landscape over 15 years ago is even more true now: “[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330–31, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).

Further, as a simple matter of demographic growth and buying power, “[m]ulticultural marketing is no longer an option but a necessity.”¹⁰ In 2016, LGBT adults in the United States represented \$917 billion in total buying power.¹¹ Businesses that publicize their support of LGBT equality have better customer brand loyalty.¹² Customer loyalty and engagement boosts a business’s standing in the customers’ eyes, and affects not only dollars but social media shares that encourage further sales and goodwill. Given our increasingly diverse state and nation, businesses need to develop and market products to a diverse audience in order to stay competitive.

⁹ Rod Robinson, *Supply Chain Diversity: More than Quotas*, Wharton Mag. (Feb. 12, 2016), <http://whartonmagazine.com/blogs/supply-chain-diversity-more-than-quotas/>.

¹⁰ Yuriy Boykiv, *Multicultural Marketing: No Longer an Option, But a Necessity*, Inc. (May 16, 2016), <https://www.inc.com/yuriy-boykiv/multicultural-marketing-no-longer-an-option-but-a-necessity.html>.

¹¹ Jeff Green, *LGBT Purchasing Power Near \$1 Trillion Rivals Other Minorities*, Bloomberg (July 20, 2016), <https://www.bloomberg.com/news/articles/2016-07-20/lgbt-purchasing-power-near-1-trillion-rivals-other-minorities>.

¹² Hewlett, *supra* note 6.

Diversity and inclusion benefit not only businesses, but the economy. Researchers have found a “clear positive correlation” between countries with legal rights for LGBT people and per capita gross domestic product.¹³ LGBT inclusive cities are more innovative, and LGBT inclusive countries are more competitive.¹⁴ According to one study, “[t]he American economy would gain \$2.1 trillion in gross domestic product (GDP) every year by closing its racial gaps in income: a 14 percent increase.”¹⁵

Amici recognize the benefits of a diverse workforce and spend considerable efforts and resources recruiting and retaining diverse employees, and developing and marketing products to a diverse customer base. These efforts have been acknowledged and acclaimed. For instance, *Amici*’s member businesses, such as Salesforce and Zillow, regularly appear in Great Place to Work’s annual list of best workplaces for diversity.¹⁶

In addition to these external accolades, *Amici*’s member businesses see internal rewards for their diverse workforces. For example, Expedia Group’s initiatives to achieve gender balance have led to more innovative

¹³ Badgett, *supra* note 5.

¹⁴ Jon Miller & Lucy Parker, *Open for Business: Report Highlights*, at 8, 12, Open for Business (Jan. 2018), link available at <https://open-for-business.org/reports>.

¹⁵ Sarah Treuhft, *The Equity Solution: Racial Inclusion Is Key to Growing a Strong New Economy*, at 2, PolicyLink (Oct. 22, 2014), https://www.policylink.org/sites/default/files/Equity_Solution_Brief.pdf.

¹⁶ See, e.g., Great Place to Work, Best Workplaces for Diversity 2018, <https://www.greatplacetowork.com/best-workplaces/diversity/2018> (last visited Mar. 1, 2019).

teams that can design products and services to address the needs of the women who are the principal decision-makers in the corporate travel world.¹⁷

Recognizing the importance of developing a talent pipeline, *Amici* spend considerable efforts to prepare the next generation of diverse employees. Among other efforts, Microsoft, Starbucks, and Amazon have partnered with UW Law School to support the Gregoire Fellows program since its inception, advancing diversity in the legal profession through a scholarship and mentoring program that supports diverse law students.¹⁸

2. Washington Businesses Also Recognize the Importance of Supplier and Customer Outreach.

Amici develop and rely on supplier diversity programs to achieve business success. For instance, RealNetworks attributes its continual business growth in part to its development of a diverse and multicultural supply chain that includes minority, women, and veteran owned suppliers.¹⁹

Amici also engage in product development and outreach efforts designed to reach their diverse customer base. For example, Brooks

¹⁷ Egencia, *Why people, and women particularly, say Expedia is the best place to work* (Feb. 22, 2017), <https://www.egencia.com/public/uk/why-people-and-women-particularly-say-expedia-is-the-best-place-to-work>.

