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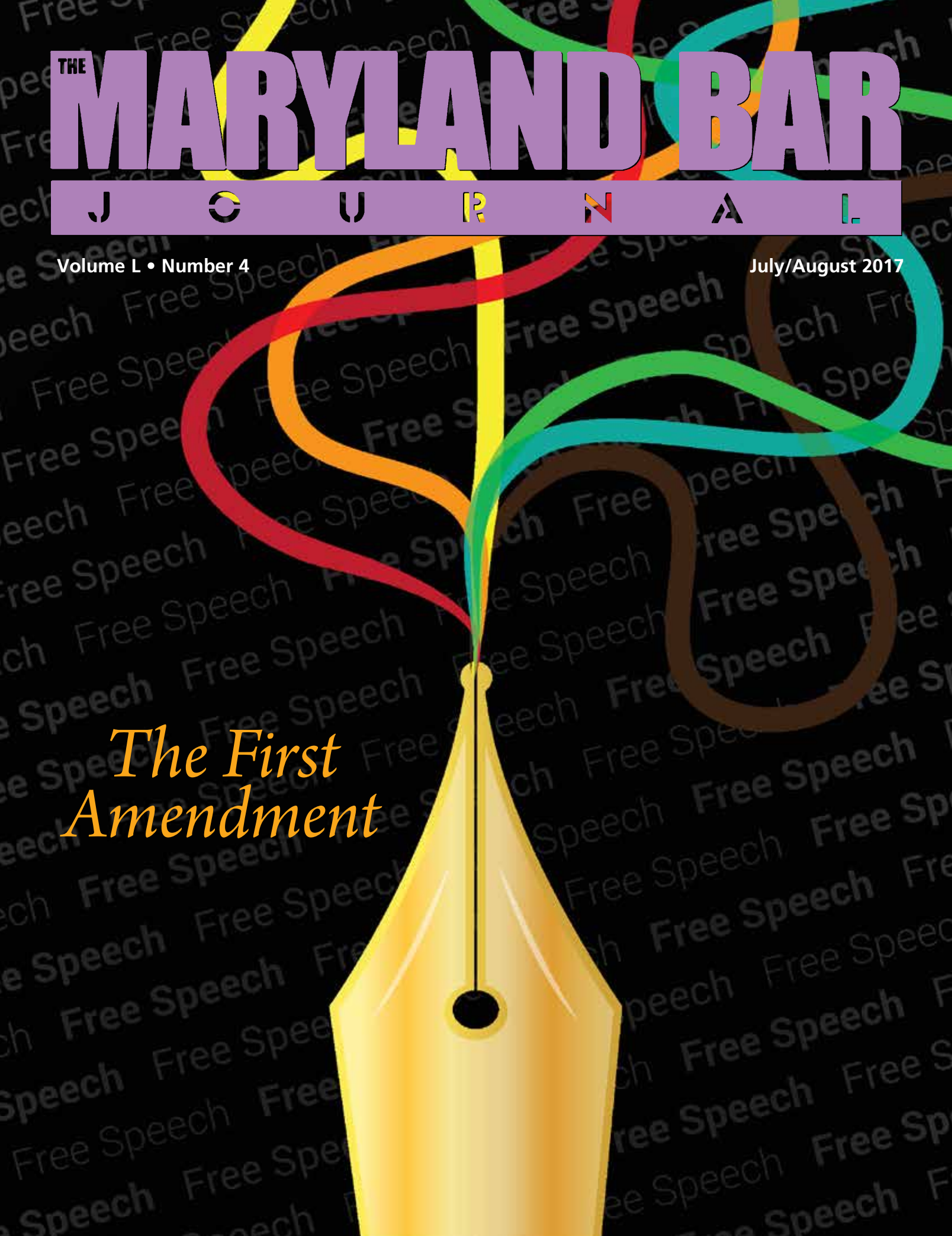



# *The First Amendment*

# The Butcher, The Baker, The Candlestick Maker: When Non-Discrimination Principles Collide with Religious Freedom

**By Ayesha Khan**

This country and its courts have long struggled with the issue of when and whether religious individuals and organizations should be exempted from legal requirements. One of the most well-known decisions on the topic is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the U.S. Supreme Court held that the Amish religious order was entitled to an exemption from a mandatory-schooling requirement.

