STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 (consolidated with 13-2-00953-3) DEFENDANTS' REPLY SUPPORTING THEIR MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFFS' LACK OF STANDING
ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	

I. INTRODUCTION

Plaintiffs cannot erase the fact that Barronelle was, and is, happy to sell Ingersoll

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and Freed raw materials. But Plaintiffs never expressly requested raw materials, so it was impossible for Barronelle to deny selling them such. The best argument Plaintiffs can muster is that they *did not know* what they wanted when Ingersoll spoke with Barronelle. Either way, it would be pure speculation to decide this case, which raises a host of thorny constitutional and statutory questions, on the ground that Plaintiffs *could have* asked Barronelle to participate in their wedding—at some hypothetical point before their marriage. And Plaintiffs cannot obtain relief for third parties without demonstrating that they are entitled to the same relief themselves. Because a concrete dispute is plainly lacking here, the Court should grant summary judgment in Defendants' favor.

II. ARGUMENT

A. Because no live controversy exists between the parties, Plaintiffs lack standing to bring this suit.

1. Ingersoll and Freed have failed to show that Barronelle's allegedly discriminatory policy applied to them.

Plaintiffs contend that a "live controversy" exists between the parties because they make opposing *legal* arguments. But the parties to every case make conflicting legal arguments. If that were the test, this Court would never find that *any* plaintiff lacked standing to bring suit. Standing doctrine requires more than that. It requires not mere disagreement about the law but a legally "protectable interest that," factual speaking, "has been invaded or is about to be invaded." *Alexander v. Sanford*, 181 Wn. App. 135, 149-50 (2014) (quotation omitted). Put in the context of this case, Plaintiffs must show that Barronelle's inability to participate in same-sex wedding ceremonies not only implicated

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Ingersoll's and Freed's legal rights, but also that Barronelle's policy, factually speaking, "operated to [their] prejudice." *Postema v. Snohomish Cnty.*, 83 Wn. App. 574, 579 (1996). Plaintiffs cannot make that factual showing here.

Taking the facts in the light most favorable to the non-movants, Ingersoll and Freed now claim that they desired to purchase raw materials—sticks and twigs and perhaps vases—from Barronelle. Ingersoll Dep. 48-50; Freed Dep. 33.[1] Thus, Barronelle's policy about participation in wedding ceremonies that conflict with her religious beliefs did not apply to them. Stutzman Dep. 80. In fact, Barronelle's policy could not apply to Ingersoll and Freed because this policy did not even exist until after Ingersoll and Barronelle discussed his wedding. Stutzman Dep. 44. Nor can this policy possibly apply to Ingersoll and Freed in the future because Ingersoll and Freed were married well over a year ago. Ingersoll Dep. 58; Freed Dep. 33. Thus, Plaintiffs' hypothetical divorce and remarriage is the only way Barronelle's policy could apply to them. If this does not represent "a mere expectancy or future, contingent interest" in the outcome of this case, nothing does. *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 307 (1995).

Plaintiffs' efforts to muddy the factual record by citing post-deposition discovery responses, which were not subjected to cross-examination, do not now operate to create an issue of material fact. Washington courts reject such attempts to create a genuine issue of material fact by subsequently backtracking from a party's clear deposition testimony.

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[1] While this post-litigation claim for only "sticks and twigs" is easily disputed, for purposes of this motion, these facts are taken on their face and in the light most favorable to the non-movant Plaintiffs.

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Cf. Smith v. Stockdale, 166 Wash. App. 557, 567 (2012) ("When a party gives clear answers to unambiguous deposition questions that negate the existence of any genuine issue of material fact, that party cannot then create an issue by affidavit that without explanation merely contradicts previously given clear testimony."). The Court should similarly reject Plaintiffs' reliance on discovery responses remitted *after* depositions.

But even accepting these discovery responses, they merely state that Plaintiffs *did not know what they wanted* when the conversation between Ingersoll and Barronelle occurred. And this does not help Plaintiffs. The only policy challenged here is Barronelle's inability, in good conscience, to intimately participate in a same-sex wedding ceremony. Regardless whether Ingersoll and Freed (1) wanted sticks, twigs, and perhaps vases, or (2) did not know what they wanted to order, Plaintiffs remain unable to show that Barronelle's policy applied to—let alone injured—them.

