No. 91615-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON and ROBERT INGERSOLL, et al.

Plaintiffs-Respondents,

v.

ARLENE'S FLOWERS, INC., et al.

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* NORTHWEST CONSUMER LAW CENTER

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I. INTEREST OF AMICUS CURIAE

The Northwest Consumer Law Center ("NWCLC") zealously advocates, litigates, and promotes access to justice for low- and moderate-income clients, and through its education programs, empowers consumers with the knowledge and resources to protect their rights. Since opening its doors in January 2013, NWCLC has served approximately 2,200 clients. NWCLC regularly brings claims on behalf of consumers under Washington's Consumer Protection Act ("CPA"), chapter 19.86 RCW.

Many of the amicus briefs filed in this case address the importance of holding businesses accountable for discrimination against same-sex couples. There are two important legal questions under the Washington CPA, however, that have been largely overlooked—thus making this amicus brief necessary. The first is whether the Defendants' conduct in this case was unfair or deceptive under the CPA, *independent* of the Washington Law Against Discrimination ("WLAD"). The second is whether the trial court applied the correct legal standard to determine Baronelle Stutzman's personal liability under the CPA. In this brief, NWCLC addresses both of these questions in depth.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

In what follows, NWCLC addresses two important questions under the CPA: (1) whether Defendants' actions violated the CPA, independently of any WLAD violation; and (2) what legal standard determines Defendant Stutzman's personal liability.

1. Even if Defendants' actions did not give rise to a per se violation of the CPA because it violated the WLAD, their actions would still be unfair under the CPA. Those actions were inherently anticompetitive, decreasing free competition in the marketplace and creating hospitable conditions for price-fixing and monopoly. These effects are precisely what the CPA is designed to prevent.

2. The Court should forcefully reject Stutzman's attempt to limit personal liability under the CPA to cases involving deception or conduct that is "particularly wrongful." Instead, the Court should affirm that personal liability depends on whether the person participated in or approved of the CPA violation. *State v. Ralph Williams' Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976). This standard is well established in Washington law and serves to deter CPA violations before they occur.

III. AUTHORITY AND ARGUMENT

A. Defendants' discrimination independently violates the Consumer Protection Act because it has anti-competitive effects.

When the Senate Commerce Committee considered the Civil Rights Act of 1964, it noted that "[d]iscrimination is not simply dollars and cents." S. Rep. No. 88-872, at 16 (1964) (quoted in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964)). Discrimination is also "the humiliation, frustration, and embarrassment" that comes from exclusion, and the simple injustice of denying a "citizen of the United States" the "right to enjoy equal treatment." *Id.*

While the Senate Commerce Committee rightly stressed that discrimination is *more* than just dollars and cents, it did not deny that discrimination is, among other things, about dollars and cents. And here it is crucial for this Court to recognize the economic hazard that LGBTQ consumers face from the denial of market access. As all the parties to this proceeding agree, this is not a one-off case. Were the Court to allow the form of exclusionary conduct practiced by Defendants, we can be certain that other businesses in Washington will follow in Defendants' footsteps. Many LGBTQ consumers will be cut off from segments of commerce, an anticompetitive result that cannot be squared with the purposes of the CPA.

As NWCLC will show, Defendants' discrimination violated the CPA independently of the WLAD because it was (1) an unfair or deceptive act or practice (2) occurring in commerce (3) that has a public-interest impact. *See State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011) (setting out the elements that the Attorney General must prove in a CPA action); RCW 19.86.080.[1] Defendants do not appear to dispute that the discrimination occurred in commerce, at least as that term is defined in the CPA, *see* RCW 19.86.010(2), so the Court need only answer whether the discrimination was unfair or deceptive, and whether it has a public-interest impact. And, as Amicus will explain, discrimination like Defendants' is unfair and has an impact on the public interest because it diminishes market competition, creates conditions that are ripe for monopoly or price-fixing, and thus has the potential to harm the consumer welfare of LGBTQ Washingtonians.