On occasion, the political right and left have agreed on the legal rules governing religious exemptions. For example, both sides of the aisle came together to enact the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2012), which prohibits the federal government from imposing a burden on religious practice absent a compelling interest in doing so. Other exemptions, however, have proven more controversial.

The development that has truly taken the gloves off is society's increasing acceptance of gay couples' entitlement to enter into civil commitments and legally recognized marriages. Both before and after the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2583 (2015), that gay couples have a constitutional right to marry, various states and municipalities enacted provisions prohibiting public accommodations from discriminating against customers on the basis of their sexual orientation. These statutes and ordinances have raised many questions in the wake of *Obergefell*: Must a wedding photographer offer his or her services to gay couples? How about innkeepers, florists, and bakers who offer their services to straight couples making plans to walk down the aisle?

With some notable exceptions, the courts have largely held that these and other business owners have no legal right to disregard anti-discrimination provisions. That trend began when the New Mexico Supreme Court rejected a commercial photographer's argument that, because her business involved an expressive art form, her free-speech and free-exercise rights entitled her to violate a public-accommodations statute by refusing to photograph a lesbian couple's wedding. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (N.M. 2013). Elane Photography argued that, in the course of its business, it creates and edits photographs to tell a positive story about each wedding it photographs. It asserted that by photographing a gay couple's wedding or commitment ceremony, it would be conveying the message that such occasions deserve celebration and approval. Elane Photography argued that it did not want to be complicit in conveying that message. *See Id. at* 65.

The New Mexico Supreme Court rejected Elane Photography's arguments. In the Court's view, the application of the public-accommodations statute to the photographer did not violate the Free Speech Clause because photographing a wedding does not send a message of affirmation of the wedding itself. Reasonable observers will know that wedding photographers are hired by paying customers and that the photographer may not share the "happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)." *Id.* at 69-70.

The court contrasted photographing a wedding with displaying "Live Free or Die" on one's license plate, which one cannot be forced to do (*see Wooley v. Maynard*, 430 U.S. 705, 717 (1977)), and reciting the Pledge of Allegiance, which likewise cannot be required (*see West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In the court's view, the latter two circumstances involve the endorsement of a specific message; the photographer, in contrast, is not required to recite or display any particular message. *See* 309 P.3d at 64.

The New Mexico Supreme Court reasoned that the photographer's position was similar to the law schools' position in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52-53 (2006), which involved a federal law that made universities' federal funding contingent on their giving military recruiters access to the same university resources that were given to nonmilitary recruiters. Because schools sent emails and distributed flyers for non-military recruiters, the statute required that they do the same for military recruiters. *Id.* at 60. The schools argued that this requirement violated their free-speech and free-association rights. *Id.* at 53. The High Court disagreed, observing that the ostensibly compelled speech was incidental to the law's regulation of conduct, and that making conduct illegal does not curtail freedom of speech or press merely because the conduct is in part "initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The New Mexico Supreme Court relied on *Rumsfeld* to conclude that any burden on Elane Photography's speech was incidental to the public-accommodations statute's regulation of conduct, namely, the provision of equal service to gay couples. 309 P.3d at 65. And, as in *Rumsfeld*, Elane Photography was free to disavow, implicitly or explicitly, any messages that it believed the photographs to convey. It could, for example, post a disclaimer on its website or in its advertising that the owners oppose marriage between gay couples but that they serve this population simply to comply with applicable anti-discrimination laws. *See Id.* at 70.

The court rejected Elane Photography's free-exercise argument on the ground that the public-accommodations statute was targeted at sexual-orientation discrimination rather than at religious exercise. *See id.* at 73-76. This holding drew on the Supreme Court's controversial holding

in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), that neutral laws of general applicability—*i.e.*, laws that were not enacted with the purpose of impeding religious practice and that apply with equal force to religious and nonreligious actors—do not run afoul of the Free Exercise Clause even if they impose a substantial burden on religious practice. (The U.S. Congress reacted to the ruling in *Employment Division* by enacting RFRA, but the U.S. Supreme Court subsequently invalidated RFRA insofar as it applied to the states. *See City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).)

