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Brief for Professor Kent Greenfield As *Amicus Curiae* in Support of Respondents, *State of Washington vs. Arlene's Flowers* and *Ingersoll vs. Arlene's Flowers*

Kent Greenfield
Boston College Law School, kent.greenfield@bc.edu

No. 91615-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

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

Appellants.

ROBERT INGERSOLL and CURT FREED,

Respondents,

vs.

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

Appellants.

BRIEF FOR PROFESSOR KENT GREENFIELD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Daniel A. Rubens
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
Phone: (212) 506-3000

John Wolfe (WSBA No. 8028)
Paul F. Rugani (WSBA No. 38664)
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Phone: (206) 839-4300

Attorneys for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS

Kent Greenfield is Professor of Law and Dean's Distinguished Scholar at Boston College Law School. Professor Greenfield has written extensively about the constitutional rights of corporations. *See, e.g.*, Kent Greenfield, *Corporations Are People Too (And They Should Act Like It)* (2018). He is also an active participant in litigation pertaining to corporate accountability. In 2017, he filed an amicus brief with the U.S. Supreme Court in support of respondents in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, presenting arguments similar to those raised in this brief. He was also the founder and president of the Forum for Academic and Institutional Rights, a nonprofit corporation formed to represent law schools that opposed the so-called Solomon amendment. *See Rumsfeld v. FAIR*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). Professor Greenfield submits this brief to aid this Court in analyzing the important state law issues pertaining to corporate authority that must be decided prior to reaching the constitutional claims.

INTRODUCTION

This Court must decide a question of state corporate law before reaching Appellants' constitutional claims. Namely, this Court must determine whether a corporation has the capacity under state law to claim

exemption from neutral marketplace regulations, applicable to its competitors, on the basis of the purported constitutional interests not of the company but its shareholders. Appellants' entire case rests on the assertion that "Arlene's [Flowers, Inc.'s] free-exercise rights are synonymous with Mrs. Stutzman's." Appellants' Br. on Remand (ABR) 18 n.3. Mrs. Barronelle Stutzman conflates herself with the corporation that employs her and whose stock she owns. *See* Appellants' Opening Br., dated 10/16/15 (AB) 1 n.1 (stating that the brief would reference both the individual and corporate parties "collectively" as "Mrs. Stutzman"). That is simply not the case. The interests of a corporation are not "synonymous" with those of a shareholder. And they are different not because of federal constitutional law but because of state corporate law.

The constitutional claims of Appellant Arlene's Flowers, Inc., "'a Washington for-profit corporation engaged in the sale of goods and services'" to the public, *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 822 n.1, 389 P.3d 543 (2017), depend on assumptions running contrary to the separation of shareholders from the corporate entity, a longstanding and fundamental principle of this State's corporate law and corporate law generally. The constitutional interests asserted here by Appellants are not the interests of the corporation. The corporation is not a religious company and is not being forced to perform any act inconsistent with its

constitutional interests as a corporation.

Appellants instead assert the interests of Barronelle Stutzman, a shareholder, who demands that the Court project her religious beliefs and political views onto the company. She claims that the Washington Law Against Discrimination (WLAD), ch. 49.60 RCW, and the Consumer Protection Act (CPA), ch. 19.86 RCW, burden Mrs. Stutzman's *individual* religious beliefs. Mrs. Stutzman asserts that her beliefs are burdened when the *corporation* in which she owns shares is required to act as a public accommodation under the laws of this State. But under state law she and the corporation are not the same, as this Court has repeatedly acknowledged. This Court should not change longstanding precedent to deem them identical for purposes of the Washington and U.S. Constitutions.