If businesses are allowed to refuse service to LGBTQ consumers, the market providing services to LGBTQ people will by definition be narrowed. The fewer the number of competitors in a market, the likelier it is that consumers will be charged higher prices than they would be

[1] In a private action like the one that Robert Ingersoll and Curt Freed have brought, CPA plaintiffs must also show injury in their "business or property," RCW 19.86.090, and a causal link between the unfair or deceptive act and the injury. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792–93, 719 P.2d 531 (1986). Defendants do not appear to dispute these elements, so NWCLC will not discuss them.

charged in a competitive market. This may happen because there is only one remaining firm that is able to charge monopoly prices. Or it may happen because the market is controlled by only a few remaining firms. In that case, tacit or explicit collusion between the remaining competitors becomes a real possibility. *See, e.g.*, Arthur G. Fraas & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, 26 J. Indus. Econ. 21, 30 (1977) ("[T]he frequency of collusion [in a given market] appears to be inversely associated with numbers of firms."); Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. Econ. Lit. 43, 57 (2006) (firms in concentrated markets are more likely to collude than firms in less concentrated markets).

The smaller the market, the greater the effect a competitor's exit from (or refusal to participate in) the market will have. This comes in part from the fact that it is easier for one firm to influence a small market than a large one. It also comes from the fact that a small market is itself a barrier to entry from outside competitors; the small size of the market may discourage potential competitors from making the necessary upfront capital expenditures needed to enter the market. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 234–35 (6th ed. 2007).

There is ample reason to believe that refusal of services to LGBTQ consumers would most likely occur in Washington's smaller markets. In

2012, Washington voters approved Referendum 74, which allowed same-sex couples to marry while preserving the right of religious organizations to refuse to perform, recognize, or accommodate any marriage ceremony. *See* RCW 26.04.010, 26.04.020(4)–(6). Washington's ten most sparsely populated counties all rejected Referendum 74 by wide margins.[2] Precisely in those markets whose size most easily squelches market competition, refusal of service to LGBTQ consumers seems most likely to occur in the absence of a law preventing it.

As NWCLC has shown, then, competition in the marketplace drops, and the potential for supra-competitive pricing rises, if a commercial enterprise is allowed to refuse service to LGBTQ Washingtonians. That—among the other reasons detailed by Respondents and by other Amici—is why the CPA proscribes the discrimination at issue in this case as unfair. The purpose of the CPA is "to promote free competition in the marketplace for the ultimate benefit of the consumer." *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984). Anticompetitive

[2] The ten most sparsely populated Washington counties are Garfield, Ferry, Lincoln, Columbia, Skamania, Okanogan, Pend Oreille, Adams, Klickitat, and Wahkiakum. *See* Wash. Off. of Fin. Mgmt., Forecasting & Research Div., Estimates of Apr. 1 Population Density and Land Area by County, *available at* http://www.ofm.wa.gov/pop/popden/popden_county.xlsx (last accessed Aug. 30, 2016). These counties rejected Referendum 74 by an average of about 14 percentage points. *See* Washington Sec'y of State, November 6, 2012 General Election Results, Referendum Measure No. 74 – County Results (Nov. 27, 2012), http://results.vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples_ByCounty.html.

conduct like the discrimination here decreases free competition in the marketplace and has the potential to reduce consumer welfare for LGBTQ Washingtonians, and is unfair for at least that reason. *See Rush v. Blackburn*, 190 Wn. App. 945, 963, 361 P.3d 217 (2015) (in determining whether an act is "unfair" under the CPA, Washington courts examine "whether it causes substantial injury to consumers"). For the same reason, the discrimination has a public-interest impact. By decreasing free competition in the marketplace, it "has the capacity to injure other persons," i.e., LGBTQ consumers other than the particular Plaintiffs here. RCW 19.86.093(3)(c).

