NO. 17-108

IN THE
Supreme Court of the United States

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN, ET AL.
Petitioners,

v.

STATE OF WASHINGTON, ET AL.
Respondent.

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN,
Petitioners,

v.

ROBERT INGERSOLL AND CURT FREED,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF AMICUS CURIAE LEGAL SCHOLAR ADAM J. MACLEOD IN SUPPORT OF PETITIONERS

JENNIFER L. BURSCH
ADVOCATES FOR FAITH & FREEDOM
24910 Las Brisas Road
Suite 109
Murrieta, CA 92562
(951) 304-7583
jbursch@tylerbursch.com

ROBERT H. TYLER
Counsel of Record
ADVOCATES FOR FAITH & FREEDOM
24910 Las Brisas Road
Suite 109
Murrieta, CA 92562
(951) 304-7583
rtyler@tylerbursch.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the Washington courts generated an unnecessary conflict between civil rights by inventing a novel interpretation of Washington public accommodations law, in disregard of their own precedents and this Court's guidance.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Introduction: Emerging Threats to This Court's Prescription for Peaceful Pluralism 2

II. *Hurley* Accurately Restated Doctrine of Public Accommodations 5

A. Property: Pluralism and Reason 5

B. The Reason for Exclusion is Dispositive 8

III. A Case of Avoidable Conflict 13

A. The Washington Supreme Court Disregarded This Court's Guidance 13

B. State Courts Are Generating Dangerous Confusion 15

C. Washington Can Avoid Conflict By Adhering to a Faithful Interpretation of Its Law 21

CONCLUSION 21

TABLE OF AUTHORITIES

***Cases*:**

Adderley v. *State of Florida*,
385 U.S. 39 (1966).....4

Bell v. *Maryland*,
378 U.S. 226 (1964).....7

Christian Legal Society Chapter of the University of California, Hastings College of the Law v. *Martinez*,
561 U.S. 661 (2011).....*passim*

Coger v. *Northwestern Union Packet Co.*,
37 Iowa 145 (1873).....7

Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,
473 U.S. 788 (1985).....3

Craig v. *Masterpiece Cakeshop, Inc.*,
370 P.3d 272 (Colo. App. 2015) 3

Donnell v. *State*,
48 Miss. 661 (1873).....7

Fell v. *Spokane Transit Auth.*,
911 P.2d 1319 (Wash. 1996).....9, 10, 13

Ferguson v. *Gies*,
46 N.W. 718 (Mich. 1890).....8

Hollingsworth v. *Washington Mutual Savings Bank*,
681 P.2d 845 (Wash. App. 1984) 14

Hurley v. *Irish American Gay, Lesbian, and Bisexual Group of Boston*,
515 U.S. 557 (1995).....*passim*

Jencks v. *Coleman*,
13 F. Cas. 442 (D.R.I. 1835) 7

Elane Photography, LLC v. *Willock*,
309 P.3d 53 (N.M. 2013).....3

Lane v. *Cotton*,
12 Mod. 472 88 Eng. Rep. 1458 (K.B.1701) 7

Leskovar v. *Nickels*,
166 P.3d 1251 (Wash. App. 2007) 19

Lewis v. *Doll*,
53 Wash. App. 203 (1989).....13

Markham v. *Brown*,
8 N.H. 523 (N.H. 1837).....6

Marrone v. *Washington Jockey Club*,
227 U.S. 633 (1913).....6

McFadden v. *Elma Country Club*,
613 P.2d 146 (Wash. App. 1980) 19

Messenger v. *State*,
41 N.W. 638 (Neb. 1889).....7

Rosenberger v. *Rector and Visitors of University of Virginia*,
515 U.S. 819 (1995).....19