Even in situations in which a single shareholder is dominant, the separation of shareholder from corporation is fundamental. Separateness is often the very reason why founders of companies—even small ones—choose to incorporate rather than to operate as a sole proprietorship.[1] Shareholders receive immense benefits in exchange for this separation,

[1] Sole proprietorships are not legally separate from their owners. *See* 1 *Fletcher Cyclopedia of the Law of Corporations* § 23 (2019). The arguments urged in this brief would not apply to such business entities.

including the right of limited liability, which protects their personal assets from claims against the corporation. Shareholders depend on and desire this separation; they should not be able to assert unity with the corporation whenever it suits their ideological, political, or religious purposes, or exempts the company from regulatory obligations that bind other corporations. Any relaxation of this rule would cause immense definitional difficulties for corporations operating in the State, creating the likelihood of intracompany fights followed by years of litigation to define which corporations can assert the interests of shareholders and which cannot.

Although Appellants cite the Supreme Court's decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018), as justifying their disregard of the corporate form, neither decision requires this Court to depart from its own state law precedents. Because Appellants' claims impermissibly blur the separation between the corporation and its shareholders, this Court should adhere to its prior opinion and affirm the trial court's rulings.

STATEMENT OF THE CASE

Amicus curiae joins in Respondents' statements of the case.

ARGUMENT

I. Because Of The Separate Legal Personality Of Corporations And Shareholders, The Constitutional Interests Of Shareholders Should Not Be Projected Onto The Corporation.

Throughout their briefs, Appellants refer to themselves collectively as "Mrs. Stutzman." ABR 1 n.1. But the viability of the constitutional claims of appellant Arlene's Flowers, Inc., a for-profit corporation formed under Washington law, depends on this Court's willingness to assume the corporation holds sincere beliefs that operate to exempt it from otherwise applicable and neutral law. It is not the corporation that holds any such beliefs, but rather its shareholder and employee Mrs. Stutzman. It is Mrs. Stutzman who "create[s] custom floral arrangements" and who refused to sell wedding flowers to a same-sex couple because of "her" Southern Baptist faith. ABR 2, 5. Mrs. Stutzman characterizes the question to be decided as whether Washington can compel "her" to "violate her conscience," not the conscience of the corporation in which she owns shares. ABR 45.

Thus, it is not the company but rather Mrs. Stutzman who asserts a deep religious faith, ABR 5, and who "'designs her wedding arrangements to convey an expressive message,'" ABR 35 (quoting CP 538). It is Mrs. Stutzman's "artistic expression" that is allegedly being compelled, ABR 42, in violation of *her* "conscience and … deeply held religious beliefs."

CP 47. Mrs. Stutzman asserts that the State caused *her* "dignitary harm," charging the State with "outlaw[ing] Mrs. Stutzman's religious exercise, demean[ing] her religious beliefs as discriminatory, and stigmatiz[ing] her in the community." ABR 47. Wedding flowers reflect "*[h]er* artistic designs." ABR 6 (emphasis added). She stakes her compelled speech claim on the notion that state laws compel her to "violate[] *her* beliefs about marriage." ABR 32 (emphasis added).

Arlene's Flowers, Inc., meanwhile, is a closely held Washington for-profit corporation that "has [Mrs.] Stutzman and her husband as the sole corporate officers." CP 2200. Originally incorporated in 1989, the company was previously operated by Mrs. Stutzman's mother. Several years later, Mrs. Stutzman purchased her mother's shares in the corporation. CP 92, 535-36, 2200. The company is not chartered as a religious organization, nor is it a membership association organized around a cause, ideology, or affinity.

In earlier stages of these proceedings, Mrs. Stutzman expressly emphasized the distinction between "Arlene's Flowers' affairs" and "her personal affairs." AB 49. Based on that separateness, she contended that it would be unprecedented to "impose[] personal liability on a business owner in a public accommodation case like this." AB 48-49. Now, however, Mrs. Stutzman abandons her argument that she and the

corporation are separate and instead claims they are one and the same.

The constitutional claims of the corporation can succeed only if the company can assert Mrs. Stutzman's religious beliefs as its own. But Mrs. Stutzman and Arlene's Flowers are not the same.[2] They are not identical for purposes of corporate law, in Washington or elsewhere. This Court should not change state law precedents to deem them to be identical for purposes of First Amendment law.