It is no answer to say that the CPA need not proscribe anticompetitive conduct that may lead to price fixing and monopolies because price fixing and certain kinds of monopolies are already unlawful under the antitrust laws. The CPA goes beyond the antitrust laws and prohibits conduct threatening even "an *incipient* violation of one of the antitrust laws." *Black*, 100 Wn.2d at 800 (emphasis in original).

There is good reason for the CPA to head off oligopolistic conditions before they begin. The concerted pricing to which oligopoly lends itself can be exceedingly difficult to detect. *See* Thomas O. Barnett, Ass't Attorney General, Antitrust Division, U.S. Dep't of Justice, *Seven Steps to Better Cartel Enforcement* (June 2, 2006), *available at*

https://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement ("It is notoriously difficult to discover cartel behavior or, once discovered, to compile sufficient evidence to successfully prosecute cartel members in court."). Indeed, tacit collusion—which the federal antitrust laws do *not* reach, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)—is particularly "difficult to discover," and "likely to be sustained for a longer period." Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 Minn. L. Rev. 9, 13 (2004). And yet "[t]here is now a consensus among economists that tacit price-fixing arrangements are just as harmful to consumers as explicit price-fixing agreements." *Id.* at 22. Because it is difficult for law enforcement to detect unlawful behavior in this area, an ounce of prevention is worth a pound of cure.

And if it is difficult even for law enforcement to detect unlawful behavior, it is all the more so for consumers. Indeed, consumers may not be able to detect even monopoly pricing. If an LGBTQ consumer has only one option for a particular service, then the consumer will not have a readily available competitor against which to compare prices.

Even if the WLAD were repealed tomorrow, discrimination against LGBTQ consumers would still diminish market competition and have the capacity to harm LGBTQ Washingtonians precisely in their

capacity as consumers. It is vital, therefore, for this Court to recognize these anticompetitive effects, and to hold that Defendants' discrimination violated the CPA independently of the WLAD.

B. An officer or director who directs or participates in unfair or deceptive acts or practices, as Stutzman did, should be held individually liable.

It is vitally important to deter unfair refusals to serve LGBTQ consumers. And one of the best ways to do that is to hold business owners who establish discriminatory or unfair practices personally responsible for their actions. NWCLC urges the Court to affirm the trial court's finding that Defendant Stutzman is individually liable under the CPA. Stutzman challenges that finding, arguing that her conduct was not sufficiently wrongful to warrant imposition of personal liability. Opening Br. at 48; Reply Br. at 49–50. Stutzman relies on cases suggesting that a responsible corporate officer may be held personally liable under the CPA only if the officer's conduct was deceptive or particularly wrongful. *See, e.g., One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 108 Wn. App. 330, 30 P.3d 504 (2001) (finding the individual defendant's conduct was not "so wrongful or deceptive that it would justify imposing personal liability on the corporation's sole corporate officer"); *Bradley v. Morgan Drexen, Inc.*, No. CV-09-109-RHW, 2009 WL 2870508 at *4 (E.D. Wash. Aug. 31, 2009) ("Deceptive practices in violation of the Consumer

Protection Act are the type of wrongful conduct that justifies imposing personal liability on a participating corporate officer."). The Court should clarify that a corporate officer's conduct need not be deceptive or "particularly wrongful" in order to establish personal liability under the CPA—the legal standard is personal participation in, or approval of, the CPA violation, and nothing more. *See Ralph Williams*, 87 Wn.2d at 322.

This Court has established that an officer or director who participated in, or knowingly approved of, conduct that violates the CPA may be individually liable under the CPA. *Ralph Williams*, 87 Wn.2d at 322. The plain text of the statute supports individual liability; it provides that "any person" may be liable for a violation of the CPA. *See, e.g.*, RCW 19.86.080(a) (authorizing the Attorney General to bring suit against "any person" who acts in violation of the statute); RCW 19.86.010(1) (defining "person" as "natural persons, corporations, trusts, unincorporated associations and partnerships"); RCW 19.86.090; *see also Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 798–800, 363 P.3d 587 (2015) (emphasizing the broad meaning of the term "any person" as used in the CPA). Stutzman is a natural person subject to individual liability for unfair or deceptive acts or practices under the CPA.