Scrivener v. *Clark College*,
334 P.3d 541 (Wash. 2014).....14

Shelley v. *Kraemer*,
334 U.S. 1 (1948).....16

Shepard v. *Milwaukee Gas Light Co.*,
6 Wis. 539 (1858).....7

State v. *Arlene's Flowers, Inc.*,
389 P.3d 543 (Wash. 2017).....*passim*

State v. *DeCoster*,
653 A.2d 891 (Me. 1995).....9

Waggoner v. *Ace Hardware Corp.*,
953 P.2d 88 (Wash. 1998).....19

***Legislative Materials*:**

R.C.W. § 49.60.020.....20

R.C.W. § 49.60.030.....13

***Other Authorities*:**

Blackstone, William, *Commentaries on the Laws of England* (1769).....6, 7, 8

Inazu, John D., *A Confident Pluralism*, 88 So. Cal. L. Rev. 587 (2015).....6

Finnis, John, *Equality and Differences*, 56 Am. J. Juris. 17 (2011) 12

Finnis, John, *Natural Law and Natural Rights* (2nd ed, 2011) 20

Finnis, John, *The Priority of Persons Revisited*, 58 Am. J. Juris. 45 (2013) 16

Foot, Philippa, *Moral Dilemmas and Other Topics in Moral Philosophy* (2002) 20

Katz, Larissa, *Exclusion and Exclusivity in Property Law*, 58 University of Toronto L. J. 275 (2008) 5, 9

Koppelman, Andrew, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 So. Cal. L. Rev. 619 (2015) 11

MacLeod, Adam J., *Property and Practical Reason* (2015) ..... *passim*

MacLeod, Adam J., *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 Mich. St. L. Rev. 643 ..... *passim*

MacLeod, Adam J., *Universities as Constitutional Lawmakers (And Other Hidden Actors in Our Constitutional Orders)*, 17 U. Pa. J. Const. L. Online 1 (2014) 4

Maltz, Earl M., *"Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 Rutgers L. J. 553 (1986).....7

Raz, Joseph, *The Morality of Freedom* (1986).....20

Slavny, Adam and Parr, Tom, *Harmless Discrimination*, 21 LEGAL THEORY 100 (2015).....12

Wilson, Lawrence A. & Shannon, Raphael, *Homosexual Organizations and the Right of Association*, 30 Hastings L.J. 1029 (1979).....6

INTEREST OF AMICUS CURIAE[1]

Adam J. MacLeod is Associate Professor at Faulkner University, Thomas Goode Jones School of Law. He is the author of *Property and Practical Reason* from Cambridge University Press (2015), co-editor of *Foundations of Law*, a textbook from Carolina Academic Press (2017), and academic articles in peer-reviewed journals and law reviews in the United States, United Kingdom, and Australia. Amicus has researched and written about the nondiscrimination norm in civil rights laws such as the Washington laws at issue in this case.

SUMMARY OF ARGUMENT

This and other recent cases of conflict between basic civil and constitutional rights could have been avoided had state courts better heeded this Court's guidance. In *Hurley* v. *Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), *Christian Legal Society Chapter of the University of California, Hastings College of the Law* v. *Martinez*, 561 U.S. 661 (2011), and at other times, the Court has consistently admonished state judiciaries to let

---

[1] Parties to these cases have consented to the filing of this brief; letters indicating their consent are on file with the Clerk. Counsel of record for Petitioner and Respondents received notice seven days prior to the due date of the *Amicus Curiae's* intention to file this brief. Counsel of record for Petitioner and counsel of record for Respondents, Mr. Ingersoll and Mr. Freed have waived the notice requirement. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

institutions of private ordering, especially private property, resolve freighted moral conflicts except in cases of intentional discrimination for an invalid reason, such as race and sexual orientation. In those decisions, the Court adhered to the common-law contours of the public accommodations doctrine.

Recently, an increasing number of state agencies and even state supreme courts have distorted the public accommodations doctrine, in contravention of this Court's guidance in *Hurley* and *Martinez*, to create for customers a novel claim-right to control the terms of licenses that owners of public accommodations grant to the public. Unlike basic rights of equal protection and nondiscrimination, that claim-right is hostile to the fundamental rights of free expression, association, and conscience exercised on private property. The Court should take the opportunity presented by this case to restate and extend a more comprehensive understanding of the public accommodation doctrine and re-teach state courts how to avoid unnecessary constitutional conflicts.

ARGUMENT

I. Introduction: Emerging Threats to This Court's Prescription for Peaceful Pluralism

In *Hurley* v. *Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court ruled that the public accommodations doctrine should not be applied to generate avoidable constitutional conflict. And in *Christian Legal Society Chapter of the University of California, Hastings*

College of the Law v. *Martinez*, 561 U.S. 661 (2011), this Court reaffirmed a property owner's "right to preserve the property under its control for the use to which it is lawfully dedicated," which includes the authority to exclude from its property those whose purposes are at odds with its own. Id. at 679, quoting *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). In both of those cases, this Court reinforced the ancient wisdom that common-law institutions of private ordering such as private property estates and licenses are competent to mediate moral conflicts reasonably, with greater nuance and pluralism than governments, which by contrast must pick winners and losers in zero-sum contests of general applicability.

