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

STATE OF WASHINGTON,

Plaintiff,

vs.

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

Defendants.

ROBERT INGERSOLL and CURT FREED,

Plaintiffs,

vs.

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

Defendants.

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

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

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

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

II. FACTUAL BACKGROUND[6]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: We didn't get into that.

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

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

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

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

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

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

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

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

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

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

III. LEGAL BACKGROUND

A. The Consumer Protection Act (CPA)

The CPA provides:

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

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

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

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

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

RCW 19.86.920 (italics added).

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

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

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

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

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

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

B. The Washington Law Against Discrimination (WLAD)

The WLAD provides:

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

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

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

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

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

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

RCW 49.60.215(1) (italics added).

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

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

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

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

D. United States Constitution, Amendment I

The Free Exercise Clause provides as follows:

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

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

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

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

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

Id. at 885 (further citation omitted).

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

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

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

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

E. Washington State Constitution, Article I, Section 11

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

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

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

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

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

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

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

Backlund, 106 Wn.2d at 648.

IV. ANALYSIS

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

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

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

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

1. Lack Of Standing On The Part of Both Plaintiffs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Individual Plaintiffs' WLAD Claim Against Defendants

The WLAD specifically prohibits discrimination as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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