¹⁸ UW News, *UW School of Law's Gregoire Fellows Program to advance diversity in the legal profession* (Apr. 15, 2015), <http://www.washington.edu/news/2015/04/15/uw-school-of-laws-gregoire-fellows-program-to-advance-diversity-in-the-legal-profession/>.

¹⁹ RealNetworks, *Supplier Diversity Program*, <https://www.realnetworks.com/supplier-diversity-program> (last visited Feb. 14, 2019).

Running works to ensure its employee base reflects the company’s diverse customer base. “The run welcomes all and is the most inclusive sport in the world. As such, it’s important to us that our employees and marketing represent all runners.”²⁰ Other *Amici*’s customer outreach efforts include tourism. Adrift Hotel & Spa has long advertised in LGBT publications to attract customers to its hotel in Long Beach.²¹

Amici also spend considerable efforts promoting their values on a broader scale. Knowing that “[t]he more people integrated into the community, the more it prospers,” the Economic Development Alliance of Skagit County operates a program that assists Latino entrepreneurs in Skagit County through business development support and loans.²²

3. Appellants’ Vague Exemptions Would Undermine Washington Businesses’ Ability to Recruit and Retain a Diverse Employee Base.

Adopting Appellants’ proposed exemption would frustrate *Amici*’s diversity and inclusion efforts. An unwelcoming Washington that allows discrimination based on religious beliefs would hamper *Amici*’s recruitment efforts because LGBT candidates would be more reluctant to apply to jobs

²⁰ Heidrick & Struggles, *Women in leadership: From backcountry to boardroom*, at 2, 5-6 (2018), <https://camberoutdoors.org/wp-content/uploads/2018/01/Women-in-Leadership-from-Backcountry-to-Boardroom.pdf>.

²¹ Seattle Gay News, Winter Wedding Special, at 7 (Dec. 20, 2013), http://www.sgn.org/sgnnews41_51/pdf/Section3_12-20-13WEB.pdf.

²² Aaron Weinberg, *Latino business owners get boost from EDASC program*, GoSkagit.com (Sept. 20, 2016), https://www.goskagit.com/news/latino-business-owners-get-boost-from-edasc-program/article_e7341176-89f5-558e-b98e-9ff7046e1337.html.

at Washington businesses. It would hamper *Amici's* retention efforts because LGBT employees would be unhappier and more likely to quit their jobs. It would reduce *Amici's* ability to access LGBT customers by reducing the number of employees who can personally relate to this customer base. And these concerns affect not only LGBT employees, but others who fall within the WLAD's protections, such as racial and religious minorities, women, veterans, and employees with disabilities.

Consider this scenario. Between flights, hotel rooms, dinners, interviews, relocation, hiring bonus, and other expenses, a company spends tens of thousands of dollars to recruit a Muslim woman from New York City. The woman moves to Washington, and the company spends further resources to train her—teaching her about the company's customers, products, and business philosophy, and helping her become a fully integrated and valued member of the team. Over time, however, the stigmatic effects of the community's discrimination begin to weigh on her. She seeks to purchase a hijab—the headscarf she wears as an expression of her faith—but a tailor refuses to sew her one because the tailor's religion does not recognize Islam. She seeks to eat at a restaurant, but the chef asks her to leave when she recites “Bismillah” rather than another religion's grace before partaking of his culinary creation. Emboldened by the lack of consequences following these examples, others in the community treat her

differently, too—staring at her as she walks down the street; telling her to remove her hijab when she enters a store; demanding that she “go back to your country.” The woman’s work begins to suffer. She is more stressed and less productive, dissatisfied and unhappy with her decision to move. Her decrease in productivity may affect the rest of the team. Finally, the woman quits her job and returns to New York, a state that does not allow public accommodation businesses to discriminate based on a religious belief carve-out.²³ The company has lost her knowledge, contributions, skills, and network, let alone the resources it expended to recruit and train her, and must begin the hiring process anew.