Ingersoll's and Freed's personal interest in this case thus rests on nothing more than a hypothetical "expectancy" or "future, continent interest" that they could have changed (or eventually made up) their minds and asked Barronelle to do something to participate in their same-sex wedding. But Plaintiffs do not argue that they ever actually made this request. "Ifs" and "mights" are not enough to establish "a present, substantial interest" in this case or that a cognizable "benefit will accrue" to Ingersoll and Freed if the Court rules on whether Defendants' policy violates the Washington Law Against Discrimination ("WLAD") or the Consumer Protection Act ("CPA"). *Timberlane*, 79 Wn. App. at 307. Standing is plainly lacking here. The Court should thus grant summary

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judgment in Defendants' favor. *See Ullery v. Fulleton*, 162 Wn. App. 596, 604 (2011) (noting if a plaintiff lacks standing his claims "cannot be resolved in whole or in part on the merits").

Plaintiffs cite *Negron v. Snoqualmie Valley Hosp.* for the proposition that "damage is inherent in a discriminatory act." 86 Wash. App. 579, 587 (1997). But Plaintiffs cannot show an act of "discrimination" occurred in the first place if they cannot show that Barronelle's policy applied to them. Moreover, the *Negron* Court was referring to damages for "emotional distress," *id.* at 587, a claim Plaintiffs waive here. *See* Plaintiffs Ingersoll and Freed's Opposition to Defendants' Motion for Summary Judgment Based on Plaintiffs' Lack of Standing ("Plaintiff's Response") at 8 n.7 ("Robert and Curt do not seek actual damages relating to non-economic harms."); Defendant's Third Set of Discovery Requests to Plaintiff Robert Ingersoll and Responses Thereto at 7 ("I am not seeking money damages for any physical, mental, or emotional injuries."). Plaintiffs cannot demonstrate "a present, substantial interest" in this case by citing injuries related to claims they never brought. *Timberlane*, 79 Wn. App. at 307.

Plaintiffs claim economic damages involved in finding another florist. But they still cannot establish that Barronelle's allegedly discriminatory policy applied to them. Without a link to discrimination on a protected ground, Plaintiffs are merely dissatisfied customers, not WLAD and CPA plaintiffs, and no legal remedy exists for the trifling economic consequences of their bad customer experience. *See* RCW § 49.60.030; RCW § 19.80.020.

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Consumers visit additional stores all the time if they disapprove of the service rendered at a previously-visited location. And that is all that happened in this case. Indeed, this matter is nothing like *Stockdale* in which a customer established a CPA injury to her personal property by showing that she paid a $5.00 entry fee to access private beachfront and an adjacent cliff and subsequently injured herself by jumping off. *See* 166 Wn. App. at 565-66. Barronelle did not charge Ingersoll for their cordial, if difficult, encounter, and she facilitated a referral to another florist from whom Freed ultimately purchased flowers to decorate their ceremony. *See* Ingersoll Dep. 22-23; Freed Dep. 15.

It is simply a non-starter for Plaintiffs to contend that Barronelle's conscientious objection to participating in wedding ceremonies that conflict with her religious beliefs is somehow new. In stark contrast to Plaintiffs' inconsistencies, Defendants' position has remained consistent. *See, e.g.*, Answer to Ingersoll's and Freed's Complaint at 7 ("Defendant ... declined to provide goods and services for a particular type of event, based on a religious objection to participation in the event, and the subject matter thereof.").

Furthermore, Barronelle's testimony reflects a moral position, not mere corporate policy, which she attempted to apply to Ingersoll in good faith:

> **Q:** If Robert Ingersoll had told you that what he wanted to purchase form Arlene's Flowers for his wedding was simply branches to use for the wedding would have you sold those to him?
> A: Yes.
> **Q:** If he had told you that he wanted to purchase just simple stems that he would then arrange would you have sold those to him?
> **A:** Yes.

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Stutzman Dep. 80; *see also id.* at 98, 105-06.

2. The State fails to show that Barronelle's allegedly discriminatory policy caused any cognizable harm; it thus lacks standing to bring this suit.

The State unsuccessfully attempts to establish standing to maintain this suit. First, the State—just like Ingersoll and Freed—reduces standing to the mere assertion of a legal right with no factual component whatsoever. But that cannot be the law or every beneficiary or third-party vindicator of a civil right would have standing to sue regardless whether that right was actually implicated by an appropriate defendant. Indeed, under the State's theory, the Attorney General could sue any business in Washington without demonstrating that anyone's rights had "been invaded or [were] about to be invaded." *Alexander*, 181 Wn. App. at 149-50. That is, however, the only circumstance in which the Attorney General's power "to restrain and prevent the doing of any act ... declared to be unlawful" by the CPA makes sense. RCW § 19.86.080(1).