This is a case of avoidable conflict between basic constitutional rights. It is not the only one to have emerged from state courts in recent years. The courts of New Mexico, Colorado, and now Washington have disregarded or rejected this Court's guidance in *Hurley* and *Martinez* and have unnecessarily placed basic rights of equality and non-discrimination in direct conflict with foundational rights of conscience, free expression, and private property. *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013); *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), cert. denied, *Masterpiece Cakeshop, Inc.* v. *Colorado Civil Rights Commission*, 2016 WL 1645027 (Colo. 2016); *State* v. *Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017). This Court should grant certiorari in this case to reaffirm and further clarify the practical wisdom at the heart of its *Hurley* and *Martinez* decisions, and in order to teach state courts how to avoid these unnecessary conflicts.

These conflicts are unnecessary because the courts in New Mexico, Colorado, and Washington have misconstrued and misapplied the public accommodations doctrine. Properly construed, that doctrine does not place constitutional and civil liberties at odds with each other. It forbids an owner and operator of a public accommodation from terminating a customer's license to enter *without good reason*. In *Hurley*, as in this case, the reason for exclusion was not the sexual identity of the claimants—an invalid reason to exclude—but rather a reason that is both valid and constitutionally protected, the free expression of a conscientious belief.

This Court's accurate restatement of the public accommodations doctrine in its unanimous *Hurley* opinion is just as valid today as it was in 1995. And the Court has, in *Martinez* as at other times, repeatedly affirmed the right of property owners to preserve the integrity of the purposes for which they hold their premises open to licensees when they act without discriminatory intent and have not created a public forum, even where the manifest *effect* of that preservation unequally burdens identifiable minority groups within the community, such as traditional Christians at a state university in California, *Martinez*, 561 U.S. 661, and civil rights activists in the 1960s American South, *Adderley* v. *State of Florida*, 385 U.S. 39 (1966). The genius of our pluralistic constitutional orders is that minority groups can gain lawful access to other property and organize in pursuit of their own moral purposes and commitments there. Adam J. MacLeod, *Universities as Constitutional Lawmakers (And Other Hidden*

Actors in Our Constitutional Orders), 17 U. Pa. J. Const. L. Online 1, 11-14 (2014).

This Court's prescription for harmonizing and protecting fundamental rights in the marketplace has not grown stale since its *Hurley* and *Martinez* decisions. Indeed, in our fractured, fractious age it is just as vital and important as ever. This court should reinforce the continued vitality of the doctrines and principles explained in *Hurley* and *Martinez*. In so doing the Court can remind state courts how to fulfill their constitutional obligations to protect and reconcile the fundamental liberties of all.

II. *Hurley* Accurately Restated Doctrine of Public Accommodations

A. Property: Pluralism and Reason

Property ownership enables plural groups with different moral visions to choose how and on what terms to interact with each other. This Court accurately restated the common law of property ownership in *Hurley*, 515 U.S. at 571-72 and *Martinez*, 561 U.S. at 679. However, recent decisions by state courts demonstrate that a more complete restatement is in order.

As the *Martinez* Court accurately stated, the essence of property ownership is the right to decide for what purposes property will be used. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 University of Toronto L. J. 275 (2008). Many owners exercise this right to form and build together their own moral vision, not only in the privacy of the home,

but also in religious assemblies, charitable works, and societal and political reform movements. Adam J. MacLeod, *Property and Practical Reason* 74-87, 114-21 (2015). Property rights have stood guard around many of the most powerful social reform movements in American history. The civil rights protests that were planned in Southern black churches and the LGBT activism of more recent decades were possible because of the owners' rights both to use property and to tell others to keep out. MacLeod, *Property and Practical Reason*, at 33-34; John D. Inazu, *A Confident Pluralism*, 88 So. Cal. L. Rev. 587, 590 & n.17 (2015); Lawrence A. Wilson & Raphael Shannon, *Homosexual Organizations and the Right of Association*, 30 Hastings L.J. 1029, 1043, 1046-49, 1054-55 (1979).