Employees who feel discriminated against are at least three times more likely to plan to leave their company within the next year.²⁴ Unhappy employees are less productive, less creative, and less engaged with their jobs, and an individual teammate’s loss in productivity may cause other teammates to lose productivity as well.²⁵

These are the inevitable results of the stigmatic effects that civil rights laws such as the WLAD are enacted to erase. “Discrimination is not

²³ See generally *Gifford v. McCarthy*, 137 A.D.3d 30, 23 N.Y.S.3d 422 (2016).

²⁴ Hewlett, *supra* note 6.

²⁵ Shawn Achor, *Positive Intelligence*, Harvard Business Review (Jan. 2012), <https://hbr.org/2012/01/positive-intelligence>; Paolo Guadiano, *Hiring for Diversity Is Like Paying Your Customers to Grow Revenues*, Forbes (Jan. 6, 2018), <https://www.forbes.com/sites/paologuadiano/2018/01/06/hiring-for-diversity>.

simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public” because of his protected class. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292, 85 S. Ct. 348, 376, 13 L. Ed. 2d 258 (1964) (Goldberg, J., concurring). The U.S. Supreme Court has specifically recognized that it “diminish[es] their personhood” to deny same-sex couples the same legal right to marriage as opposite-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 192 L. Ed. 2d 609 (2015). “Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

A company can spend all the resources at its disposal to create a welcoming work environment, but it cannot control other businesses or the surrounding community. *Amici* rely on the WLAD to ensure that the businesses’ values of equality, diversity, and inclusion are protected and enforced as shared community values, to create a Washington where LGBT employees and others protected by the WLAD will want to live and work.

4. Appellants’ Ill-Defined Exemptions Would Undermine Washington Businesses’ Ability to Sell Their Services and Products to a Diverse and Expansive Customer Base.

Adopting Appellants’ proposed exemption would also frustrate

Amici's efforts to access diverse customers. Difficulty recruiting and retaining diverse employees will translate to difficulty attracting and serving a diverse customer base. Further, some *Amici's* efforts to increase LGBT tourism in both Eastern and Western Washington will be hampered by outside perceptions that people who identify as LGBT are not welcome. As the U.S. Supreme Court and Congress have recognized, discrimination harms commerce by imposing “an artificial restriction on the market,” “interfer[ing] with the flow of merchandise,” and “having a depressant effect on general business conditions” in the community. *Katzenbach v. McClung*, 379 U.S. 294, 299–300, 85 S. Ct. 377, 381, 13 L. Ed. 2d 290 (1964); Hearing on S. 1732 Before the Comm. on Commerce, 88th Cong. 623–630, 695–700, 1384–1385 (1963)).

One need only look to Indiana and North Carolina to appreciate the disastrous effects of religiously based discrimination on tourism, businesses, and the local economy. In 2015, Indiana passed a Religious Freedom Restoration Act (RFRA), which would have allowed businesses to use their religious beliefs to justify discrimination against people who identify as LGBT.²⁶ One week later, in response to a “swift, strong and negative” reaction that included calls for boycotts and cancellation of

²⁶ Dwight Adams, *RFRA: Why the ‘religious freedom law’ signed by Mike Pence was so controversial*, *Indy Star* (Apr. 25, 2018), <https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002/>.

conventions, concerts, shows, and business expansion plans, the state legislature amended the law to add protections for sexual orientation and gender identity.²⁷ One week of RFRA cost the City of Indianapolis up to \$60 million in lost revenue and 12 conventions—an important component of the city’s tourism revenue.²⁸ And RFRA’s harms reached well beyond tourism. The Indianapolis-based company Angie’s List cancelled a \$40 million expansion that would have brought more than 1,000 new jobs to the state.²⁹ Businesses lost long-term relationships, customers, and suppliers; businesses decided not to relocate or expand in state; businesses were forced to spend considerable time and money on RFRA damage control.³⁰ Months after RFRA’s amendment, companies were still having to overcome RFRA’s effects on national and international recruitment efforts.³¹

North Carolina encountered a similar backlash, with worse effects. The state’s so-called “bathroom bill” limited LGBT protections and made illegal cities’ attempts to protect transgender people who use public

²⁷ Andrew Bender, *Indiana’s Religious Freedom Act Cost Indianapolis \$60 Million in Lost Revenue*, Forbes (Jan. 31, 2016), <https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/#657464c72e2aa>.