Second, the State's argument regarding legislative grants of enforcement authority suffers from the same flaw. State agencies unquestionably have standing to bring enforcement suits in appropriate circumstances. Citation to cases like *In re M.K.M.R.*, 148 Wn. App. 383 (2009), which simply hold that a particular statute allows for agency enforcement in certain circumstances, are thus beside the point. *See id.* at 391-93 (interpreting the language of the Washington Uniform Parentage Act to allow the Division of Child Support to file an action challenging paternity when there is a putative father). The rub is that courts do not rule on standing in a factual vacuum. Vague

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suggestions of public interest impact will not do. As illustrated in *State v. Gillette*, 27 Wn. App. 815 (1980), agencies have standing to challenge a real, verifiable public harm. *See id.* at 822-13 (granting standing to file suit when a defendants' reconstruction of a stream bank resulted in the loss of "606 adult fish"). Nothing of the sort exists here.

Third, the State puts much stock in *Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986), but that decision does not help the State. It simply outlines two methods for demonstrating public interest impact. The first is unavailable here because it depends on "the likelihood that additional plaintiffs have been or will be *injured in exactly the same fashion*" as Ingersoll and Freed. *Id.* at 791 (emphasis added). The inconvenience Ingersoll and Freed suffered was due to a simple misunderstanding based on the parties' unique course of dealing over the span of a nine-year relationship (that apart from their usual, extravagant requests, the Plaintiffs merely wanted raw materials from Barronelle, though they never articulated that to her). *See* Defendants' Motion for Summary Judgment Based on Plaintiffs' Lack of Standing ("Motion") at 2-5. It is therefore highly implausible that anyone else would be "injured in exactly the same fashion." *Hangman Ridge*, 105 Wn.2d at 791. Accordingly, this case is "essentially a private dispute," not a matter of public interest. *Id.* at 790.

The second method of establishing public interest impact requires a "showing that a statute has been violated which contains a specific legislative declaration of public interest impact." *Id.* at 291. Here, the State cites as a predicate Ingersoll's and Freed's allegation that Barronelle violated the WLAD. *See* State's Response to Motion for

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Summary Judgment Based on Plaintiff's' Lack of Standing ("State's Response") at 7 (quoting 49.60.030(3)). But under the assumed facts herein, Ingersoll and Freed did not expressly seek anything Barronelle would have denied them or, at the very least, did not know what kind of floral arrangements they wanted to help celebrate their wedding ceremony. *See* Motion at 6-8, 10-15; *supra* Part II.A.1. Ingersoll and Freed consequently lack standing to bring this case, no justiciable controversy exists, and their claims are moot. Consequently, the State's predicate, *per se* WLAD violation fails at the start just like the private plaintiffs' speculative claims.

B. This case is not justiciable because any dispute between the parties is dormant, hypothetical, speculative, or moot.

The best argument at Plaintiffs' disposal is that Ingersoll and Freed did not know what kind of flowers they wanted when Ingersoll spoke with Barronelle. But this hardly shows: (1) an "actual present and existing dispute," (2) "genuine and opposing interests," (3) that are "direct and substantial," and (4) that any "judicial determination [in this case would] be final and conclusive." *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490 (2000) (quotation omitted). In fact, it demonstrates exactly the opposite.

Over a year after Ingersoll's and Freed's same-sex wedding ceremony, any dispute regarding the floral arrangements Plaintiffs desired for that ceremony is "dormant, hypothetical, speculative, or moot." *Id.* (quotation omitted). The parties lack "genuine and opposing interests" because Ingersoll and Freed no longer wish to buy flowers to help celebrate their same-sex wedding ceremony. *Id.* (quotation omitted). Ingersoll's and Freed's interest in Barronelle's policy is also "theoretical, abstract or

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academic" as it does not apply to them and could not affect the service they would receive at her shop. *Id.* (quotation omitted). And "a judicial determination [would not] be final and conclusive" in this case because it would rest on a theoretical state of facts. *Id.* (quotation omitted). Hence, no justiciable controversy exists and Plaintiffs do not qualify for declaratory relief. *See Lewis Cnty. v. State*, 178 Wn. App. 431, 437 (2013) (holding that unless "[e]ach of these four elements [is] met, ... the court steps into the prohibited area of advisory opinions.").