A. Corporate separateness—i.e., legal personhood—is the core principle of corporate governance.

The first principle of corporate law is that for-profit corporations are entities that possess legal interests of their own and a legal identity separate and distinct from their shareholders. This legal "personhood" holds true whether the for-profit corporation has two, two hundred, or two million shareholders. In each scenario, the corporate entity is distinct in its legal interests and existence from those who contribute capital to it.

This Court has repeatedly recognized this principle of strict

[2] That the State of Washington is pursuing claims against Mrs. Stutzman as an individual does not mean that the State is ignoring the separation between her and the company. Stutzman has two roles vis-à-vis the company: shareholder and officer/employee. In neither role is she legally synonymous with the company. The State seeks to hold her accountable as an officer for her role in causing the company to violate state law. That is a question of her potential personal liability as an officer. That is not veil piercing, and has no relevance to the question of whether her views as a shareholder can be projected onto the company. Amicus takes no position as to her potential individual liability as an officer, or on the question of whether an employee of a company has a constitutional right to disobey a work requirement imposed by the company pursuant to state law. See *infra* 19.

separation, noting that "[a] corporation exists as an organization distinct from the personality of its shareholders." *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552, 599 P.2d 1271 (1979). "When the shareholders of a corporation, who are also the corporation's officers and directors, conscientiously keep the affairs of the corporation separate from their personal affairs, and no fraud or manifest injustice is perpetrated upon third-persons who deal with the corporation, the corporation's separate entity should be respected." *Id.* at 552-53. "A corporation's separate legal identity is not lost because it is owned by one person or members of a single family." *State v. Brelvis Consulting LLC*, 430 P.3d 685, 691 (Wn. Ct. App. 2018).[3] The centrality of corporate separateness is well established and longstanding. *See Burnet v. Clark*, 287 U.S. 410, 415, 53 S. Ct. 207, 77 L. Ed. 397 (1932) ("A corporation and its stockholders are generally to be treated as separate entities.").

This separation is not an ancillary part of corporate law and governance. It is instead the *sine qua non* of the wealth-creating legal

[3] *See also, e.g.*, *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 644, 618 P.2d 2017 (1980) ("Typically the corporation is considered an entity separate and distinct from its officers or stockholders even where they are only one in number."); Thomas V. Harris, *Washington's Doctrine of Corporate Disregard*, 56 Wash. L. Rev. 253, 253 (1981) ("Corporations are ordinarily recognized as legal entities separate and distinct both from their own shareholders, officers, and directors, and from other corporations."); Stephen B. Presser, *Piercing the Corporate Veil* § 2:52 (2018) ("The courts of Washington appear to have accepted the notion that veil-piercing ought to be done only with great caution.").

innovation of the corporate form. The rationale behind corporate separateness is to encourage entrepreneurial activity by founders, investment by passive investors, and risk-taking by corporate managers. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 93-97 (1985). The corporate veil is a profound but simple device helping to achieve all three of these goals. Indeed, it is impossible to imagine a workable legal framework for corporate governance without such separation.

Because the corporation is a separate entity, its shareholders are not responsible for its debts. This "privilege of limited liability," as protected by the corporate veil, is "the corporation's most precious characteristic." William W. Cook, *The Principles of Corporation Law* 19 (1925). If the corporation cannot pay its bills, the creditors—not the shareholders—bear the loss, with only very narrow exceptions. This is true even for a corporation with a single shareholder.

Although the term "corporation" sometimes calls to mind large, publicly traded enterprises, incorporation's insulation of shareholders' personal assets from risk is especially crucial for small businesses. If Amazon has to pay a tort judgment, it is unlikely any particular shareholder would suffer devastating losses even without limited liability. If a local florist, bakery, or retail store is held liable in a significant tort or

contract judgment, the handful of shareholders would risk financial ruin if not for limited liability.