Property ownership also entails the right to *include* others for common purposes. As the *Hurley* Court observed, at common law those who profess to be employed by the public on their private property grant to the public a license to enter for the purpose of acquiring the goods or services on offer. II William Blackstone, *Commentaries on the Laws of England* 212 (1769). That license can be refused or terminated for a "good reason." *Markham* v. *Brown*, 8 N.H. 523, 529-30, 531 (N.H. 1837); III Blackstone, *Commentaries*, at 166. This means that business owners have a limited nondiscrimination duty.

The strength and contours of the nondiscrimination duty vary according to the source and nature of the public's license to enter. Where the customer's license is created by contract, such as a ticket to a sporting event, the license is a mere

privilege terminable at the will of the venue owner. *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636-37 (1913). At the other end of the spectrum, where the business is chartered as a common carrier, utility, or other public monopoly, the owner has a general (though not unlimited) duty to serve all on equal terms. *Jencks* v. *Coleman*, 13 F. Cas. 442 (D.R.I. 1835) (Story, J.); Earl M. Maltz, *"Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 Rutgers L. J. 553 (1986). In between those two poles are cases, such as this one, in which private property is held open for a particular business purpose. In these cases, the license is neither terminable at will nor a vested right to be served. It is a license carved out by the owner's purpose for opening to the public and terminable by the owner for a "good reason." *Hurley*, 515 U.S. at 571, citing *Lane* v. *Cotton*, 12 Mod. 472, 484–485, 88 Eng. Rep. 1458, 1464–1465 (K.B.1701) (Holt, C.J.); III William Blackstone, *Commentaries on the Laws of England* *164, *166 (1893) (1769). See generally Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 Mich. St. L. Rev. 643, 686-702.

Any good reason will suffice to justify the owner in terminating the customer's license to enter, yet some reasons for exclusion have always been categorically invalid at common law. Race is chief among these. *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); *Coger* v. *Northwestern Union Packet Co.*, 37 Iowa 145 (1873); *Donnell* v. *State*, 48 Miss. 661, 682 (1873); *Messenger* v. *State*, 41 N.W. 638 (Neb. 1889). Thus, as Justice Goldberg observed in 1964, the duty of a business owner not to discriminate

because of race is "firmly rooted in ancient Anglo-American tradition." *Bell* v. *Maryland*, 378 U.S. 226, 296-97 (1964) (Goldberg, J., concurring). Statutes prohibiting racial discrimination in public accommodations simply codify the rights and privileges of the "good old common law." Id. at 293-94. They do not change the law—it was never reasonable to exclude someone for the reason of their race—but instead restate conclusively, and add concrete sanction to, ancient principles.

In a statement of the common-law view, the Michigan Supreme Court explained that to refuse service to a person "for no other reason than" that person's race is contrary to the "absolute, unconditional equality of white and colored men before the law." *Ferguson* v. *Gies*, 46 N.W. 718, 719-20 (Mich. 1890). It is therefore "not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable." Id. at 721. A statute prohibiting racial discrimination does not detract from the common-law nondiscrimination norm. It is "only declaratory of the common law." Id. at 720. "Declaratory" is a term of art in common law jurisprudence, referring to that part of the unwritten law (e.g. custom, natural law) that is already law before it is declared by a judge or posited by a legislature. I Blackstone, *Commentaries*, at 42, 53-54, 86.

B. The Reason for Exclusion is Dispositive

Though most public accommodations statutes expand the list of reasons for exclusion that are invalid, they do not abrogate common law rights and

privileges. The common law norm declared and codified in Washington law, as in the Massachusetts law at issue in *Hurley* and other state statutes, reconciles fundamental rights by justifying intervention when an owner acts for an invalid reason, but not otherwise. *Fell* v. *Spokane Transit Auth.*, 911 P.2d 1319, 1331 (Wash. 1996). Because the customer's license is carved out of the owner's property estate according to the purposes for which the property is held open, *State* v. *DeCoster*, 653 A.2d 891, 893–94 (Me. 1995), the reasons, purposes, intentions of the owner determine in the first instance what counts as a valid reason. Public accommodation statutes identify discrete reasons that are never valid.