C. This case is moot because it involves only abstract questions that are insubstantial and preclude effective judicial relief.

1. Defendants' misleading claims cannot resurrect a moot case.

Plaintiffs attempt to resuscitate their mooted claims by presuming an established discriminatory act and depicting Ingersoll and Freed as victims in search of redress. But they cannot establish that conclusion because Barronelle was, and is, happy to provide them with the raw materials they sought. Stutzman Dep. 80; *see also id.* at 98, 105-06. Even if Ingersoll and Freed were unsure about what they wanted to purchase, this only bolsters Defendants' point that this case (1) "involves ... abstract propositions or questions" the answers to which can no longer be known, (2) the hypothetical nature of these questions means no "substantial questions in the trial court ... exist," and (3) this Court "can no longer provide effective relief" because any order issued would necessarily be rooted in a theoretical set of facts. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99 (2005).

The cases Defendants cite are not to the contrary. For instance, *Washington State*

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Communication Access Project v. Regal Cinemas, Inc., unlike here, was a case in which "recurring discrimination" was not only possible but likely because the movie theater could easily "cease showing movies with closed captioning." 173 Wn. App. 174, 207 (2013). Hence, the same "plaintiffs would again be subjected to the same alleged wrongful conduct given the lack of acceptance by the defendants that captions were legally required." *Id.* (quotation omitted).

The same is not true here, as, regardless of the parties' differing views of the law, Ingersoll and Freed have been married for over a year and no longer need floral arrangements for their wedding ceremony. *See* State's Response at 10 (acknowledging that "Ingersoll and Freed have been married and now have no need of Defendants' services"). Accordingly, there is no "opportunity for future disagreement" between the parties and this case is moot because the chance of a recurrence is "so remote and speculative that there [is] no tangible prejudice to the existing parties." *Id.* at 208 (quotations omitted). In other words, this is a rare case in which it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 204 (quotation omitted).

The State's reliance on *State v. Ralph Williams' North West Chrysler Plymouth, Inc.* is misplaced for the same reasons. 87 Wn.2d 298 (1976). Mootness doctrine did not apply in that case because of the very real possibility of identical, recurring violations. *See id.* at 312 (expressing concern that "appellants may reenter the state and resume the identical deceptive practices"); *id.* at 313 ("There must exist a cognizable danger of

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recurrent violation."). Because the parties' course of dealing is entirely unique, in this case, "the allegedly wrongful behavior could not reasonably be expected to recur." *Id*

Sorenson v. City of Bellingham is also not on point. 80 Wn.2d 547 (1972). In fact, the Supreme Court concluded that case was moot because the election in which the plaintiff wished to run had already been held. *See id.* at 558 ("[W]here only moot question or abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal ... should be dismissed."). But the Court was "persuaded" based on the "public interest" exception to the mootness doctrine "that the question presented should be decided" anyway. *Id.* at 558. That exception does not help Plaintiffs. As Defendants have explained and will clarify below, it does not apply here. *See* Motion at 14-15; *see infra* Part II.C.2.

Spokane Research is also readily distinguishable. In that case, the defendant did not release documents in response to the Public Disclosure Act request of the plaintiff journalist. 155 Wn.2d at 102. Rather, it did so based on an order in an entirely separate lawsuit. *Id.* As a result, there was no admission of fault by the defendant on which to base an award of statutory penalties for allegedly improper document withholding. *Id.* at 102. The plaintiff's potential award of financial penalties, if he prevailed on the merits of his claims, prevented the case from becoming moot. *Id.* ("If Connor is correct, his right to inspect and copy the documents was improperly denied from the time of his request to the disclosure. Penalties must be assessed accordingly."). No statutory penalties are available here because Barronelle was, and is, happy to give Ingersoll and Freed the raw

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materials they desired. And if they had not yet decided what to use in decorating their same-sex wedding, Barronelle can hardly be faulted for failing to provide them with an unknown product.