That is why even where a single shareholder owns all the corporation's shares, the corporate veil cannot be pierced absent significant misconduct or fraud on the part of the shareholder. This presumptive impermeability of the corporate veil has been confirmed by "thousands of instances where a sole shareholder was held not liable for either tort or contract obligation[s] of his wholly owned corporation." George D. Hornstein, *Corporation Law and Practice* § 751 (1959); *see generally* Stephen B. Presser, *Piercing the Corporate Veil* § 1.1 (2018) ("It is now accepted as one of the first principles of American law that those who own shares in corporations, whether such shareholders are individuals or are themselves corporations, normally are not liable for the debts of their corporations."). If entrepreneurs want to remain legally identified with their businesses, they can. They merely need to forgo the benefits of limited liability.

The corporate form acts as a subsidy to entrepreneurs and shareholders by offering benefits not otherwise available to those that operate outside of the corporate structure. In particular, the corporate form allows business owners to shift tax burdens as well as contract and tort liability to the corporation. At the same time, incorporation often provides

shareholder-employees with tax-advantaged health care and retirement plans, while shielding shareholders against personal liability for claims against the business. Corporations themselves hold property and pay debts. The financial capacity or creditworthiness of a company does not depend on the wealth of individual shareholders; corporations enter into contracts and borrow money in their own names. And—unless this Court uses this case to change the rule—the legal rights and constitutional interests of a company depend on the rights and interests of the company itself, not those of its shareholders. Creditors, investors, customers, and suppliers do not need to investigate the particularities of the corporation's shareholders to decide whether to engage in business with the corporation.

In the present case, Arlene's Flowers, Inc., argues it should be exempt from the WLAD and CPA because of the religious values of a shareholder while seeking to maintain the benefits of corporate separateness for all other purposes. The shareholder has benefited from her separateness in countless ways, including being insulated from actual and potential corporate liabilities since she purchased shares from her mother. Yet now the company and the shareholder ask this Court to disregard that separateness in connection with a government regulation the shareholder would rather the corporation not obey. Appellants want to argue, in effect, that the corporate veil is only a one-way ratchet: the

corporation's shareholder can get protection from tort and contract liability by standing behind the veil, but the corporation can ask a court to disregard the corporate veil whenever the company is required by law to act in a way that offends the shareholder's beliefs.

Appellants cannot have it both ways. "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437, 66 S. Ct. 247, 90 L. Ed. 181 (1946); *see Moline Props., Inc. v. Comm'r*, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943) (holding that even a sole shareholder cannot seek to sidestep a corporation's separateness to gain a personal tax advantage).[4]

The Court should not assume it can disregard this principle of separateness with companies such as Arlene's Flowers and not cause

[4] As this Court is aware, courts may disregard corporate separateness when the corporate form is "intentionally used to violate or evade a duty." *E.g.*, *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 409-10, 645 P.2d 689 (1982) (internal quotation marks omitted); *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980). But the doctrine remains reserved for "exceptional situations," where it is "necessary and required to prevent unjustified loss to the injured party." *Morgan*, 93 Wn.2d at 587 (internal quotation marks omitted). There is no indication that such is the case here, and Appellants do not ask that the corporate veil be disregarded on any basis other than religious belief. Indeed, far from having created a corporation to circumvent state policy, Appellants instead ask this Court to permit circumvention of state policy by *ignoring* the corporation's existence.

significant uncertainty, infighting, and litigation with regard to other companies. As a matter of corporate law, nothing inherent in Appellants' arguments restricts their claims to private companies. If Appellants prevail, corporations such as Amazon, Costco, and Starbucks—all headquartered or chartered in Washington—could be subject to shareholder pressure to announce religious or political views to exempt those companies from otherwise applicable regulation. These companies, as well as the courts hearing such claims for exemptions, would then be required to engage in a complex calculus to decide which rights of which shareholders should prevail.