Since 2013, *Elane Photography* has been cited by courts throughout the country in rejecting sundry wedding vendors' attempts to decline to serve gay couples. For example, a court held that the owners of a popular wedding venue in upstate New York could not ignore a state law that prohibited public accommodations from engaging in sexual-orientation discrimination. *See Gifford v. McCarthy*, 137 A.D.3d 30 (Sup. Ct. App. Div. N.Y. Jan. 14, 2016). The court relied on *Elane Photography* to hold that the state statute did not run afoul of free-speech principles because it did not compel the site's owners to endorse the marriages that they hosted; and that the statute was consistent with free-exercise principles because it was targeted at discrimination rather than at religious beliefs. *Id.* at 39-41. The New Jersey Division on Civil Rights reached the same conclusion regarding a campground pavilion. *See* Findings, Determination, and Order at 11, *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09 (N.J. Div. on Civil Rights Oct. 22, 2012).

A similar but arguably more persuasive case was presented by the owners of an art gallery who claimed that their freedoms of speech, religion, and association entitled them to refuse to rent out the venue for a gay couple's wedding because the gallery was a vehicle for the owners' artistic and religious expression. Verified Pet. at & 49, *Odgaard v. Iowa Civil Rights Comm'n*, No. CVCV046451 (Iowa Dist. Ct. Oct. 7, 2013). After the state trial court dismissed the lawsuit, the event site's owners appealed to the Iowa Supreme Court. The business owners ultimately decided, however, to settle the lawsuit by discontinuing the practice of holding weddings at their venue and agreeing to refrain from sexual-orientation discrimination in their other operations. *See* http://www.desmoinesregister.com/story/news/investigations/2015/01/28/gortz-haus-owners-decide-stop-weddings/22492677/.

Only one wedding venue's claims have met with success. The Hitching Post Wedding Chapel in Coeur d'Alene, Idaho is owned by Christian ministers who make the chapel available for wedding ceremonies that they themselves typically perform. *See Knapp v. City of Coeur d'Alene*, 172 F. Supp. 3d 1118, 1120 (D. Idaho 2016). After they filed suit seeking protection against enforcement of a public-accommodations ordinance prohibiting sexual-orientation discrimination, the city announced that it had no intention of subjecting the venue to the ordinance, which explicitly exempted "religious corporations." *See Id.* at 1126. Thereafter, the district court dismissed the vast majority of the owners' claims for lack of standing, leaving only a small portion of the case (regarding a single day on which the city's intentions were unclear) alive. *See Id.* at 1138.

Meanwhile, another wedding vendor's case has been making its way up the appellate ladder. In *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), the Washington Supreme Court rejected a florist's claim that she had free-speech, free-exercise, and free-association rights to refuse to provide flowers for a gay couple's wedding. The state Supreme Court drew on the reasoning of the New Mexico Supreme Court when it concluded that the "decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding. . . . [P]roviding flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." *Id.* at 557. Someone who learns that a florist declined the business could just as easily attribute it to "insufficient staff" or "insufficient stock." *Id.*

The Washington Supreme Court held that the florist's free-exercise claim failed both because the statute was not enacted to target religion and because the government has a compelling interest in eradicating discrimination. *Id.* at 843, 851-52. In reaching the latter conclusion, the court dismissed the florist's argument that the couple could simply use another florist: "This case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches." *Id.* at 566 (quoting Br. of Resp'ts Ingersoll and Freed at 32). Finally, the court rejected the florist's free-association claim, reasoning that commercial enterprises that are open to the general public, unlike private clubs and organizations that are defined by particular goals and ideologies, are not expressive associations. *Id.* at 567. The organization sponsoring the florist's lawsuit has since announced its intention to seek review in the U.S. Supreme Court, *see* https://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman.

Another wedding, however, beat

Arlene's Flowers to the punch. In *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), the Colorado Civil Rights Commission sought to enforce a public-accommodations statute against a baker who declined to furnish the wedding cake for a gay couple's wedding. The Colorado Court of Appeals rejected the baker's argument that Colorado's public-accommodations statute compelled speech in violation of the First Amendment by requiring the baker to "convey a celebratory message about [same-sex] marriage." *Id.* at 276. The court echoed the holding of *Elane Photography*, reasoning that "it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of [marriage between gay couples]." 370 P.3d at 286.