So: Certain, particular reasons, such as a potential customer's race, are never valid reasons. Others, such as a customer's conduct or the service the customer requests, are valid or invalid according to the purposes for which the business is held open. In both classes of cases—those governed by the statute and those governed by the general common-law standard—the public accommodation doctrine turns on the owner's reasons for excluding a customer or refusing to provide a particular good or service to a customer.

This feature of public accommodations doctrine is inherent in both the source and the structure of the rights and duties of which it consists. As this Court explained in *Martinez* and *Cornelius*, the owner of the property has the power to determine the uses to which the resource will be put and accordingly to determine the terms and limitations of others' licenses to enter and partake of the owner's uses. Put simply, the

owner possesses the right to set the agenda—the governing plan of action—for use of the resource. Katz, *Exclusion and Exclusivity*, at 277-79, 285-93; MacLeod, *Property and Practical Reason*, at 1-11. The licensee possesses neither an unlimited right to enter nor a right to receive any particular goods or services but rather a privilege that is carved out of the owner's right by the owner's creation of the license. *Fell*, 911 P.2d at 631-31; MacLeod, *Property and Practical Reason*, at 37-38, 216-19. The owner reserves the right to determine which moral vision will be promoted on her property.

At common law, the relevant inquiry into the owner's reasons logically proceeds in three stages. First one must know the purpose for which the business is held open to the public. Second one must know what was the owner's reason for denying service to this customer. Third and finally, a jury or other factfinder must determine whether that reason was valid in light of the purposes for which the business is held open to the public.

These are generally fact questions. Naturally, the public accommodations statute determines the ultimate question conclusively as a matter of law where as a matter of fact an owner has acted for one of the prohibited reasons identified in the statute. But the issue what was the owner's actual reason remains a fact question. Indeed, under the statute it is the dispositive consideration on which liability turns. If the owner has not acted for one of the reasons prohibited by the statute, the owner has not acted unlawfully as a matter of law.

This court emphasized the dispositive significance of the owner's intention in the *Hurley* case. There, as here, the owner of the public accommodation did not act because of—for the reason of—the sexual orientation of those who were excluded. As this court noted, "Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march." *Hurley*, 515 U.S. at 572. The reason for excluding GLIB from the parade was to avoid communicating a message about human sexuality that the parade organizers did not want to endorse. Petitioner Barronelle Stutzman, the owner and president of Petitioner Arlene's Flowers, Inc., makes the same disclaimer. She was willing to serve, and did serve, Robert Ingersoll on many occasions knowing full well that he identifies as homosexual. The reason for declining to participate in the preparation for his wedding was to avoid communicating what she understands to be a falsehood about the nature of marriage.

Homosexual-identity rights activists and legal scholar Andrew Koppelman explains why cases such as these are not about anti-gay discrimination. Whatever the merits of the idea that marriage is inherently a man-woman union, he says, "it is not about gay people. It is focused on the value of a certain kind of heterosexual union. The existence of gay people is a side issue." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 So. Cal. L. Rev. 619, 625-26 (2015). The effects of this belief in man-woman marriage are not the purpose or motivating intention

for the conscientious business owner's decision to decline service. They are unintended side effects.

Nondiscrimination laws refer to wrongful discriminatory intention because it is the intention to act for a prohibited reason that is wrongful, regardless of consequences. Harm is neither a necessary nor a sufficient condition to make discrimination unlawful because harm is not what makes wrongful discrimination illicit. "The wrongness of the act is not contingent on its consequences." Adam Slavny and Tom Parr, *Harmless Discrimination*, 21 LEGAL THEORY 100, *14 (2015) (available at http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1012417&fulltextType=RA&fileId=S1352325215000130). An employer or business owner who acts for wrongful, racist motivations should be liable even if the employee or customer was better off as a result (because, e.g., she found a better job or superior service elsewhere). *Id.* at *5-*13. For the same reason, an employer or business owner, such as Stutzman, who acts from pure motivations, untainted by any of the wrongful grounds of action enumerated in law, should not be liable even if her actions left an employee or customer feeling worse about themselves.