For over eighty years, this Court has recognized that corporate officers who take part in the commission of a tort by a corporation are

individually liable. *Messenger v. Frye*, 176 Wash. 291, 295, 28 P.2d 1023 (1934). Over the last forty years, Washington courts have applied the responsible corporate officer doctrine to violations of the CPA to impose individual liability on corporate officers who participate in the wrongful conduct. *Ralph Williams*, 87 Wn.2d at 322; *Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); *see also Annechino v. Worthy*, 175 Wn.2d 630, 637, 290 P.3d 126 (2012) ("The cases where we have found officers personally liable for the torts of corporations involved officers who either knowingly committed wrongful acts or directed others to do so knowing the wrongful nature of the requested acts.").

The responsible corporate officer doctrine is a basis for individual corporate officer liability that is distinct from the alter ego theory used to pierce the corporate veil. *See Ralph Williams*, 87 Wn.2d at 321–22 (distinguishing between two theories for holding corporate officer individually liable for deceptive practices); *Grayson*, 92 Wn.2d at 553–54 (holding corporate officer individually liable under responsible corporate officer doctrine even though the court ruled that the trial court improperly pierced the corporate veil under the alter ego theory); *see also Durand v. HIMC Corp.*, 151 Wn. App. 818, 835, 214 P.3d 189 (2009) (individual liability for violations of statutory wage payment requirements "does not turn on piercing the corporate veil").

Unable to deny her direct involvement refusing to sell Freed flowers for his same-sex wedding, Stutzman seizes on language in a court of appeals decision suggesting that a plaintiff must show that the responsible corporate officer's acts or practices were deceptive (as opposed to unfair) or particularly wrongful.[3] *See* Appellants' Br. at 49 (citing *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 108 Wn. App. 330, 335, 30 P.3d 504 (2001), *rev'd in part by*, *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 148 Wn.2d 319, 61 P.3d 1094 (2002)). Stutzman argues that it is "punitive" to hold her personally liable, essentially because her discriminatory business practice is not as bad as a fraudulent business practice. Appellants' Br. at 49. And some Washington courts have improperly limited personal liability under the CPA to cases involving deceptive acts or "particularly wrongful" practices. *See, e.g., Parkinson v. Freedom Fidelity Mgmt., Inc.*, No. 10-CV-0345-TOR, 2012 WL 1931233, at *12 (E.D. Wash. May 29, 2012) (holding that officers who charged illegal debt adjusting fees engaged in conduct that was unfair—but not deceptive or "particularly wrongful"—were not subject to individual liability under the CPA).

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[3] Discrimination against LGBTQ people is "particularly" wrongful, but Respondents are required to show only that discrimination is unfair under the CPA.

NWCLC urges the Court to clarify that a corporate officer who directs or participates in unfair acts under the CPA—even acts that can be described as "transparent" or "garden variety" CPA violations—may be held personally liable for them. Imposition of personal liability on Stutzman is neither "unprecedented" nor unfair. *See* Appellants' Br. at 48–49. Just as Ralph Williams was individually liable because he controlled, formulated, and directed the unfair and deceptive policies of his companies, *Ralph Williams*, 87 Wn.2d at 322, Stutzman is personally liable because she both set and executed her company's policy of refusing to provide flowers for same-sex weddings, CP 2570–71, 2609. It was Stutzman's act that violated the CPA and that supplies the basis for liability. The mere fact that Stutzman incorporated her shop does not shield her from responsibility for her violations. To hold otherwise would elevate form over substance to the detriment of consumers.