²⁸ *Id.*

²⁹ James Briggs, *A year after RFRA, Angie’s List’s east-side expansion is still off*, Indy Star (July 8, 2016), <https://www.indystar.com/story/money/2016/07/08/year-after-rfra-angies-lists-east-side-expansion-still-off/86435652/>.

³⁰ Bob Segall, *State releases e-mails revealing RFRA damage*, WTHR (Sept. 17, 2015), <https://www.wthr.com/article/13-investigates-state-releases-e-mails-revealing-rfra-damage>.

³¹ *Id.*

restrooms based on their gender identity.³² By the time it was partially repealed one year later, the bill had cost North Carolina nearly \$4 billion in lost revenue based on lost business and cancelled projects, conventions, sporting events, and concerts.³³

Exceptions to public accommodations laws wreak havoc on businesses and the local economy. They discourage tourists from visiting, discourage outside businesses from doing business in state, and discourage businesses from relocating or expanding into a state that doesn't reflect the businesses' values. Appellants' "justified" discrimination is bad for employee diversity, bad for customer diversity, and bad for Washington's economy.

B. Appellants' Formless Exemptions Would Create a Catch-22 for Washington Businesses Seeking to Avoid Liability Under Non-Discrimination Laws.

In Washington, businesses hire employees with different religious and cultural views and perspectives. *Amici* view this with pride, and spend considerable resources to work towards this goal. *Amici* also take pride in providing services to customers with different views and perspectives as well. But ruling in favor of Appellants would put businesses in a difficult

³² Michael Gordon, *Understanding HB2: North Carolina's newest law solidifies state's role in defining discrimination*, Charlotte Observer (Mar. 26, 2016), <https://www.charlotteobserver.com/news/politics-government/article68401147.html>.

³³ Emery P. Dalesio, *'Bathroom bill' to cost North Carolina \$3.76B*, Associated Press (Mar. 30, 2017), <https://www.apnews.com/e6c7a15d2e16452c8dcbc2756fd67b44>.

position, caught between its employees and customers.

Amici want to run businesses that serve their customers without employees discriminating against customers in violation of law or businesses' policies. If a business's goods and services have any relation to what could be expressive activity, employees carrying out a business's mission may argue their job responsibilities also convey an expressive message. A business should be entitled to take adverse action against an employee who cannot follow a non-discrimination policy and serve all customers, because an employee who refuses to make or sell the business's product or service to particular customers is not doing her job and is exposing the company to potential lawsuits for discrimination. But Appellants' theory could allow employees to do just that—refuse to perform their job.

Amici would therefore find themselves in a catch-22. A business whose individual employees discriminate against its customers based on the employees' religious beliefs may find itself sued by those customers. But a business not accommodating the type of exemption Appellants ask for may find itself sued by its employees or potential employees who perceive an employer's anti-discrimination policies as a violation of First Amendment free exercise rights. Indeed, in *Walden v. Centers for Disease Control*, 669 F.3d 1277, 1282 (11th Cir. 2012), a government contractor's employee was

laid off from her counseling job after refusing to provide counseling services to a gay client. Asserting that “her religion prohibits her from encouraging or supporting same-sex relationships through counseling,” the employee sued her employer, her co-employees, and the federal agency with which her employer contracted, alleging violation of her free exercise rights under the First Amendment. *Id.* at 1280. *Amici* cannot implement workable practices that would strike the correct balance to avoid both customer and employee lawsuits given the lack of guidance inherent in Appellants’ proposed exemption.