If the Court sought to limit its holding to private or even family companies with a dominant shareholder, courts would still be forced to resolve questions about what degree and type of ownership constitutes "control"—a question to which corporate law provides no ready answer. *See, e.g.*, Alex Poor & Michelle Reed, *The "Control" Quagmire: The Cumbersome Concept of "Control" for the Corporate Attorney*, 44 Sec. Reg. L.J. Art. 1 (Summer 2016). Courts would also be required to determine what degree of unanimity among shareholders would allow them to project their views onto the corporate entity.[5]

[5] The definitional problems posed by a reversal would be immense. Would the religious shareholder have to own the shares at the time of the asserted constitutional burden? Would the religious shareholder have to own all the company's shares, a majority of shares, or

The Court should not presume all privately held corporations are tiny. "Closely held" or even "family owned" is not synonymous with "small." Some of this State's most prominent corporations—Saltchuk Resources ($2.6 billion in revenues, 5,500 employees), and SanMar Corp ($1.3 billion in revenues, 4,000 employees), for example—are privately held, family companies. *See* Puget Sound Business Journal, *Washington's Largest Family-Owned Companies*, Feb. 1, 2019, https://tinyurl.com/y3l58o3y. If this Court were to relax the rule of separateness here, such a holding would likely spawn further litigation over which corporations can claim the beliefs of their shareholders to avoid the obligations of neutral laws.

A ruling for Appellants would also erode the efficiency benefits that the State and other market participants derive from corporate separateness. Customers, creditors, suppliers, investors, and state regulators will be unable to know whether a particular company is subject to the same laws as others without investigation into, and disclosure of, the

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simply be sufficiently dominant that he can control the company's management? It is standard for privately held companies to have common shares and several series of preferred shares. How should courts determine which shareholder class's views and beliefs are to be projected onto the company? If a corporation dominated by a religious shareholder organizes its business in multiple layers of wholly owned subsidiaries, which is routine, would the shareholder's religious beliefs be projected onto the parent company only, or flow throughout the entire enterprise? Should courts distinguish between corporations chartered in Washington and those chartered in Delaware or elsewhere, as is routine? And what if the enterprise asserting religious beliefs changes its corporate form over time?

religious and political beliefs of the shareholders, the number of shareholders, and the capital structure of the company. The era of the "Green Book" was not only morally shameful but also economically inefficient. The State of Washington need not return to such an era.

B. Corporate separateness should not be ignored in constitutional law.

Given the importance and centrality of corporate separateness in corporate governance law and doctrine, Appellants have a heavy burden in persuading this Court to ignore these entity distinctions in its constitutional analysis. But Appellants do not seem to recognize the necessity of persuasion here, failing to make any developed argument as to why Mrs. Stutzman's constitutional interests should be projected onto the corporation. Instead, they merely assert that "Arlene's free-exercise rights are synonymous with Mrs. Stutzman's," ABR 18 n.3, citing the U.S. Supreme Court's decisions in *Burwell* and *Masterpiece Cakeshop*.

Neither U.S. Supreme Court decision controls the free exercise claim here. In *Burwell*, the question was whether for-profit corporations qualify as "person[s]" that could "exercise … religion" within the meaning of the Religious Freedom Restoration Act of 1993. A divided Court concluded that closely held corporations are protected under that statute. 134 S. Ct. at 2767-75. That holding, in turn, depended on Congress's

instruction that the statutory term "exercise of religion" "be construed in favor of a broad protection of religious exercise," which the Court viewed as "an obvious effort to effect a complete separation from First Amendment case law." *Id.* at 2761-62. The Court's decision did not address claims under the First Amendment. *Id.* at 2785.

Masterpiece Cakeshop did involve a claim under the First Amendment. But the Court's opinion said nothing about corporate separateness—its dispositive free-exercise holding focused entirely on the Colorado Civil Rights Commission's treatment of the cake baker and bakery. *See* 138 S. Ct. at 1729-32. Given that the parties in *Masterpiece Cakeshop* drew no distinction between the baker and his business in their constitutional arguments, the Court's acquiescence in that framing can hardly be said to have settled the issue. And even if it had, because Masterpiece Cakeshop is a corporation chartered under Colorado law, the Court's ruling was necessarily based on assumptions about Colorado's state law of corporations, not Washington's.