The Seventh Circuit draws a useful analogy in evaluating whether a corporate officer's conduct subjects him or her to liability:

> The line between a personal act and an act that is purely an act of the corporation (or of some other employee) and so not imputed to the president or to other corporate officers is sometimes a fine one, but often it is clear on which side of the line a particular act falls. If an individual is hit by a negligently operated train, the railroad is liable in tort to him but the president of the railroad is not. Or rather, not usually; had the president been driving the train when it hit the plaintiff, or had [he] been sitting beside the driver and

> ordered him to exceed the speed limit, he would be jointly liable with the railroad.

Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, 195 F.3d 953, 956 (7th Cir. 1999) (Posner, C.J.).

Stutzman was driving the figurative train when it hit Ingersoll. She personally refused to sell him flowers or other goods or services for his wedding to Freed and did so because it was a same-sex marriage. CP 2570–71. She then created a policy that requires her employees to refuse service to any future customer seeking flowers for a same-sex wedding. Accordingly, the trial court correctly applied the governing standard and found her individually liable for her illegal discrimination on the basis of Ingersoll's sexual orientation. NWCLC asks the Court to affirm the trial court's determination that personal liability under the CPA requires no more than the showing made here.

The CPA is not the only area of Washington law in which a corporate officer may be held personally liable, even without piercing the corporate veil. *See State, Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 243–44, 971 P.2d 948 (1999) (violation of environmental laws); *K.P. McNamara Nw., Inc. v. State, Washington Dep't of Ecology*, 173 Wn. App. 104, 142, 292 P.3d 812 (2013) (same); *Durand*, 151 Wn. App. at 835 (Washington Wage Rebate Act claim); *Kalmanovitz v. Standen*, No. C14-

1224RSL, 2015 WL 9273611, at *3–4 (W.D. Wash. Dec. 21, 2015) (same). These cases do not turn on whether the individual officer acted "deceptively" or demand any showing of "wrongfulness" other than knowing violation of the law. Nor should individual liability under the CPA.

The CPA is designed to deter wrongful conduct before it occurs. As this Court has said, "[c]orporate officers cannot use the corporate form to shield themselves from individual liability." *Ralph Williams*, 87 Wn.2d at 322; *see also POM Wonderful LLC v. Purely Juice, Inc.*, 362 F. App'x 577, 581 (9th Cir. 2009) (unpublished decision) (internal quotation marks omitted) ("A corporate officer is liable for torts he personally commits, and cannot hide behind the corporation where he is an actual participant in the tort.").

Individual liability advances state interests and protects Washington consumers because "the only way in which a corporation can act is through the individuals who act on its behalf." *Lundgren*, 94 Wn. App. at 243 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S. Ct. 134, 88 L. Ed. 48 (1943)) (internal quotation marks omitted). The responsible corporate officer doctrine is premised on the corporate officer's ability to prevent or correct a violation of the relevant statute.

K.P. McNamara Nw., Inc., 173 Wn. App. at 144 (citing *Lundgren*, 94 Wn. App. at 244).

Imposing individual liability on the officers and directors who act for the corporation—especially when they personally participate in the illegal conduct, as here—is an important part of deterring discrimination and violations of the CPA. This Court has recognized the importance of the CPA's goal of deterrence before, *see Hangman Ridge*, 105 Wn.2d at 785, and should do so again by affirming the trial court's determination that Stutzman is personally liable for her company's refusal to sell flowers to couples planning same-sex weddings. In doing so, the Court should clearly reject Stutzman's argument that individual liability under the CPA only reaches acts that are deceptive or reflect some heightened degree of wrongfulness.

IV. CONCLUSION

NWCLC respectfully request that the Court affirm the trial court's judgment. NWCLC urges the Court to take this opportunity to clarify that refusing to serve LGBTQ customers is an unfair practice under the Washington CPA, independently of the WLAD. NWCLC also urges the Court clarify that a corporate officer who directs or participates in unfair acts or practices may be held personally liable under the CPA.

RESPECTFULLY SUBMITTED AND DATED this 30th day of September, 2016.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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