Amici’s double bind is made only starker by this Court’s recent holding that a business is “subject to strict liability for the discriminatory conduct of its employee in a place of public accommodation.” *Floeting v. Grp. Health Coop.*, No. 95205-1, 434 P.3d 39, 44, 2019 WL 406923, at *5 (Wash. Jan. 31, 2019). This Court explained that a strict liability rule for WLAD’s public accommodations provision would “better further the legislative goal of eradicating discrimination in places of public accommodation” because businesses would “try even harder to make sure that their employees are well trained, are well supervised, and do not discriminate,” and businesses would be encouraged “to focus on preventing discrimination, rather than merely punishing employees when it occurs.” *Id.* at *6. Yet, Appellants’ requested exception would tie *Amici’s* hands—

as it would subject *Amici* to employees' religious discrimination claims if employers attempt to prevent religiously based discrimination. For instance, employees might sue if they disagreed with their employers' disciplinary process and thought their employers were improperly inquiring into the employee's religious beliefs. *See, e.g., Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 604 (9th Cir. 2004) (employee alleged "'the entire disciplinary process' that [employer] initiated in response to [employee's] anti-gay conduct constituted 'an inquisition serving no other purpose than to ferret out the extremity of [the employee's] views on homosexuality'"); *Gifford*, 137 A.D.3d at 38–40 (rejecting argument that right to freely exercise religion would be burdened if petitioners were compelled "to implement anti-discrimination training and procedures that will necessarily endeavor to alter their religiously-motivated views and practices"). Despite the need to respect employee religious beliefs, businesses could be subject to strict liability if employees decide on their own initiative that their religious beliefs entitle them to discriminate against certain customers.

Ultimately, what Appellants seek to achieve cuts against the shared community values of inclusion and acceptance, and leaves businesses unable to implement workable practices to avoid both customer and employee lawsuits.

C. Appellants’ Exemptions Would Affect Other Protected Classes and Activities Well Beyond Same-Sex Marriage.

The WLAD protects more than sexual orientation—it protects people based on their race, creed, color, national origin, sex, military status, and disabilities. RCW 49.60.010. Each of these classes is equal; the WLAD does not single out sexual orientation or same-sex marriage for lesser protection, and any carve-out to the WLAD based on personal, idiosyncratic beliefs will affect these other groups.

Take, for example, Appellants’ straw man about an alleged religious discrimination incident involving the gay owner of Bedlam Coffee. App. Br. at 20-22. Although *Amici* disagree with Appellants’ characterization of the incident, there is no dispute that the WLAD prohibits discriminating against a person due to his or her religious beliefs. *See, e.g.*, State of WA Br. at 23-24 (letter sent to owner “informing him that ‘in the State of Washington you can’t discriminate against someone in your place of business based on your beliefs’”). Yet under Appellants’ proposed exemption, such discrimination would be permissible based on the discriminator’s personal beliefs despite the WLAD’s protections.

V. CONCLUSION

For the reasons stated above, *Amici* respectfully request this Court reaffirm its original well-reasoned decision.

RESPECTFULLY SUBMITTED this 5th day of March, 2019.

Amici Curiae Washington Businesses
and Business Associations

By /s/ Jennifer K. Chung

Bruce E. H. Johnson, WSBA # 7667

Kenneth E. Payson, WSBA # 26369

Jennifer K. Chung, WSBA # 51583

Davis Wright Tremaine LLP

920 Fifth Avenue, Suite 3300

Seattle, WA 98104-1601

206-622-3150 Phone

206-757-7700 Fax

BruceJohnson@dwt.com

KenPayson@dwt.com

JenniferChung@dwt.com

By /s/ Amanda J. Beane

Amanda Beane, WSBA # 33070

Nitika Arora, WSBA # 54084

Perkins Coie LLP

1201 Third Avenue, Suite 4900

Seattle, WA 98101-3099

206-359-8000 Phone

206-359-9000 Fax

ABeane@perkinscoie.com

NArora@perkinscoie.com

Counsel

CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that on this 5th day of March, 2019, she caused the foregoing document to be electronically filed with the Washington State Supreme Court, which will send notification of such filing to all attorneys of record.

Dated this 5th day of March, 2019, at Seattle, Washington.