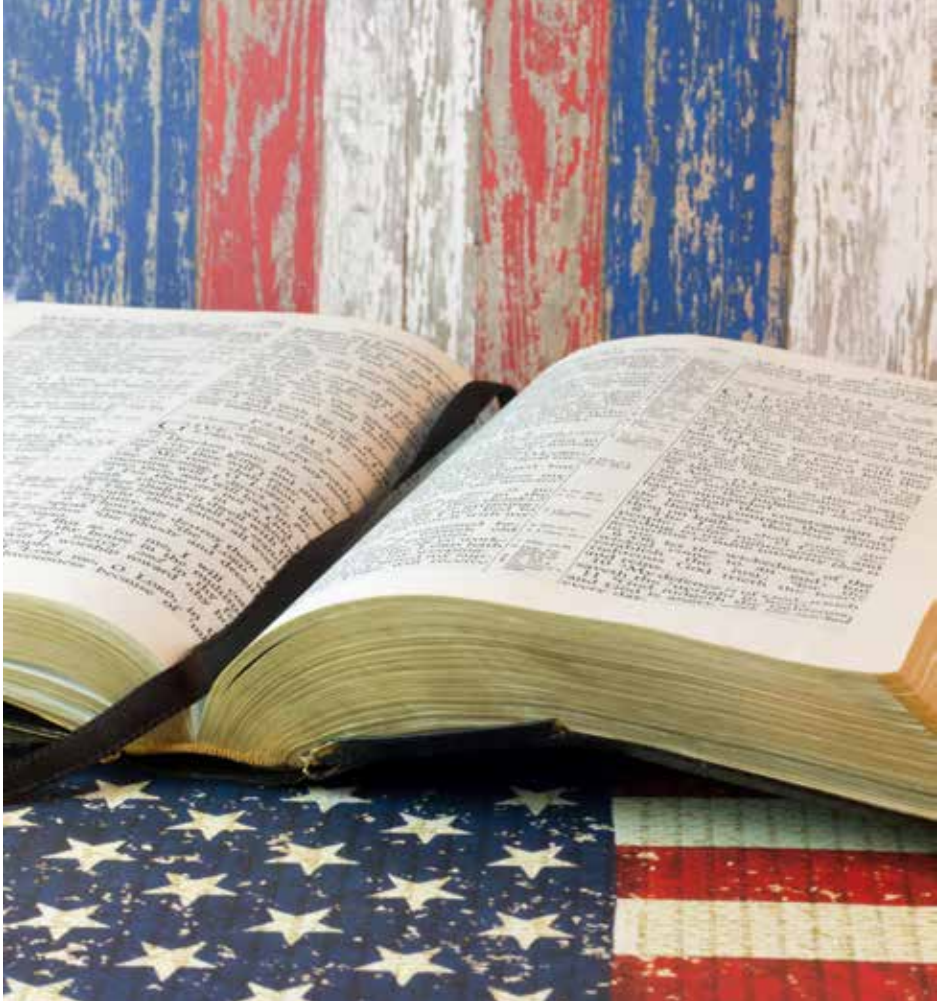
The Colorado Court of Appeals relied on *Employment Division* to reject the baker's assertion of a free-exercise right to violate the public-accommodations statute, concluding that the statute was "not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct." 370 P.3d at 292. After the Colorado Supreme Court declined to take the case, the baker filed a Petition for Certiorari with the U.S. Supreme Court. The Petition was redistributed for conference over a dozen times and then, on the last day of the Court's 2016 term, the Court granted the petition. *See* 2017 WL 2722428 (June 26, 2017).

It is unclear why the Court relisted *Masterpiece Cakeshop* so many times. Some have speculated that those Justices who favored a grant of certiorari were waiting for the arrival of our newest Justice Neil Gorsuch, who has generally favored a robust interpretation of religious freedom. Gorsuch sided with his Tenth Circuit colleagues in concluding that RFRA entitled religious owners of for-profit businesses to an exemption from Affordable Care Act regulations requiring employers to provide insurance coverage for contraceptives, a conclusion that was ultimately affirmed by the Supreme Court in a 5-4 vote. *See Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751 (2014). Subsequently, religious non-profit organizations challenged a related regulatory scheme, which allowed them to bow out of providing contraceptive coverage but required that they state their objection in writing so that the coverage could be provided by a third party. *See Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015). After a panel of the 10th Circuit rejected the argument that this regime substantially burdened the non-profit organizations' religious exercise, Gorsuch joined in dissenting from a denial of rehearing en banc, contending that the regulations impermissibly interfered with the organizations' religious freedom. 799 F.3d 1315, 1317-18 (10th Cir. 2015) (Hartz, J., dissenting from denial of reh'g). That case ultimately made its way to the Supreme Court, but the High Court punted when the federal government offered a workaround. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (vacating and remanding for consideration of whether coverage could be provided without requiring written notice).