Nondiscrimination laws govern an actor's reasons for decision. Consequences or side effects of the actor's decision are often unforeseen and generally not intended. Any effort to adjudicate those side effects will lead courts into moral judgments that also have unintended consequences and side effects. See John Finnis, *Equality and Differences*, 56 Am. J. Juris. 17,

27-32 (2011). For example, a court that holds liable a business owner because her actions had the consequence of casting moral doubt on same-sex marriage would cause the further consequence of casting *both* moral *and* legal doubt on monotheistic beliefs concerning the nature of marriage.

III. A Case of Avoidable Conflict

A. The Washington Supreme Court Disregarded This Court's Guidance

In keeping with centuries of Anglo-American jurisprudence, Washington law prohibits exclusion from a public accommodation only for particular, enumerated reasons. Like other such statutes it prohibits discriminating "because of"—i.e., for the reason of– particular enumerated characteristics, including race and sexual orientation. Washington Law Against Discrimination (WLAD), R.C.W. § 49.60.030. It does not prohibit exclusion for some other, non-enumerated reason even where the effect of exclusion falls disproportionately on some identifiable group that shares an enumerated characteristic. In respect of those other motivating reasons Washington law follows the common-law practice of leaving resolution to local law and institutions of private ordering such as contract, license, and the civil jury. *Fell*, 911 P.2d at 630-37; *Lewis* v. *Doll*, 53 Wash. App. 203, 206-07 (1989); MacLeod, *Tempering Civil Rights Conflicts*, at 692-711.

Stutzman and Arlene's Flowers did not discriminate against Ingersoll and Freed because of

their sexual orientation. It is undisputed that Respondent Robert Ingersoll "had been a customer at Arlene's Flowers for at least nine years, purchasing numerous floral arrangements from Stutzman and spending an estimated several thousand dollars at her shop," and that Stutzman and her flower shop served Ingersoll with full knowledge "that Ingersoll is gay and that he had been in a relationship with [Respondent Curt] Freed for several years." *Arlene's Flowers*, 389 P.3d at 549. "Stutzman is an active member of the Southern Baptist church. It is uncontested that her sincerely held religious beliefs include a belief that marriage can exist only between one man and one woman." Id. It is also undisputed that "Stutzman told Ingersoll that she would be unable to do the flowers for his wedding because of her religious beliefs, specifically, because of 'her relationship with Jesus Christ.'" Id.

Nevertheless, the Supreme Court of Washington affirmed a summary judgment against the Petitioners for putative violation of WLAD. It reasoned that because Ingersoll and Freed did not obtain the services they desired from Stutzman, her decision had the same effect as "indirect" discrimination, which is prohibited WLAD. Id. at 553. That interpretation of WLAD is at odds with decades of Washington decisional precedents, in which Washington's appellate courts have interpreted WLAD and similar nondiscrimination laws to prohibit intentional discrimination and not discriminatory effect per se. *Scrivener* v. *Clark College*, 334 P.3d 541, 545-50 (Wash. 2014); *Hollingsworth* v. *Washington Mutual Savings Bank*, 681 P.2d 845, 850 (Wash. App. 1984) ("intent at the time of the challenged act… is the

critical inquiry."), abrogated on other grounds, *Allison* v. *Housing Authority of City of Seattle*, 799 P.2d 1195, 1196-97 (Wash. App. 1990).

B. State Courts Are Generating Dangerous Confusion

Just as the Massachusetts Supreme Judicial Court did two decades ago, *Hurley*, 515 U.S. at 563-66, the Washington Supreme Court in this case created an unnecessary conflict between equality and nondiscrimination rights on one hand and rights of conscience and free expression on the other. And it did so by distorting its own laws, just as the Massachusetts court misapplied Massachusetts law. *Hurley*, 515 U.S. at 571-81. This case is part of a spreading pattern of state-court confusion that has far-reaching implications. Judgments that impose liability upon owners for actions that have the unintended effect of failing to endorse minority identities create novel claim-rights to be served what the customer wants on the customer's terms, MacLeod, *Tempering Civil Rights Conflicts*, at 667-77, which are neither grounded in nor justified on the basis of public accommodations doctrine. Id. at 686-702.