/s/Jennifer K. Chung
Jennifer K. Chung, WSBA #51583

DAVIS WRIGHT TREMAINE LLP

March 05, 2019 - 2:14 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 91615-2
Appellate Court Case Title: Robert Ingersoll, et al. v. Arlene's Flowers, Inc., et al.
Superior Court Case Number: 13-2-00953-3

The following documents have been uploaded:

- 916152_Briefs_20190305141138SC575741_1775.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Business Amicus Brief.pdf
- 916152_Motion_20190305141138SC575741_0555.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Motion for Leave to File Business Amicus Brief.pdf

A copy of the uploaded files will be sent to:

- EGill@aclunc.org
- JAbernathy@FreedomFoundation.com
- Jamila.johnson@splcenter.org
- VLBabani@perkinscoie.com
- abeane@perkinscoie.com
- akeim@becketfund.org
- alanc@atg.wa.gov
- amici.cooper@outlook.com
- amit.ranade@hcmp.com
- anton.sorkin@emory.edu
- arossiter@adflegal.org
- attorneyappel@gmail.com
- bchandler@terrellmarshall.com
- beth@terrellmarshall.com
- bgould@kellerrohrback.com
- bmarvin@connelly-law.com
- brucejohnson@dwt.com
- caso@chapman.edu
- chelsdon@thehelsdonlawfirm.com
- chris.mammen@wbd-us.com
- christinekruger@dwt.com
- csipos@perkinscoie.com
- cstoll@nclrights.org
- danhuntington@richter-wimberley.com
- daniel@fahzlaw.com
- daviddewhirst@gmail.com
- dlaycock@virginia.edu
- dperez@perkinscoie.com
- drubens@orrick.com

- dshih@susmangodfrey.com
- dverm@becketfund.org
- echiang@aclu-wa.org
- feivey@3-cities.com
- feldman@pwrfl-law.com
- gahrend@ahrendlaw.com
- green@au.org
- hank@budgeandheipt.com
- hbalson@pilg.org
- iruiz@kellerrohrback.com
- ishapiro@cato.org
- jake.ewart@hcmp.com
- jcampbell@ADFlegal.org
- jconnelly@connelly-law.com
- jeastman@chapman.edu
- jessew@mhb.com
- jessica.ellsworth@hoganlovells.com
- jhelsdon@thehelsdonlawfirm.com
- jneedlel@wolfenet.com
- john.wolfe@orrick.com
- jpizer@lambdalegal.org
- jtedesco@ADFlegal.org
- judyg@atg.wa.gov
- jweber@cato.org
- kah@stokeslaw.com
- kaitlyn.golden@hoganlovells.com
- katskee@au.org
- kcolby@clsnet.org
- kennethpayson@dwt.com
- kim.gunning@columbialegal.org
- kkemper@elmlaw.com
- krista.stokes@hcmp.com
- kwaggoner@adflegal.org
- laura.szarmach@hoganlovells.com
- lawoffice@tomolmstead.com
- leccles@susmangodfrey.com
- lnowlin@aclu-wa.org
- map@pattersonbuchanan.com
- mark.aaron.goldfeder@emory.edu
- mark@holadylaw.com
- marshall@mcasylawfirm.com
- mcpartland.bryce@mcpartlandlaw.com
- mdeutchman@adl.org
- mpr@stokeslaw.com
- mrienzi@becketfund.org
- narora@perkinscoie.com
- nicole.schiavo@hoganlovells.com
- noahp@atg.wa.gov
- noemiv@mhb.com
- pleadings@aclu-wa.org
- pmr@pattersonbuchanan.com
- prugani@orrick.com
- rtucker@adflegal.org
- rzotti@maronmarvel.com

- scanet@ahrendlaw.com
- sea_wa_appellatefilings@orrick.com
- sfreeman@adl.org
- shendricks@klinedinstlaw.com
- smarnin@adl.org
- sminter@nclrights.org
- solson@klinedinstlaw.com
- tcberg@stthomas.edu
- todd@nelsonlawgroup.com
- toddb@atg.wa.gov
- valeriamcomie@gmail.com

Comments:

Sender Name: Jennifer Chung - Email: jenniferchung@dwt.com

Address:

920 5TH AVE STE 3300
SEATTLE, WA, 98104-1610
Phone: 206-757-8358

Note: The Filing Id is 20190305141138SC575741