2. The public importance exception to mootness doctrine does not apply here.

Defendant's urge this Court to ignore the Supreme Court's binding decision in *Orwick v. City of Seattle*, and apply the exception to mootness doctrine for cases "involving matters of continuing and substantial public interest." 103 Wn.2d 249, 253 (1984) (en banc) (quotation omitted). But that would be clear error. Far from establishing some optional criterion, the Supreme Court's decision in *Orwick* makes clear that the public interest exception to mootness doctrine applies exclusively to "cases which became moot only after a hearing on the merits of the claim." *Id.*; *see also id.* (explaining that "[a]fter a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future"). That is why the *Orwick* Court stated that because the "petitioners' claim for declaratory and injunctive relief became moot before trial," "[d]ismissal of their claim will not involve a waste of judicial resources and will avoid the danger of allowing petitioners to litigate a claim in which they no longer have an existing interest." *Id.*

That reasoning applies equally to this case. Plaintiffs readily admit that the Court has not resolved the merits of this case. Plaintiffs' Response at 15 ("[T]he central issues have yet to be decided on their merits."). And it is equally clear that because Ingersoll's and Freed's ceremony took place over a year ago, "they no longer have an existing

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interest" in this case's outcome. *Orwick*, 103 Wn.2d at 253; *see also* State's Response at 10 (acknowledging that "Ingersoll and Freed have been married and now have no need of Defendants' services"). Accordingly, the public interest exception does not apply here.

Far from being "mistaken," this reading of *Orwick* finds ample support in caselaw. The Supreme Court's opinion in *In re Marriage of Horner*, 151 Wn.2d. 884 (2004) (en banc), for instance, notes that the public interest exception applies "'[a]fter a hearing on the merits, [because] it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future.'" *Id.* at 893 (quoting *Orwick*, 103 Wn.2d at 253). In *Horner*, the public interest exception applied because "the genuinely adverse parties fully litigated the merits of [the] case on numerous occasions." *Id.* Even Plaintiffs' own cited authority explains that *Orwick* "serves to limit review to cases in which a *hearing on the merits* has occurred." *Westerman v. Cary*, 125 Wn.2d 277, 286 (1995) (explaining that (emphasis added). That is plainly not the case here. Accordingly, the public interest exception does not apply.

To support their contrary argument, Plaintiffs attempt to use cases stating that the public interest exception only applies when "the real merits of the controversy are unsettled." *Grays Harbor Paper Co. v. Grays Harbor Cnty.*, 74 Wn.2d 70, 73 (1968). But this language obviously do not mean what Plaintiffs assert, *i.e.*, that the public interest exception only applies when no prior resolution of the merits has occurred. *Grays Harbor* itself recognizes that the exception allows courts to "retain and decide an appeal which has otherwise become moot," *id.* at 969, thus inherently recognizing that the exception

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encompasses cases that were not moot below and were initially decided on the merits. Yet a legal issue may remain "unsettled" until it is resolved by the State's appellate courts. In short, this Court should follow *Orwick's* plain teaching and reject Plaintiffs' attempts to rewrite Washington caselaw to breathe new life into this case.[2]

D. Plaintiffs cannot obtain injunctive relief for third parties that they are not also entitled to themselves.

Lastly, Ingersoll and Freed contend that they can obtain injunctive relief on behalf of third parties even though they are not entitled to that form of relief themselves. But the cases Plaintiffs cite only indicate that a court may expand the terms of an injunction to preclude the use of unfair practices against the general public as well as the named plaintiffs regardless of whether the expanded terms personally aids the latter. But they do not hold that injunctive relief is available in a CPA action on behalf of third parties separate and apart from an injunction issued to protect the live interests of a named plaintiff. *See, e.g.*, *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853 (2007) ("Consumers brining actions under the CPA do *not merely vindicate their own rights*; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.") (emphasis added); *Hockley v. Hargitt*, 82 Wn.2d 337, 350 (1973) (rejecting the argument that "plaintiff may enjoin future violation

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[2] Nor does any separate exception to mootness doctrine exist for controversies that are short-lived. That is merely one of the factor courts consider in weighing the public interest test. *See, e.g.*, *In re Marriage of* Horner, 151 Wn.2d at 892 (noting the "short-lived" consideration as a fifth factor used in determining whether the public interest exception to mootness doctrine applies); *Westerman*, 125 Wn.2d at 286-87 (same).

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only as to himself, thus protecting his own interests, but that he may not protect the public interest as well" and holding that a CPA plaintiff is not "*limited to injunctive relief tailored to his own individual interest*") (emphasis added). That argument is wholly Plaintiffs' invention. Accordingly, the Court should reject it.

III. CONCLUSION

Because Plaintiffs lack standing, no justiciable controversy exists, and Ingersoll's and Freed's claims—as well those made by the State on their behalf—are moot, Defendants respectfully request that the Court grant summary judgment in their favor.

RESPECTFULLY SUBMITTED this 15th day of December, 2014.

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