Even if *Masterpiece Cakeshop* offers support for the notion that corporations may pursue free exercise claims based on religious hostility to their shareholders,[6] it does not follow that entity distinctions must be

[6] The free exercise ruling in *Masterpiece Cakeshop* does not change the axiom of corporate separateness. When a company is targeted for official opprobrium because of the religious views of its shareholders—the theory of the case relied upon by the U.S. Supreme Court in

ignored in the free speech context or when shareholders raise free exercise challenges to neutral laws, applied without hostility. *Cf. Arlene's Flowers*, 187 Wn.2d at 848 n.20 (addressing only "Stutzman's individual claim that *her* [free exercise] rights have been violated," but not "whether Arlene's Flowers (the corporation) has any such rights"). The U.S. Supreme Court, to be sure, has left no doubt that for-profit corporations and their trade associations may raise free speech claims. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). But the Court does not equate the interests of corporations with their shareholders for the purpose of free speech analysis. On the contrary—corporations are holders of their own rights.[7]

In this respect, for-profit corporations are distinct from membership associations, in that the latter represent and embody the legal

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Masterpiece Cakeshop and by Appellants here—then the company *itself* has a legitimate constitutional claim to be free of such opprobrium. The same would be true if the company were targeted because of the religious views of its employees or its customers. In all such cases it is the *company* that is being targeted. See Greenfield, *Corporations Are People Too*, *supra*, at 88-100. In the present case, however, there is no discriminatory targeting of the company. *See* State Br. on Remand 25-39; Ingersoll & Freed Br. on Remand 12-14. The law at issue is neutral and generally applicable to all companies providing public accommodation.

[7] The U.S. Supreme Court has recognized corporate speech rights in order to preserve the "'open marketplace' of ideas protected by the First Amendment," *Citizens United v. FEC*, 558 U.S. 310, 354, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), and to protect the company's, consumers', and society's interest in "the free flow of commercial information," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). The asserted interests are those of the company itself, not the company's shareholders. *See generally* Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309 (2015).

interests of their members, are deemed to share the values of their members, and have standing to sue on their members' behalf. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *FAIR*, 547 U.S. at 52 n.2. Corporations, in contrast, are legally distinct entities whose shareholders may have idiosyncratic investment objectives, distinctive and variable economic needs, and a diversity of political and religious beliefs. Amazon and Arlene's Flowers are not the Boy Scouts or the NAACP. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 238, 9 L. Ed. 2d 405 (1963).

Corporations stand in their own shoes as a matter of constitutional law. Corporations, to be sure, can and should have a role to play in public discourse, *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978), but they do not act merely as conduits for shareholders' points of view or have standing to assert their shareholders' constitutional interests. Courts have long recognized this distinction between shareholders and corporations in other constitutional contexts. *See, e.g.*, *Braswell v. United States*, 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988) (sole shareholder has no Fifth Amendment right to resist a subpoena to the corporation for corporate documents that personally incriminate him); *Brelvis Consulting*, 430 P.3d at 691 (applying

Braswell to hold that a corporation's owner and manager, "in his capacity as … custodian" of a single-member limited liability company, "may not resist a request for production of [the LLC's] records on Fifth Amendment grounds").