In light of Gorsuch's views, his addition to the Court will likely do little to change the balance on the Court in this area; as in other contentious areas, the swing vote likely rests with Justice Kennedy, who is one of the High Court's strongest free-speech advocates. *See, e.g.*, Steven H. Shiffrin, *What's Wrong with the First Amendment* 181 (Cambridge Univ. Press 2016) (noting that Kennedy "is one of the strongest supporters of free speech on the Court"). Kennedy is also quite supportive of religious freedom, going out of his way in his concurrence in *Hobby Lobby* to proclaim that freedom of religious exercise is essential to preserving people's "dignity" and "self-definition." 134 S. Ct. at 2785. At the same time, however, Justice Kennedy has long been a champion of the LGBT community, a stature gained from the soaring prose of his majority opinions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell*, 135 S. Ct. 2584.

These competing leanings make it difficult to predict where Kennedy would come down if the Court were to take a case in this area, but a confluence of three factors suggests that Kennedy would likely side, yet again, with the LGBT community. First, public accommodations inhabit a marketplace defined more along commercial lines than ideological ones. Businesses that serve customers primarily exist to make money, and only secondarily (if at all) to advance "political, social, economic, educational, religious, and cultural ends," thereby diminishing their entitlement to insularity and selectivity. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (holding, before Justice Kennedy joined the Court, that civic club could be required to admit women in part because admitting women would not impede the organization's ability to continue to advance public positions on issues of the day).

To be sure, in *Hobby Lobby*, 134 S. Ct. at 2770, Justice Kennedy joined the majority in rejecting the argument that, because they exist "simply to make money," for-profit organizations are not entitled to RFRA's protections. In that case, however, the company was claiming a religious-freedom right vis-à-vis employees, not customers—



which harkens to the second reason Kennedy is likely to side with the LGBT community: the issue here is about who must be served; it is not about who must do the serving. Customers, unlike business owners and employees, are generally neither responsible for, nor understood to be responsible for, the messages that a business sends. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), Kennedy joined a majority opinion holding that the Boy Scouts had a First Amendment right of expressive association to exclude gay scout leaders; but the Court emphasized that Dale was a teacher and role model for the Boy Scouts (*see Id.* at 653-56), suggesting that the Court would be less tolerant of discrimination against the someone who played no role in shaping the organization's message.

Third and most important, it is difficult to ignore the parallels between this situation and the lunch-counter and related battles of the 1950s and '60s. In 1964, the owner of the Heart of Atlanta Motel argued that the federal public-accommodations statute, Title II of the Civil Rights Act of 1964, unconstitutionally precluded him from denying rooms to "Negroes." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). The Court saw it differently, upholding the statute on the ground that "the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Id.* at 250 (internal quotation marks omitted).

Kennedy's reputation as the "dignity" Justice (*see, e.g.*, Explaining Justice Kennedy: The Dignity Factor, http://www.npr.org/sections/thetwo-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor (June 28, 2013)) would take a severe hit if he were to conclude that public accommodations have a constitutional right to rebuff gay customers, who could thereby be left in the position of having "to pick their merchants carefully, like black families driving across the South half a century ago." Robin Fretwell Wilson & Jana Singer, Same-Sex Marriage and Conscience Exemptions, Engage: J. Federalist Soc'y Prac. Groups, Sept. 2011, at 16–17 (internal quotation marks omitted). In *Obergefell*, Kennedy described his approach to balancing the tension between religious freedom and gay rights as follows:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.

*Id.* at 2603. Kennedy could well see a decision upholding businesses' right to turn away gay customers as the kind of state action that would place the state's imprimatur on "an exclusion that demeans or stigmatizes." In describing society's trajectory since *Lawrence*, he observed that "[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." 135 S. Ct. at 2600. That "full promise of liberty," in Kennedy's mind—and in the mind of this article's author—likely includes the right of LGBT individuals to frequent public accommodations alongside their straight friends. We will know by June 2018 whether that is so.

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