The distortion in this case, as in *Hurley*, has two profound effects. First, it transforms a customer's right not to be discriminated against for an invalid reason—an immunity against unjust termination of one's license to enter—into an affirmative claim-right to use other people's businesses and enterprises for one's own expressive purposes. Compare *Hurley*, at 572-73. That claim-right puts considerable pressure

upon the fundamental rights of owners and upon the freedom of owners and customers to negotiate for goods and services within public accommodations. For one of the limitations of sweeping, affirmative claim-rights is that, unlike liberties and immunities that give rise to duties of abstention, they cannot be applied unconditionally and conclusively in all cases without ignoring facts and rights that as a matter of justice ought to be taken into consideration when forming valid judgments. John Finnis, *The Priority of Persons Revisited*, 58 Am. J. Juris. 45, 53-54 (2013); MacLeod, *Property and Practical Reason*, at 173-215.

Second, the Washington high court set this novel claim-right against Stutzman's fundamental rights of conscience, free expression, and private property. As this court explained in *Hurley*, such an expansive interpretation of the public accommodations law has "the effect of declaring the sponsor's speech itself to be the public accommodation." *Hurley*, 515 U.S. at 573. It employs the coercive power of the state to create and enforce for the customer a right to shape the owner's speech and to determine the terms on which the owner will hold her services open to the public. Id. In short, it vests in the customer a right to control the owner's private property and to set the terms on which the owner can exercise her fundamental rights there.

This novel interpretation of public accommodations doctrine opens up other new hazards. Indeed, the Washington, New Mexico, and Colorado courts have collided with some hazards of their own design. They have unlawfully discriminated. See *Shelley* v. *Kraemer*, 334 U.S. 1

(1948) (a judicial ruling is state action for equal protection purposes). No matter which standard they use to measure the offensive harm to same-sex couples, the courts cause that same harm to Jews, Christians, Muslims, and other theists who hold the historic and theologically-grounded conviction that marriage is a man-woman union. If the measure is discriminatory effect then the disproportionately-deleterious effect of their *decisions* on traditional theists renders those decisions acts of discrimination on the basis of religion. If the measure is dignitary harm then the necessary premise equating traditional theistic convictions with unlawful discrimination, which demeans those who hold those convictions by equating them with bigots and racists, renders the courts' *reasoning* an act of discrimination on the basis of religion. Either way, the state courts have violated the very nondiscrimination norm that is essential to their holding. Their reasoning is operationally self-refuting.

The Supreme Court of Washington contradicted itself in this and other respects. It both rejected and relied upon the distinction between status and conduct. It ruled that the conduct of Ingersoll and Freed—getting married under Washington law—is fully reducible to and inseparable from their beliefs and identities as homosexuals. *Arlene's Flowers*, 389 P.3d at 552-53. Yet to get around the obvious free speech, association right, and religious liberty problems raised by this ruling, it also considered Stutzman's own conduct—declining to participate in what she understands to be a falsehood about marriage—as distinct and separate from her expressions, religious beliefs, and identity as a

Southern Baptist. Id. at 556-60; 566-67. According to the Washington high court, one both *can* and *cannot* avoid discriminating unlawfully under Washington law by distinguishing between status and conduct. This is logically self-refuting.

The state courts are clearly confused. They have failed to notice that the status-conduct distinction is not settled the same way for all purposes in all areas of law. Some constitutional rules protect status without regard to the right-holder's conduct, such as the right to vote whatever one's race. Others protect conduct without regard to status or belief, such as the rights of association, free expression, and free exercise of religion. Generally, constitutions leave the decision whether to distinguish between status and conduct to those with authority to promulgate particular policies—universities and non-profit organizations, business owners, local governments, neighborhood associations—and to those with authority to render judgment about the reasonableness of any distinction, especially the civil jury.

The state courts also are confused about *Christian Legal Society* v. *Martinez*, 561 U.S. 661 (2010). For example, the Supreme Court of Washington read *Martinez* to abolish the distinction between status and conduct for equal protection and public-law purposes. *Arlene's Flowers*, 389 P.3d at 552-53. But the Court in *Martinez* expressly grounded the University of California's right to conflate status and conduct not in Equal Protection, civil rights statutes, or any other generally-applicable laws but rather in a source of private rights: the University's "right to

preserve the property under its control for the use to which it is lawfully dedicated." *Martinez*, 561 U.S. at 679. Because the University of California owns its campuses in fee simple absolute, it has the power to choose when to adhere to the distinction between status and conduct, subject to its constitutional obligations as a state actor. *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). Arlene's Flowers and Barronelle Stutzman enjoy an even more robust property right to choose because they are not state actors and have no duties to remain neutral between moral and religious viewpoints.