Barronelle Stutzman is both a shareholder of Arlene's Flowers and its employee. No one is challenging the sincerity of Mrs. Stutzman's beliefs. But Washington law does not require her to do, say, or create anything as a *shareholder* that even arguably violates her beliefs. To the extent the WLAD and CPA require her to act contrary to her beliefs, those laws apply to her in her role as an *employee* of a company determined to be a public accommodation under Washington law. The rights of employees to assert a religious objection to a work requirement of an employer or to a requirement of state or federal anti-discrimination law is a separate question, one on which amicus takes no position. But there is no doubt that if Arlene's Flowers has a *corporate* speech or religious interest at issue here, it is not because it has an employee, or even an officer, who disagrees with Washington law. For the company to have a claim, it would have to allege that the company *qua* company has been coerced into saying or doing something contrary to "those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518,

636, 4 L. Ed. 629 (1819). There is nothing inherent in the operation of Arlene's Flowers or in its chartering documents that would make obedience to state anti-discrimination law inconsistent with "its very existence."

This is not to say that corporations cannot assert free speech or free exercise interests, but merely that courts should take care that the rights asserted belong to the corporation and not to someone else. If Mrs. Stutzman has an *individual* constitutional interest here, it cannot be used as the basis for a regulatory waiver for the *company*. Even if the individual employee could assert a constitutional right to be exempted from WLAD's and CPA's obligations for employees of a public accommodation (a question on which amicus takes no position), the company cannot leverage a solitary employee's or shareholder's objections to a regulation as the basis for a company-wide exemption.

CONCLUSION

This court should affirm the trial court's rulings.

Respectfully submitted,

ORRICK, HERRINGTON &
SUTCLIFFE LLP

By: *s/ John Wolfe*

John Wolfe (WSBA No. 8028)
Paul F. Rugani (WSBA No. 38664)
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Phone: (206) 839-4300

Daniel A. Rubens
51 West 52nd Street
New York, NY 10019
Phone: (212) 506-3000

Attorneys for Amicus Curiae

Dated: March 5, 2019

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court and served on counsel of record via the Court's electronic filing system.

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

s/ John Wolfe
John Wolfe

ORRICK, HERRINGTON & SUTCLIFFE LLP

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- jcampbell@ADFlegal.org
- jconnelly@connelly-law.com
- jeastman@chapman.edu
- jessew@mhb.com
- jessica.ellsworth@hoganlovells.com
- jhelsdon@thehelsdonlawfirm.com
- jneedlel@wolfenet.com
- jpizer@lambdalegal.org
- jtedesco@ADFlegal.org
- judyg@atg.wa.gov
- jweber@cato.org
- kah@stokeslaw.com
- kaitlyn.golden@hoganlovells.com
- katskee@au.org
- kcolby@clsnet.org
- kim.gunning@columbialegal.org
- kkemper@elmlaw.com
- krista.stokes@hcmp.com
- kwaggoner@adflegal.org
- laura.szarmach@hoganlovells.com
- lawoffice@tomolmstead.com
- leccles@susmangodfrey.com
- lnowlin@aclu-wa.org
- map@pattersonbuchanan.com
- mark.aaron.goldfeder@emory.edu
- mark@holadylaw.com
- marshall@mcaseylawfirm.com
- mcpartland.bryce@mcpartlandlaw.com
- mdeutchman@adl.org
- mpr@stokeslaw.com
- mrienzi@becketfund.org
- nicole.schiavo@hoganlovells.com
- noahp@atg.wa.gov
- noemiv@mhb.com
- pleadings@aclu-wa.org
- pmr@pattersonbuchanan.com
- rtucker@adflegal.org
- rzotti@maronmarvel.com
- scanet@ahrendlaw.com
- sethcooper.law@gmail.com
- sfreeman@adl.org
- shendricks@klinedinstlaw.com
- smarnin@adl.org
- sminter@nclrights.org
- solson@klinedinstlaw.com
- tcberg@stthomas.edu

- toddb@atg.wa.gov
- valeriemcomie@gmail.com

Comments:

Sender Name: Malissa Tracey - Email: mtracey@orrick.com
Filing on Behalf of: John Winn Wolfe - Email: john.wolfe@orrick.com (Alternate Email: sea_wa_appellatefilings@orrick.com)

Address:
701 Fifth Avenue, Suite 5600
Seattle, WA, 98104
Phone: (206) 839-4309

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