It bears emphasis that Washington law neither requires nor forbids property owners to make these distinctions. In *Waggoner* v. *Ace Hardware Corp.*, 953 P.2d 88 (Wash. 1998) and *McFadden* v. *Elma Country Club*, 613 P.2d 146 (Wash. App. 1980), Washington's courts recognized that denying privileges to someone who is engaged in nepotistic dating or unmarried cohabitation is not the same as discrimination because of marital status, even though Washington law no longer enforces criminal sanctions for unmarried cohabitation. And in *Leskovar* v. *Nickels*, 166 P.3d 1251 (Wash. App. 2007), rev. denied 187 P.3d 270 (Wash. 2008), a city's decision to extend marital benefits to same-sex couples was held not to violate the Defense of Marriage Act, which defined marriage as a man-woman union. These rulings show that the blunt instruments of generally-applicable public laws do not resolve the status-conduct distinction for all purposes.

Indeed, these are precisely the sorts of controversial moral questions that should be left to

institution of private and local ordering. WLAD is neutral as between those who support same-sex marriage and those who hold theistic convictions about marriage. It expressly "shall not be construed to endorse any specific belief, practice, behavior, or orientation." R.C.W. 49.60.020. The Washington courts rushed to moral judgment without legal warrant, equating traditional, theistic beliefs with unlawful discrimination.

After creating this unnecessary moral conflict, the Washington courts left no way to resolve it without impugning someone's dignity. No standard exists for weighing the dignity of same-sex couples against the dignity of Southern Baptists, nor vice versa. No common standard of measurement can compare one to the other.[2] The problem is not merely that it cannot lawfully be done; the problem is that any effort to do it is inherently nonsensical, and its resolution arbitrary.

---

[2] This problem is known in legal and moral philosophy as incommensurability. See Joseph Raz, *The Morality of Freedom* 321-66 (1986); Philippa Foot, *Moral Dilemmas and Other Topics in Moral Philosophy* 76–77 (2002); John Finnis, *Natural Law and Natural Rights* 111-18 (2nd ed, 2011). One classic statement of incommensurability colorfully explains that the "injunction to maximize net good is senseless, in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book." Finnis, *Natural Law and Natural Rights*, at 113.

C. Washington Can Avoid Conflict By Adhering to a Faithful Interpretation of Its Law

The simplest way to avoid this mess is for Washington's courts to interpret Washington's nondiscrimination laws as nondiscrimination laws have been interpreted throughout Anglo-American jurisprudence and as the appellate courts of Washington have always interpreted Washington's own Law Against Discrimination before now: as prohibitions against acting with an *intention* or *purpose* or *reason* to discriminate on a prohibited basis. That is the same guidance this Court offered in *Hurley*, to avoid unnecessary conflicts of civil and constitutional rights by confining application of public accommodation laws to cases of exclusion for invalid reasons. And it is consistent with the canons of charitable construction and natural meaning, and with the duty of courts to avoid constitutional conflicts where possible.

CONCLUSION

Racial discrimination in access to publicly-available resources is prohibited by law because race is irrelevant to the purposes for which the resources are held open. Similarly, a customer's sexual orientation is generally irrelevant to the purposes of a public accommodation.[3] By contrast, differing conceptions of marriage *are* relevant to a business

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

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

Fortunately, the public accommodations doctrine does not require courts to wade into the metaphysical waters of moral or theological judgment. This Court should hear this case in order to repeat and expand upon its counsel to state courts to construe public accommodations laws as they have been construed for centuries, as a rule governing intention, not unintended side effects.

Respectfully submitted,

ROBERT H. TYLER
Counsel of Record
ADVOCATES FOR FAITH &
FREEDOM
24910 Las Brisas Road
Suite 109
Murrieta, CA 92562
(951) 304-7583
rtyler@faith-freedom.com

JENNIFER L. BURSCH
ADVOCATES FOR FAITH &
FREEDOM
24910 Las Brisas Road
Suite 109
Murrieta, CA 92562
(951) 304-7583
jbursch@tylerbursch.com

Counsel for Amicus Curiae

August 21, 2017